



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,

v.

RAY SUMLIN CONSTRUCTION CO., INC.
Respondent.

OSHRC DOCKET
NO. 92-0991

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 13, 1993. The decision of the Judge will become a final order of the Commission on June 14, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before June 2, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: May 13, 1993

DOCKET NO. 92-0991

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

George Palmer, Esq.
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 201
2015 - 2nd Avenue, North
Birmingham, AL 35203

A. Richard Maples, Jr., Esq.
1111 Dauphin Street
Mobile, AL 36604

James D. Burroughs
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR,

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v.

RAY SUMLIN CONSTRUCTION CO., INC.,

Respondent.

OSHRC Docket No. 92-991

Appearances:

L. K. Cooper, Jr., Esq.
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

A. Richard Maples, Jr., Esq.
Mobile, Alabama
For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

Ray Sumlin Construction Co., Inc. (Sumlin), contests the following items of a citation issued by the Secretary on February 25, 1992: (1) item 1a alleges that Sumlin failed to instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment, in violation of § 1926.21(b)(2); (2) item 1b charges Sumlin with a violation of § 1926.651(k)(1), for failing to have a competent person conduct daily inspections of its excavation and adjacent areas for evidence of a situation that could result in a possible cave-in; and (3) item 2 alleges that Sumlin failed to use an

adequate protective system in its excavation to protect its employees from a cave-in, as required by § 1926.652(a)(1).

The Secretary issued the citation as a result of an inspection of Sumlin's worksite at 827 Forrest Avenue in Gadsen, Alabama. Sumlin is a heavy commercial construction contractor (Tr. 192). Occupational Safety and Health Administration (OSHA) compliance officer (now assistant area director) Terry Bailey conducted the inspection on February 6, 1992, after being assigned the inspection by his supervisor, John Lankford (Tr. 10-11).

Sumlin denies that it violated any of the cited standards. Sumlin moved to dismiss the citation at the close of the Secretary's case, and again at the end of the hearing (Tr. 100, 199). The motion was taken under advisement and is hereby denied. Sumlin also contends that Bailey's inspection was conducted in violation of Sumlin's fourth amendment rights.

WAS THE INSPECTION VALID?

Facts

After being assigned to inspect Sumlin's worksite, Bailey drove to the site on February 6, 1992. As he drove past the worksite, Bailey saw a backhoe digging in the ground near the foundation of a building. Next to the backhoe was a man wearing a blue hard hat. Bailey parked his car approximately 200 yards from where the backhoe was digging and observed the operation. Eventually, the backhoe stopped digging and the man wearing the blue hard hat entered the excavation (Tr. 12).

Bailey got back into his car and drove through the gate around the worksite. Bailey noticed someone walking by and told this person that he needed to see the job superintendent. A few minutes later, Jeff Carrico appeared and identified himself as the job superintendent. At this point, Bailey stated, "I presented my credentials and said that I needed to do an inspection of the excavation" (Tr. 14). Bailey then told Carrico that he needed to get his camera from his truck (Tr. 14). Bailey and Carrico were standing at a vantage point higher than the excavation, and Bailey saw that a man wearing a blue hard hat was in the excavation. The excavation walls were higher than the man's head, and they were vertical; no sloping had been done (Tr. 15-16). Carrico told someone to get the man out of the trench. Bailey watched as the man exited the excavation (Tr. 17).

As Bailey was walking to his truck to get his camera, Carrico asked, "Is there any chance of my being penalized for any of these things?" Bailey responded that Sumlin appeared to be in violation of some provisions of the Act, and that "there was a possibility of a penalty." Carrico then said, "Well, if that's the case, I'm going to need a warrant to do the inspection," and asked Bailey if he had one. Bailey told him that he did not (Tr. 17).

Bailey informed Carrico that he would take his camera to the public right-of-way outside the fenced area and take photographs (Tr. 18). Bailey asked Carrico for the name of the man he had observed in the trench and whether he was an employee of Sumlin's. Carrico said that he was and that his name was "Daniel Ellison or something like that; he wasn't real sure" (Tr. 18).

As Bailey returned to his truck from taking photographs from the public right-of-way, he saw Carrico again. Bailey was uncertain as to who initiated the conversation, but the men began talking (Tr. 20, 29). Carrico told Bailey that he had given the compliance officer an incorrect name for the employee. Carrico had found out that the employee's name was Daniel Gehring, and he gave Bailey Gehring's telephone number (Tr. 19). Bailey testified that then (Tr. 19-20):

Jeff was a little bit inquisitive as to what our standards were and, in particular, with the excavation since that's why I was there, and we were talking and I said, "Well, have you classified the soil?"

He said, "In what way would you classify the soil?"

And, I said, "Well, there are different methods of classifying as is brought out in the standards, whether it be Type A, Type B, or Type C soil."

And, I asked him if he knew how to classify the soil, and he said "No," he didn't know how to classify the soil. And, I asked him if he had a copy of the OSHA standards, and he said, "No."

I told him how he could get a copy from the federal book store, since they don't give these out any more. And, we were just in general talking about the standards and how they apply.

A little later in his testimony, Bailey stated that this conversation was actually preceded by one that had been initiated by Carrico, regarding the warrant (Tr. 29-30):

He asked me if I would be going to get a warrant, and I said that I assumed that I would be going to get a warrant. That would be up to the supervisor to decide once I presented what I had to the supervisor.

And, he wanted to know if there could be penalties involved. I said there could and probably would be, based upon what I had seen and based

on the years that I've been doing this and knowing what violations are and how they are classified.

And then Jeff asked, "Based on what?"

And, I said, "The lack of sloping and shoring of the excavation and the need for some type of protective system."

Bailey continued his discussion with Carrico, which eventually led to Carrico's inviting Bailey to look more closely at the excavation (Tr. 35-36):

[Jeff] went on to ask, "Well, what protective systems are necessary?"

And, I said, "I can't tell you that until I know what type of conditions we're working in."

He said, "How do you determine that?"

I said, "You inspect the soil and make some type of determination. There has to be [a] competent person at the site."

And, he said, "What constitutes a competent person?"

And, I said, "A competent person is one who can inspect the site."

And, he said, "Again, based upon what?"

And, I said, "On the type soil you're working in."

And, he said, "What type of soil am I working in?"

And, I said, "I don't know. I can't tell from here whether it's A soil, B soil, or C soil."

...

And then he said, "Well, let's go look and see what I've got."

I said, "Do you want me to be down there?"

And, he said, "Yes."

Bailey and Carrico then proceeded to the excavation where Bailey examined the soil and took measurements with Carrico's help (Tr. 36-37). Before Carrico began asking Bailey questions regarding the excavation, Bailey intended "[t]o return to the office, present the information to the supervisor to make warrant application, if that's what was necessary" (Tr. 44).

Carrico testified at the hearing as a witness for Sumlin. He was not questioned regarding the conversations he had with Bailey before Bailey started inspecting the excavation. Carrico's only comment on the warrant issue was that he was not aware that Bailey was conducting an inspection when they went to the excavation (Tr. 183). Bailey's testimony regarding the sequence and substance of his conversations with Carrico is, therefore, undisputed.

Sumlin's Argument

Sumlin argues that once Carrico informed Bailey that he needed a search warrant, Sumlin's fourth amendment rights were invoked and no inspection could proceed until a warrant was obtained. Sumlin contends that Carrico never withdrew his demand for a warrant, and that Bailey never informed Carrico that he was proceeding with the inspection. Sumlin believes that Bailey's inspection was invalid and that any evidence relating to the inspection should be suppressed.

The Secretary's Response

The Secretary contends that once Carrico resumed talking to Bailey, the demand for a warrant was withdrawn. The Secretary argues that, by inviting Bailey to examine the soil of the excavation, Carrico consented to the inspection.

Bailey's Inspection Was Valid

There is no dispute in the present case that, if Carrico did not consent to Bailey's inspection, his inspection is invalid. "The Supreme Court has held that the Fourth Amendment requires the Secretary to obtain a warrant in order to conduct a nonconsensual inspection. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 [6 OSHC 1571] (1978)." *Concrete Construction Co.*, 15 BNA OSHC 1614, 1616, 1992 CCH OSHD ¶ _____ (No. 89-2019, 1992). The question then becomes: Did Carrico consent to the inspection?

To determine whether a party has consented to a search, a court must look to the circumstances surrounding the event. *Schneckloth v. Bustamonte*, 412 U.S. 218, 233, 93 S.Ct. 2041, 2051, 36 L.Ed.2d 854 (1973); *Donovan v. A.A. Beiro Construction Co.*, 241 U.S.App.D.C. 161, 746 F.2d 894, 901 (1984). No one factor is necessarily decisive, but the Supreme Court has held that knowledge by the party challenging the search of its right not to consent is "highly relevant" to the evaluation. *United States v. Mendenhall*, 446 U.S. 544, 558-59, 100 S.Ct. 1870, 1879-80, 64 L.Ed.2d 497 (1980).

Simplex Time Recorder Co. v. Brock, 766 F.2d 575, 581 (D.C. Cir. 1985).

Carrico obviously knew that he had the right not to consent to a search by Bailey. He invoked that right shortly after he first met with Bailey. Furthermore, Carrico was an experienced superintendent and an educated man. He had been with Sumlin for six and a half years at the time of the hearing. Carrico started out as an assistant superintendent and was promoted to superintendent (Tr. 177). Carrico holds a bachelor of science degree in civil engineering (Tr. 178). There is no evidence or claim that Carrico was in any way intimidated or confused by Bailey.

Nor did Bailey argue with Carrico or attempt to persuade him to reconsider his request for a warrant. Bailey simply told Carrico, "Well, since you've denied me entry, I can't do anything here on the job site. I'm going to take my camera and go off on the public right-of-way and see what photographs I can take from the public right-of-way" (Tr. 18). At this point, Bailey was explicitly in acquiescence with Carrico's decision to demand a warrant.

When Bailey returned from taking photographs, he and Carrico engaged in conversation. Regardless of who initiated the conversation, there is no evidence that Carrico was in any way coerced or compelled to converse with the compliance officer. On the contrary, Carrico appeared to be the one who was driving the conversation, asking Bailey questions regarding the excavation. At the point where Carrico said, "Well, let's go look and see what I've got," (Tr. 36) he is deemed to have consented to the inspection. Carrico is an intelligent man who is no novice in the construction industry. He invited a man that he knew to be an OSHA compliance officer to examine the excavation that his company had dug. He helped Bailey take measurements of the excavation. It is unreasonable to suppose that an educated, experienced superintendent who understood his right to demand a warrant, would not understand the implications of inviting an OSHA compliance officer to examine the excavation. Bailey gave Carrico a chance to reconsider his invitation, asking him, "Do you want me down there?" (Tr. 36). Carrico replied, "Yes." His open invitation to examine the excavation waived Sumlin's fourth amendment rights. The inspection was valid.

The “Open Fields” Doctrine

The Secretary also defended the validity of the inspection based on the “open fields” doctrine. This exception to the fourth amendment provides that “there is no constitutional violation when an inspector makes observations from areas on commercial premises that are out of doors and not closed off to the public, even if the inspector entered the premises without permission.” *Concrete Construction Co.*, 15 BNA OSHC at 1617.

This exception applies here. Sumlin’s worksite was in downtown Gadsen, in the midst of several government buildings (Tr. 12). The construction site itself was on county property. The Etowah County Jail was the building under construction (Tr. 41). The excavation was 10 feet away from the edge of the property (Tr. 78). Sumlin’s operations were visible from the street. From half a block away, Bailey observed an employee enter an excavation whose vertical walls were higher than the employee’s head (Tr. 71, 95). Bailey’s inspection is valid both on the basis of consent, and on the basis of the “open fields” doctrine.

ITEM 1a: ALLEGED VIOLATION OF § 1926.21(b)(2)

The Secretary charged Sumlin with a serious violation of § 1926.21(b)(2), which 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.

At the time of the inspection, Sumlin had a written safety policy (Exh. R-2). A copy of the policy was given to each new employee on the day he was hired. The employee was told to read and sign the copy (Tr. 132). The policy contains 27 numbered paragraphs which address various safety concerns. Paragraph 14 of the policy states: “Do not work in any areas where you are in danger of electrocution, dirt cave-ins or falls, and report these dangers immediately to your foreman and/or supervisor for correction.” This is the only reference to excavations in the company’s safety policy.

Sumlin contracted Southern Risk Services to provide it with safety consultations (Tr. 118). Southern Risk Services inspected Sumlin's job sites at least once a month (Tr. 119). Sumlin also conducted weekly safety meetings at each work site, where the Sumlin's safety policy would be reviewed, and other safety topics would be discussed (Exh. R-2, Tr. 121). Brad Stuckey, Carrico's assistant superintendent, conducted a safety meeting on January 28, 1992, at the Forrest Avenue site (Tr. 130-131). On the safety report that Stuckey submitted to Sumlin, Stuckey wrote, "We discussed the danger of working on and around heavy equipment. Working in excavations and around concrete" (Exh. R-4).

Daniel Gehring, the laborer that Bailey saw in the excavation, was hired on February 4, 1992, two days before the inspection (Tr. 134-135, 194). Gehring was hired on referral from a local union (Tr. 196). He signed a copy of the safety policy, but did not attend a safety meeting between the time of his hiring and the time of the inspection (Tr. 197). Gehring told Bailey that he had been in the excavation, and that the walls of the excavation were higher than his head (Tr. 57, 63).

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 it with the exercise of reasonable diligence.

Seibel Modern Manufacturing & Welding Corp., 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

In the present case, § 1926.21(b)(2) applies to Sumlin's worksite. Sumlin did not instruct Gehring in the recognition and avoidance of unsafe conditions relating to the excavation. The only mention of unsafe conditions with regard to excavations that Gehring may have seen was in the company's safety policy, where he was warned not to work where he was "in danger of . . . dirt cave-ins." This admonition does nothing to train an employee how to recognize such a danger. Sumlin admits that Gehring did not attend any of its safety meetings. The Secretary has established that, with respect to Gehring, the terms of § 1926.21(b)(2) were not met.

Gehring was exposed to the hazard of a cave-in. He was observed working in an excavation that was 6 feet deep and had vertical walls. Although Carrico claims he does not

recall having seen Gehring in the excavation (Tr.185), Bailey noticed him while driving past on the street. With the exercise of reasonable diligence, Sumlin could have known that Gehring was in the excavation.

At the hearing, Carrico testified initially that there was no reason for anyone to get into the excavation (Tr. 186). Later, Carrico stated, “Eventually, somebody would have to get into that hole” (Tr. 190). When asked if it was unusual for employees to get down into the bottom of an excavation to do some handwork, Carrico replied, “It was not unusual. Somebody would have to get into that hole” (Tr. 191). Gehring’s presence in the excavation was not the unexpected occurrence that Sumlin tries to paint.

The Secretary has established Sumlin’s violation of § 1926.21(b)(2). It was alleged as a serious violation. Under § 17(k) of the Act, a violation of a standard is serious “if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use. . .” In the present case, Gehring’s lack of instruction in the recognition and avoidance of unsafe conditions exposed him to the hazard of being trapped in a cave-in. Cave-ins are notoriously dangerous, often resulting in death or serious injuries. The violation was serious.

ITEM 1b: ALLEGED VIOLATION OF § 1926.651(k)(1)

The Secretary alleged that Sumlin committed a serious violation of § 1926.651(k)(1), which provides:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

According to the definition section of the excavation standards, § 1926.650(b):

Competent person means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

The Secretary argues that Carrico's conversation with Bailey prior to examining the excavation establishes that Carrico was incompetent within the meaning of the cited standard. Carrico, as superintendent of the site, was responsible for inspecting the excavation and adjacent areas. Carrico was unaware of the competent person requirement, as well as the type of soil he was working in (Tr. 35-36). Classification of the type of soil is a necessary predicate to meeting the requirements of § 1926.651(k)(1). Subpart P, Appendix A(c)(1) of the standard requires that the competent person classify the soil as either Stable Rock, Type A, Type B, or Type C soil. Appendix A(c)(2) requires that the competent person make the classification "based on at least one visual and at least one manual analysis." By Carrico's own admission to Bailey, he did not know how to make this classification. The Secretary has established the violation. The hazard created by Carrico's failure to make a competent inspection is the possibility of a cave-in. The violation is serious.

ITEM 2: ALLEGED VIOLATION OF § 1926.652(a)(1)

The Secretary alleged that Sumlin was in 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 (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

It is undisputed that there was no protective system, including sloping, in the excavation that Gehring was working in. Carrico measured the depth of the trench in

Bailey's presence with his own measuring stick (Tr. 95).¹ The excavation was 6 feet deep (Tr. 37-38, 83). Carrico disputed this measurement, claiming that the end of the measuring stick was sticking out above the rim of the excavation (Tr. 182). Bailey's testimony is accepted as more credible with regard to the measurement of the excavations's depth. Furthermore, Gehring testified that the excavation walls were above his head (Tr. 57). The excavation's soil was classified as Type A (Tr. 37).

Sumlin attempted to defend itself against this charge by showing that the soil of the excavation was stable. The company produced a geotechnical report on the soil's composition to support this claim (Exh. R-9). Wayne Mostellar, Sumlin's project manager and vice-president of operations, admitted, however, that the geotechnical report did not analyze the soil in accordance with OSHA's classification system (Tr. 150). The geotechnical report has no relevance to the instant case.

The Secretary has established that a Sumlin employee was working in a 6-foot deep excavation with vertical walls, dug in Type A soil, a violation of § 1926.652(a)(1). The violation is serious, exposing the employee to the hazard of a cave-in.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

¹ At the hearing, Sumlin attempted to discredit Bailey's testimony by questioning him closely regarding the type of measuring instrument used by Carrico (Tr. 83-88). Bailey remembered it as a measuring tape (Tr. 83-84). Carrico testified that he used a 6-foot Lefkin folding stick rule (Tr. 181). This minor discrepancy in Bailey's testimony is of no significance. Bailey's testimony makes it clear that he was concerned with the measurements of the excavation, and paid little attention to the implement used to measure it: "When I went back to the truck and I wrote these measurements down, I didn't put down that it was a Sears 25-foot, one-inch wide, metallic tape. I just put that it was measured to six foot" (Tr. 86-87).

Sumlin has approximately 200 employees company-wide (Tr. 96). The company had received citations for serious violations of the Act within the past three years (Tr. 96-97). Sumlin demonstrated adequate good faith. The gravity of the violations is extremely high. The hazard created by each of the three violations was that of a cave-in. Accordingly, the penalty assessed for items 1a and 1b together is \$2000.00. The penalty assessed for item 2 is \$2000.00.

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) That items 1a and 1b of the citation are affirmed, and a combined penalty of \$2000.00 is assessed; and
- (2) That item 2 of the citation is affirmed, and a penalty of \$2000.00 is assessed.

/s/ James D. Burroughs

JAMES D. BURROUGHS

Judge

Date: April 28, 1993