



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

MUSTANG ENGINEERING HOLDINGS, INC.,

Respondent.

OSHRC DOCKET NO. 07-1337

APPEARANCES:

For the Complainant:

Josh Bernstein, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

Merritt B. Chastain, III, Esq., Gardere Wynne Sewell, LLP, Houston, Texas

Before: Administrative Law Judge: James R. Rucker

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, Mustang Engineering Holdings, Inc. (Mustang), was surveying pipe in a trench at the northeast corner of the intersection of IH 35 and IH 820 in Fort Worth Texas. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act .

On June 5, 2007, following receipt of a referral, OSHA Compliance Officer (CO) Christine Webb went to Mustang's Fort Worth work site, where she observed and photographed three Mustang employees in an excavation with a survey pole and a clipboard (Tr. 12-14, 31; Exh. C-1 through C-5). Webb instituted an inspection of Mustang's worksite. At the completion of the OSHA investigation, Mustang was issued a citation alleging violations of the construction standards found at 29 CFR §§1926.651 and 1926.652. By filing a timely notice of contest Mustang brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Fort Worth Texas on January 8, 2007. Points of authority have been submitted on the issues, and this matter is ready for disposition.

Facts

At the instigation of her investigation, CO Webb took a soil sample of the subject trench, which, upon analysis, was determined to be Class B soil (Tr. 18). Webb laid an engineering rod across the width of the trench and asked one of the Mustang employees in the trench to measure the distance from the rod to the top of the 16" diameter pipe on which he was standing (Tr. 18). The measurement from the top of the pipe to the engineering rod was 4'10" (Tr. 22). After adding the diameter of the pipe, Webb calculated the depth of the trench at 74" (Tr. 22, 31, 70; Exh. C-11). The width of the trench at that point was 12' (Tr. 30, 76; Exh. C.10). Webb estimated the bottom of the trench to be 32" wide (Tr. 24, 77). She further noted standing water in the bottom of the trench and noted that it had been raining (Tr. 29; Exh. C-13, C-14).

The CO also observed that there was no ladder, ramp, or other safe means of egress from the trench.

CO Webb testified that the cited trench was not excavated by Mustang, but by BJB, the general contractor on the site (Tr. 43). BJB was also cited by OSHA, based on the presence in the trench of BJB's foreman, Mr. Salinas (Tr. 55). Webb testified that citation was withdrawn at the informal conference after BJB provided evidence of employee/supervisor misconduct (Tr. 55-56; Exh. R-1).

According to Mustang surveyor, Chris Green, Mustang was hired to do survey work at the site (Tr. 103). When the sections of the pipe were welded and laid in the trench, but before they were covered up, Mustang would take survey measurements of the pipe with a global position system (GPS) (Tr. 103-104). This would enable the welds to be located if it became necessary to dig them up after the pipes were covered up and pressure tested. (Tr. 104) Normally, this does not require entry into the trench since employees usually just lean over and take their measurements from outside the trench. (Tr. 105) Here, however, they had to enter the trench because it was wider than normal due to work needed to be completed in the trench. (Tr. 108) Green noted, however, that the process in the trench took only five minutes. (Tr. 119).

Green further testified that, prior to this job, he never had an occasion where he had to enter a trench. (Tr. 109) He testified that he had no knowledge of OSHA trenching requirements or that there might be need of a ladder or other means of exiting from a trench (Tr. 109). Green also testified that he relied on Mr. Salinas and the BJB crew to dig a proper trench (Tr. 109, 149) Although he admitted that he never actually inquired about the safety of the trench, he believed that he could follow the lead of the BJB employees, and when they were allowed into the trench, he

concluded that it was safe to allow his employees to enter. (Tr. 149, 150) Mustang instrument man, Walter Roberts, similarly testified that he saw employees of other contractors enter the trench and that nobody ever told the Mustang employees that they should not get into the trench. (Tr. 159, 160)

Both Green and Roberts testified that, during the inspection, Green asked the CO if they should exit the trench. (Tr. 120, 158) However, rather than having them exit, she asked them to remain in the trench to assist her in taking measurements, a process which took 30-45 minutes. (Tr. 89, 121, 127, 158)

As a result of the inspection, the Secretary issued Mustang a citation alleging two serious violations of the Act.

Citation 1, item 1 alleges:

29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

On or about 6/5/07, at the trench site at the intersection of IH-35W and IH820, Ft. Worth, Texas: Employees were working in trench that was greater than 6 feet deep without having a safe means of egress available.

Serious citation 1, item 2 alleges:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section:

On or about 6/5/07, at the trench site at the intersection of IH 35W and IH 820, Ft. Worth, Texas: Employees were working in trench that was greater than 6' deep without cave-in protection being provided.

The Secretary proposed a penalty of \$600 for each of the violations, for a total proposed penalty of \$1200.

Discussion

A. Prima Facie Case

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991)

Citation 1, Item 1: 29 CFR 1926.651(c)(2) (failure to have an adequate means of egress from the trench)

There is no question that the cited standard was applicable. The record further establishes that the terms of the standard was not met. The trench was over five feet deep and no proper means of egress was provided. The record also establishes that Mustang employees were in the trench and were exposed to the violative condition. Mustang argues that it lacked any knowledge of the trenching/excavation standards and did not know that a proper means of egress was not provided. However, employers are presumed to have knowledge of the cited standards by virtue of their publication in the Federal Register. *Kenneth P. Thompson Company, Inc.*, 8 BNA OSHC 1696, 1074 (No. 76-2623, 1980) The lack of a proper method of egress was obvious to Mustang's foreman, Green. Therefore, the record establishes that Green knew, or with the exercise of reasonable diligence should have known of the violation. As foreman, Green's knowledge is imputed to Mustang. *Superior Electric Co.*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996). Therefore, Mustang had constructive knowledge of the violation.

Citation 1, Item 2: 29 CFR 1926.652(a)(1) (failure to properly slope or shore the trench)

Again, there is no question that the cited standard was applicable. At the hearing, Mustang contended that the measurements taken by the CO were inaccurate and failed to establish that the trench was improperly sloped.

Under the cited standard, a trench dug in Class B soil must be sloped at a 1:1 ratio, meaning that for each foot in depth, each side must be sloped back by one foot. Based on the measured depth of the trench and its width at the bottom, the CO estimated that the trench should have been 15'-15.5' wide. (Tr. 24). With the width of the trench measured at only 12', it was determined that there was a violation of 29 CFR 1926.652(a)(1). At the hearing, the CO stated that she measured the depth of the trench from its top to the top of the pipe at 4' 10" (Tr. 46) However, she never actually measured the distance from the top of the pipe to the base of the trench. (Tr. 47, 125) Rather, the CO assumed that the bottom of the pipe lay at the base of the trench and she added the full diameter of the pipe (16") when arriving at the depth of the trench. She stated that she was not told that the trench might have sunk a few inches into the trench. (Tr. 47, 76) However, Green testified that the pipe, which weighed several tons, had sunk anywhere from 2-8 inches into the trench. (Tr. 126) If the pipe sank 8" into the trench, the required width at the top of the trench to obtain the required 1:1 slope would be approximately 13'. Being only 12' wide at the top, the preponderance of the

evidence still establishes that the trench was improperly sloped. Accordingly, the terms of the standard were not met.

As with item 1, the record establishes that Mustang employees were working in the trench and were exposed to the violative condition.

Mustang argues that it lacked knowledge of the violation because it did not have the expertise to comprehend that the trench was improperly sloped and that it was relying on the expertise of BJB to properly construct the trench. Mustang cannot argue that it did not know that trenches and excavations must be properly shored or sloped to prevent collapse. As noted, *supra*, employers are presumed to have knowledge of the cited standards by virtue of their publication in the Federal Register. Mustang, through its foreman, also knew that its employees were in the trench establishes. Therefore, the Secretary has made a *prima facie* showing of knowledge.

B. Multi-Employer Affirmative Defense.

For both items, Mustang raises what is known as the multi-employer affirmative defense. It asserts that both items should be vacated because it had no expertise in trench construction, could not have realistically abated the hazards and did not, and could not, with the exercise of reasonable diligence, have had notice that the conditions were hazardous.

To prove the multi-employer worksite affirmative defense, an employer must prove by a preponderance of the evidence that it (1) did not create the hazardous condition, (2) did not control the violative condition such that it could have realistically abated the condition in the manner required by the standard, and (3) took reasonable alternative steps to protect its employees or did not have (and could not have had with the exercise of reasonable diligence) notice that the violative condition was hazardous. *E.g.*, *Capform Inc.*, 16 BNA OSHC 2030, 2041 (No. 91-1613, 1994); *Capform, Inc.*, 13 BNA OSHC 2219, 2222 (No. 84-556, 1989); *aff'd without published opinion*, 901 F.2d 1112 (5th Cir. 1990); *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198 (No. 3694, 1976 (consolidated)).

Regarding Item 1 (failure to have proper means of egress), Mustang failed to establish the defense. As noted, *supra*, employers are charged with knowledge of standards published in the Federal Register. Therefore, Mustang knew or should have known that a trench must be provided with an appropriate method of egress. Moreover, no particular expertise is required to know that a proper means of egress was not provided. *Kenneth P. Thompson Company, Inc.*, 8 BNA OSHC at 1074. Therefore, Mustang failed to demonstrate that, with the exercise of reasonable diligence, it

could not have had notice that the violation was hazardous. Accordingly, the affirmative defense fails and Item 1 is AFFIRMED.

A different situation is presented with Item 2 (failure to properly shore or slope the trench). The preponderance of the evidence establishes that Mustang had no experience or expertise in trenches or excavations. While its lack of expertise does not excuse it from being charged with knowledge that a trench must be properly sloped, it is relevant in determining whether it knew or with the exercise of reasonable diligence could have known whether this trench was properly sloped. “[W]hen some of the work is performed by a specialist, an employer is justified in relying upon the specialist to protect against hazards related to the specialist’s expertise so long as the reliance is reasonable and the employer has no reason to foresee that the work will be performed unsafely.” *Sasser Electric & Manufacturing Co.*, 11 BNA OSHC 2133, 2136 (No. 82-178, 1984)

Unlike the lack of proper egress, it was not obvious that the trench was improperly sloped. Indeed, the record establishes that the trench was sloped to a degree that was just shy of the required 1:1 ratio. Moreover, that the trench was substantially, if not adequately, sloped and did not present an obvious hazard is clearly demonstrated by the actions of the Compliance Officer, who requested that Mustang employees remain in the trench to assist her in taking the necessary measurements. Under these circumstances, it was not unreasonable for Mustang to rely on BJB to properly construct the trench, especially where, as here, BJB allowed its own employees to work in the trench. Accordingly, Mustang has established the affirmative defense and Item 2 is VACATED.

C. Characterization and Penalty

The Secretary characterized the violation as serious. Under section 17(k) of the Act, 29 U.S.C. §666(k), a violation is serious if there is a substantial probability that death or serious physical harm could result. This does not mean that the occurrence of an accident must be a probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur. *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1824 (No. 88-2572, 1992).

The record establishes that, in the event of a trench collapse, employees trapped in a collapsed trench could suffer injuries ranging from temporary disability (Tr. 36-37) to death from suffocation (Tr. 41). Therefore, I find that the Secretary properly classified the violation as serious.

However, I find the \$600 penalty proposed by the Secretary to be inappropriate. When considering the propriety of the penalty, the Commission must give due consideration to the size of

the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations. *R.G. Friday Masonry Inc.*, 1070, 1075 (No. 91-2027, 1995)

The evidence establishes that the gravity was low. The trench, though technically non-compliant, was substantially sloped and the likelihood of a trench collapse was low. The record also establishes that the Secretary provided credit for Mustang's small size and good safety history. (Tr. 35, Ex. R-2). However, although the CO testified that she gave credit for Mustang's good-faith, the OSHA Worksheet (Ex. R-2, p.5) reveals that, to the contrary, no credit was given for that element. From this record, I conclude that Mustang was cooperative with the CO, exhibited good-faith in this matter and is entitled to an additional credit. Accordingly, I reduce the penalty an additional \$100 and assess a penalty of \$500.

ORDER

1. Serious citation 1, Item 1, alleging a violation of 29 C.F.R. §1926.651(c)(2) is AFFIRMED and, a penalty of \$500 is ASSESSED
2. Serious citation 1, Item 2, alleging a violation of 29 CFR § 1926.652(a)(1) is VACATED

_____/s/_____

James R. Rucker
Judge, OSHRC

Dated: May 26, 2008
Denver, CO.