



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

Complainant,

v.

JALCO, INC.,

Respondent.

OSHRC DOCKET NO. 05-1088

APPEARANCES:

For the Complainant:

Carlton C. Jackson, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

Tom Scott, W.C. Blayney & Associates, Humble Texas

Before: Administrative Law Judge: James H. Barkley

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, Jalco, Inc. (Jalco), maintained a place of business in Corpus Christi, Texas, where it was engaged in the installation of 260 feet of sewer line between Power and Tanchua on Broadway. Jalco admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 15, 2005, the Occupational Safety and Health Administration (OSHA) received a complaint stating that a person had entered a manhole on Power and Broadway and been overcome by a hazardous gas (Tr. 45, 137). After receiving the complaint, OSHA conducted an inspection at Jalco's Corpus Christi worksite. As a result of that inspection, OSHA issued a citation alleging violation of Section 5(a)(1) of the Act as well violations of OSHA standards at 29 CFR §§1910.134 and 1926.21. By filing a timely notice of contest Jalco brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On January 23, 2006, Complainant moved to amend the citation. On February 1, 2006, a hearing was held in Corpus Christi, Texas, at which time the motion to amend was granted (Tr. 6-12). Briefs were submitted on the issues, and this matter is ready for disposition.

Facts

Fredrick Bright, an OSHA Compliance Officer (CO), visited Jalco's Corpus Christi work site on February 15, 2005 (Tr. 44). Bright spoke with Domingo Anguiano, Jalco's foreman on the site (Tr. 45, 48, 153). Anguiano directed Ricardo Salce, an employee of CM Constructors, Inc. (CM) to enter a manhole. The manhole was approximately 3 in diameter and 15 feet in depth. Salce was to remove a plug that had become stuck in the 24" diameter sewer pipe (Tr. 49, 57-59, 65, 155-56, 159, 178-79, 191; Exh. C-1). An exhaust fan was removed from the opening and a ladder was placed in the manhole (Tr. 81, 158, 163, 200). Salce descended into the manhole on the ladder, which was then removed to give him room to work (Tr. 57-60, 195). After dislodging the plug, Salce lost consciousness at the bottom of the manhole (Tr. 57, 165, 181, 193). The ladder was replaced in the manhole and Anguiano went in to rescue Salce (Tr. 57, 66, 165). Anguiano began to feel dizzy himself, and climbed out of the manhole, leaving Salce at the bottom of the hole (Tr. 57-58, 165, 196). Salce then revived enough to climb out himself (Tr. 57-58).

Bright testified, and Respondent's representative stipulated that no air monitoring was conducted at this manhole prior to, or during Salce and Anguiano's entry (Tr. 62, 78). Ruben Reyna, another CM employee, was present at the Broadway and Power manhole on February 15, 2005 during the incident. Reyna likewise testified that no monitoring was performed prior to Salce's entry (Tr. 193, 199). Anguiano, however, testified that it is Jalco's practice to monitor manholes prior to entering, and that he did monitor the manhole at Broadway and Power earlier, before they started taking out the plugs (Tr. 159-60, 175). At the time of the manhole entry, there was a small electric blower at Broadway and Tanchhua, 260 feet away from the Broadway and Power manhole (Tr. 62-63, 176-77, 196, 202). Salce did not wear a harness and lifeline when entering the manhole (Tr. 83). Anguiano did not wear a harness and lifeline when he entered the hole to rescue Mr. Salce (Tr. 85). Further, Anguiano did not know where the rescue equipment was located (Tr. 170-71).

Alleged Violation of §5(a)(1)

Serious citation 1, item 1, as amended, alleges:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to atmospheric hazards:

On or about February 15, 2005 employees entered a manhole approximately 15 ft deep.

- a. No air monitoring for hazardous atmospheres or % oxygen was conducted prior to employee entry.
- b. No mechanical ventilation was provided during entry.

- c. No rescue equipment was provided by the employer in case of an emergency.

A feasible means of abatement would be to provide atmospheric testing of confined spaces prior to each employee entry, to ventilate the confined space before and throughout entry procedures by use of blowers and associated duct work and to provide a tripod, life line and body harness to all confined space entrants.

Discussion

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992).

As a threshold matter, Complainant argues that Mr. Salce, a CM employee was a putative employee of Jalco under the common law test of agency.

In determining whether a hired party is an employee under the general common law of agency we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Nationwide Mut. Ins. Co. v. Darden. 503 U.S. 326 (1992).

In addition to Ricardo Salce, CM employees Ruben Reyna and Lucio Anguiano were present at the Broadway and Power work site (Exh. C-8). According to Bright, the CM employees were not sure whether Jalco or CM was their employer (Tr. 56). Anguiano told Bright that he had sole responsibility for directing the work of Salce and other CM employees at the Broadway and Power site, and that he could hire, discipline and fire CM employees (Tr. 54-55, 157, 164).

CM and Jalco are separate entities (Tr. 25). Jalco's subcontract with CM states that CM is to provide labor, pay taxes and provide insurance for the duration of the Northside/Port Area Infrastructure project for the City of Corpus Christi (Exh. C-12, p. 1). The subcontract prohibits the assignment of extra work in the absence of a written agreement, and specifically contemplates CM's use of lower tier subcontractors (Exh. C-12, pp. 2, 4). CM acknowledges its familiarity with OSHA regulations and agrees

to abide by them (Exh. C-12, p. 5). Finally, CM supervisors were directing CM employees working at Broadway and Tanchua, 260 feet away from the Power Street site; CM was cited for violations discovered at that location (Tr. 26, 80, 130).

This sparse record fails to establish that Jalco's control of the worksite was such that it was the *de facto* employer of the CM employees working with Mr. Anguiano. The record includes little detail about the nature of the work being performed, and nothing clarifying the relationship between CM and Jalco beyond what is contained in the subcontract. Mr. Anguiano's direction of the workers in one area of the Corpus Christi project is insufficient to establish that Jalco exercised such control over those workers' work environment that it became the insurer of their compliance with the Act.

The Secretary's failure to establish that Ricardo Salce was a Jalco employee is not fatal to this citation, however, as Jalco's foreman was also exposed to the cited hazard.

Bright testified that the cited manhole was a "confined space", which has a limited means of entry and egress and may potentially contain accumulations of hazardous sulfide gas or methane from decaying organic matter found in sewers (Tr. 49, 69; §1926.25(b)(6)(ii)). Based on employees reporting the smell of rotten eggs, Bright concluded that hydrogen sulfide was released when the plug was removed and waste water began to flow into the manhole (Tr. 100, 193). Where hydrogen sulfide is present, loss of consciousness results approximately 50 parts per million (ppm). Death occurs at between 100 and 200 ppm (Tr. 100). Respondent's representative stipulated that the failure to monitor atmospheric conditions prior to entering a confined space is a recognized hazard (Tr. 70-72). Moreover, Jalco's confined space entry procedure states that:

When there is a possibility that a hazardous environment could develop within the space due to operations performed, surrounding conditions and incursion of contaminants from other sources, or from volatile materials released. . . there should be either frequent or constant monitoring of atmospheric conditions (Exh. C-7, p. 11).

Respondent further recognized that failure to provide mechanical ventilation and rescue equipment for confined space entries is hazardous (Tr. 70-72). Jalco requires any person entering a confined space wear a harness or lifeline (Exh. C-7, p. 9).

Monitoring/Rescue Equipment. Jalco's supervisor was exposed to the cited hazards. Jalco's own rules require frequent or constant monitoring of volatile atmospheres. The atmosphere in the manhole, which was subject to change due to the incursion of contaminants with the removal of the sewer plug, was not monitored prior to Anguiano's entry. Even without monitoring, the hazardous nature of manhole's atmosphere should have been clear to Mr. Anguiano after Salce lost consciousness.

Nonetheless, he entered the unmonitored manhole without a body harness and lifeline. That his exposure was brief does not make the violation less serious. As noted above, no monitoring of the atmosphere was performed prior to his entry. Had the accumulation of toxic gas been higher, Anguiano might not have been able to rescue either Salce *or* himself. Because he wore no harness and lifeline, he could not have been pulled from the manhole should he have been overcome himself.

Jalco argues that Anguiano was on the work site solely in an administrative capacity and that his entry into a confined space could not have been anticipated. That contention is not supported by the record. Anguiano testified that either he or one of the two CM laborers had to enter the manhole to remove the sewer plug, and that Salce went down only because it was his turn (Tr. 158-59). Clearly Anguiano anticipated entering confined spaces himself, and he did not hesitate to do so to rescue another worker, though in doing so he acted contrary to Jalco's confined space entry program and exposed himself to a recognized hazard. Given the paucity of his training, however, it cannot be found that Anguiano's entry into the manhole was either unforeseeable or unpreventable. *See Ormet Corp.*, 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991); *Mosser Construction Co.*, 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991). Anguiano testified that he might have attended a two or three hour course on confined space training approximately four years prior to the accident, but had no clear memory of the course name or content (Tr. 166-67, 170).

For the reasons stated, Anguiano's knowledge of the cited conditions is imputed to Jalco and a violation of 5(a)(1) is established.

Ventilation. Jalco claims the manhole at Broadway and Power was ventilated by two fans, a small electric blower located 260 feet away, at Broadway and Tanchua, and an exhaust fan in the manhole opening, which was removed to allow entry into the manhole itself. Viewed in the most favorable light to Jalco, the blower at Broadway and Tanchua was ineffective, as two employees were overcome in the manhole while it was operating. Viewed less favorably, the fan was a contributing factor in the incident, in that it can be inferred from this record that the blower pushed toxic air that had accumulated in the 260 feet of sewer pipe into the manhole once the plug was removed. Jalco's claim that the manhole was ventilated is without merit.

However, Complainant failed to demonstrate that alternative mechanical ventilation was feasible on this record. In its brief, Complainant suggests that the exhaust fan used in conjunction with the blower would have been adequate, and that it could have been replaced in the cited manhole after the employees had entered. The evidence, however, shows that the fan was supported by the manhole cover and had to be removed before anyone could enter the manhole (Tr. 139, 163; Exh. C-3). It could not be returned to

service without blocking the manhole opening, preventing the use of a ladder, the observation and rescue, if necessary, of men working in the hole.

Though the Secretary has not shown a feasible means of ventilating the manhole, a violation of §5(a)(1) has been proven, in that monitoring and the use of rescue equipment were both feasible means of abatement.

Penalty

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. Penalties may be lowered *or* raised by the judge, or the Commission. *See, Valdak Corporation*, 17 BNA OSHC 1135, 1993-95 CCH OSHD ¶30759 (No. 93-0239, 1995), *affd.*, 73 F.3d 1466 (8th Cir. 1996). In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Gravity factors to be considered include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

The Secretary proposed a penalty of \$4,000 for this item (Tr. 99). The Secretary understated the gravity of this violation. Hydrogen sulfide in extremely small concentrations can cause blurred vision and trouble breathing, leading to unconsciousness and death (Tr. 98). One Jalco employee was exposed to the cited hazard for long enough to be affected by the toxic atmosphere in the manhole. The likelihood of an incident occurring was not only very high, but, in fact, had already occurred as another laborer had already been overcome in the manhole. The affected employee was acting in a supervisory capacity over another employer's employees without proper training in confined space entry, posing a hazard to both himself and the other employee. In confined space cases, it is too common for ill prepared co-workers to rush to the aid of a fallen worker only to be overcome themselves. Death has been an unfortunate result in certain of these cases. Employers working with confined spaces must be ever vigilant. Salce, Anguiano and Jalco are fortunate that Salce and Anguiano did not meet a more serious fate. No alternative measures were taken to protect against likely injury (Tr. 99). Though Jalco is a small employer, it has received other OSHA citations within the past three years (Tr. 97, 99). Taking into account the relevant factors, especially the high likelihood of a death resulting from what was an obvious hazard, a penalty of \$5,000.00 is appropriate and will be assessed.

Alleged Violation of §1910.134(a)(2)

Serious citation 1, item 2 alleges:

29 CFR 1910.134(a)(2): Respirators were not provided by the employer when such equipment was necessary to protect the health of the employee(s):

On February 15, 2005 an employee entered a 15 ft. deep manhole with no respiratory protection to remove a sewer plug, and was overcome with a hazardous gas.

The cited standard provides:

Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program which shall include the requirements outlined in paragraph (c) of this section.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The general industry respiratory standards are adopted under 29 CFR §1926.103. When Salce was overcome by the toxic atmosphere in the manhole it was clear that employees entering the manhole to rescue him would need respiratory equipment to protect them from a similar fate. The cited standard is, therefore, applicable. Jalco's confined entry procedures provide for such a contingency, stating that "[i]f ventilation is not possible and entry is necessary (for emergency rescue, for example), workers must have appropriate respiratory protection" (Exh. C-7, p. 11). Yet it is uncontroverted; Jalco did not provide respirators on the Corpus Christi work site (Tr. 106-07). Anguiano's exposure to the cited hazard was foreseeable given the meager training he was provided in confined space entry and the urgency he must have felt to rescue a fallen worker. Citation 1, item 2 has been established.

Penalty

Without respiratory protection, an employee entering a confined space with a hazardous atmosphere can be overcome, suffering respiratory trauma, including asphyxiation and death (Tr. 107). Anguiano was, in fact, overcome. Because he was acting as a supervisor, and directing CM employees on the worksite,

means that his failure to use appropriate respiratory protection endangered not just himself, but other employees. For the reasons discussed above, a penalty of \$5,000.00 is appropriate and will be assessed.

Alleged Violation of §1910.21(b)(6)(i)

Serious citation 1, item 3 alleges:

29 CFR 1926.21(b)(6)(i): Employees required to enter into confined or enclosed spaces were not instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required:

On February 15, 2005 and times prior thereto, employees had not been made aware of the hazardous conditions of confined spaces, specifically manholes and sewer lines.

The cited standard provides:

All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

Facts

Anguiano holds weekly trench safety meetings with his crews in both English and Spanish (Tr. 183). Every six months or so Jalco provides training dealing with general safety, such as the proper use of hand tools and ladders (Tr. 185). During the inspection Anguiano told Bright that he had no confined space training (Tr. 119, 144). At the hearing he testified he might have attended a two or three hour course on confined space training approximately four years prior to the accident, but had no clear memory of the course name or content (Tr. 166-67, 170). He and three or four other people had been shown how to use a gas monitoring device (Tr. 184).

Discussion

On this record Anguiano's training in confined space entry seems to have been limited to the use of a gas detector to monitor such spaces prior to entry. He could not remember having received any training specific to confined spaces within the past four years. He displayed no competence in the safe entry of confined spaces at the hearing, and certainly demonstrated none in the workplace when called upon to do so on February 15, 2005. Respondent produced no training documents in response to the Bright's request for them, though annual confined space training is required under Jalco's own confined space procedures (Tr. 116-18; Exh. C-7, p. 6).

The cited violation has been established.

Penalty

Anguiano's failure to conduct monitoring, or to have rescue equipment and respiratory equipment available at the Broadway and Power manhole can be directly attributed to Jalco's failure to provide adequate confined space training. This violation lays the foundation for those found at items 1 and 2, and so could have led to suffocation, asphyxiation and death (Tr. 117-19). For the reasons stated in the penalty discussions above, a penalty of \$1,800 is appropriate and will be assessed.

Alleged Violation of §1926.1051(a)

Serious citation 1, item 4 alleges:

29 CFR 1926.1051(a): Stairways or ladders were not provided at all personnel points of access where there was a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist was provided:

On February 15, 2005 and time prior thereto, an employee removing a sewer plug approximately 15-15 feet deep had no ladder provided for means of egress.

The cited standard provides:

A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

Discussion

The witnesses all agreed that a ladder was used to access the cited manhole. It was then removed by the laborers watching the hole so as to allow Salce room to work. The ladder remained available at the top of the manhole and was used by Anguiano in his rescue attempt. The ladder was not removed while Anguiano was inside (Tr. 122-23, 132). No Jalco employees were exposed to a hazard, and this item is dismissed.

ORDER

1. Serious citation 1, item 1, alleging violation of §5(a)(1) of the Act is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1910.134(a)(2) of the Act is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.
3. Serious citation 1, item 3, alleging violation of §1926.21(b)(6)(i) of the Act is AFFIRMED, and a penalty of \$1,800.00 is ASSESSED.
4. Serious citation 1, item 4, alleging violation of §1926.1051(a) of the Act is VACATED.

/s/ _____
James H. Barkley
Judge, OSHRC

Dated: April 21, 2006