

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission.

So Ordered.

Date: June 15, 2000

/s/ _____
Thomasina V. Rogers
Chairman

/s/ _____
Gary L. Visscher
Commissioner

/s/ _____
Stuart E. Weisberg
Commissioner

99-0962

NOTICE IS GIVEN TO THE FOLLOWING:

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Secretary of Labor, :
Complainant, :
v. : OSHRC Docket No. **99-0962**
R & G, Inc., : **EZ**
Respondent. :

Appearances:

Helen Schuitmaker, Esquire
Office of the Solicitor
U. S. Department of Labor
Chicago, Illinois
For Complainant

Gordon W. Gates, Esquire
Gates, Wise & Schlosser, P.C.
Springfield, Illinois
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

R & G, Inc., is a corporation engaged in trenching and excavation contracting. The Occupational Safety and Health Administration (OSHA) conducted an inspection at respondent's jobsite in Litchfield, Illinois, on May 9, 1999. As a result of this inspection, respondent was issued a citation.

R & G, Inc., filed a timely notice of contesting the citation and proposed penalty. A hearing was held pursuant to the EZ trial procedures in Springfield, Illinois, on September 30, 1999. For the reasons that follow, Citation No. 1, item 1a, is vacated; Citation No. 1, item 1b, is affirmed; and a penalty of \$600 is assessed.

Background

On May 3, 1999, Joseph Czaicki, an OSHA compliance officer, conducted an inspection of R & G's jobsite in Litchfield, Illinois. Upon his arrival, he observed an employee of R & G working inside a trench box in a trench 14 feet deep. The east end of the trench box was covered with a metal plate. The west end was open. One foot beyond this open end stood a vertical wall of dirt 14 feet high. Over an inch of water was observed in the bottom of the trench. The employee exited the trench shortly after the arrival of the compliance officer. R & G's supervisor was operating the backhoe. Approximately fifteen minutes after the inspection began, the vertical dirt wall at the west end of the trench box collapsed into a 5-foot section of the trench box. No employee was in the trench at the time of the collapse.

Discussion

The Secretary has the burden of proving the violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (1) 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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation No. 1, Item 1 Alleged Serious Violation of 29 C.F.R. § 1926.651(k)(2)

In Citation No. 1, item 1a, the Secretary alleges that:

Where the competent person found evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees were not removed from the hazardous area until the necessary precautions had been taken to ensure their safety:

An employee was observed working inside a trench with visible standing ground water on its floor. The on site competent person did not remove the employee from inside of the trench once this condition was known to ensure his safety in the event a wall collapsed.

The compliance officer's uncontroverted testimony established that approximately 1.5 inches of water was standing in the bottom of the trench while respondent's employee was working in that trench during the inspection. Respondent's supervisor, Mark Releford, however, testified that respondent took precautions to correct this condition by using sump pumps. The compliance officer did not observe these pumps but was advised of their presence by Releford during the inspection. While the standing water is an indication of a possible hazard, the Secretary produced no evidence that the precautions were not taken or that they were not sufficient to ensure the safety of R & G's employees. The Secretary does not argue that Mr. Releford is not a "competent person" within the meaning of the standard. No showing has been made by the Secretary that R & G violated the provisions of 29 C.F.R. § 1926.651(k)(2) by failing to remove the employee from the trench until the necessary precautions were taken. The evidence produced at hearing establishes that the precautions, the sump pumps, were in place while the employee worked in the trench. Citation No. 1, item 1a, is vacated.

Citation No. 1, Item 1b
Alleged Serious Violation of 29 C.F.R. § 1926.652(a)(1)

In Citation No. 1, item 1b, the Secretary alleges that:

Employees in excavation were not protected from cave-ins by an adequate protective system designed in accordance with paragraphs (b) or (c) of this section.

The west wall of this trench was not adequately protected against an unexpected cave-in. This trench was approximately 15.5' deep by 6' wide by 20' long. The west wall was not benched or sloped to protect exposed employees from the hazard of a wall failure.

On the day of the inspection, respondent's crew was installing gravity sanitary sewer pipe. Mark Releford, respondent's job superintendent, described the process on the day of the inspection as follows:

A. Well, we were laying pipe.

Q. Okay. Explain the process, briefly, how that works?

A. Well, what I do is, I'll, I'll dig my slot, pull the box, and you pull the box up to, you probably leave a foot or so of pipe at the back.

Q. So, in this instance--

A. At the east end--

Q. --At the east end. Okay.

A. At the east end of the box.

Q. Okay.

A. Well, then you'll go down, and I'll go in, and I'll pull my dirt, you know, I'll dig; then, Bill will go down in, and he'll take a shot; then, he'll come back out, and I'll dig. You know, I'll dig the dirt out.

Q. Okay. So, first, you'll dig the trench, rough dimensions?

A. Yeah.

Q. You'll pull the box?

A. Into what I've dug--

Q. Into that which you just dug, and you pull it just far enough that

there's a foot of the pipe that's, you just laid still inside the box?

A. Yeah.

Q. And then you'll send a man down to shoot the elevation from that pipe--

A. On dirt grade--

Q. Is that correct?

A. Yup.

Q. Heading west?

A. Yup.

Q. And then he'll come back out of the hole, and you'll finish dig, digging the inside of the box?

A. I'll dig, yeah, and then he'll go back in and shoot to make sure.

(Tr. 70-71)

Mr. Releford described the dimensions of the trench box as 14 feet deep, 20 feet long, and 42 inches wide inside the box. The pipe is 13 feet long. When the OSHA inspector arrived, an employee of R & G was in the trench box. He had just shot the grade and was climbing out of the trench. During direct examination, Mr. Releford stated that the employee had not worked closer than 10 feet from the west end of the box before exiting the trench. At that time, R & G had not completed the dig on the west side. On cross-examination, the superintendent testified that his employee may come within 5 feet of the west end of the trench box. He also admitted that the soil was wet. He classified the soil as Type A by visual observation. The compliance officer testified that the soil had fissures or cracks, and that the dirt wall at the west end, 1 foot outside the trench box, was vertical. This wall was approximately 14 feet deep. The east end of the trench box was covered by a 1/8-inch thick metal plate. While the employee was in the trench, Mr. Releford was still removing soil from an area inside the west end of the trench box.

After considering the testimony and reviewing 29 C.F.R. § 1926.652, including Appendix A, I conclude that the soil in this trench was not Type A. It must be treated as Type C since it was wet and had fissures which reduce soil stability. Even if the soil were found to be Type A, it must be sloped, shored or shielded in accordance with 29 C.F.R. § 1926.652(b) or (c). The wall outside the west end of the trench box was vertical. It had no slope, no shoring, and no shielding. The

R & G employee in the trench worked 5 to 10 feet from this vertical wall. Within fifteen minutes of his exit from the trench, this vertical wall collapsed, partially covering an area 5 feet inside the west end of the trench box. The employee in the trench clearly had access to the hazard of a collapse or cave-in of this vertical wall.

The standard at 29 C.F.R. § 1926.652(a)(1) is applicable. Respondent was engaged in trenching and excavation work. Respondent failed to comply with the standard by not sloping, shoring or shielding the 14-foot vertical dirt wall at the west end of the trench. R & G's employee working 5 to 10 feet from the west end of the box had access to this vertical wall. Respondent, through its superintendent, knew its employee was working in the trench with access to this unprotected soil wall. Mr. Releford was removing soil from the west end of the trench box while the employee was in the trench. When work stopped during the inspection, Mr. Releford told the inspector the wall would collapse, and fifteen minutes later it did. This is additional evidence of respondent's knowledge of the instability of this soil.

The Secretary has proven the alleged violation of 29 C.F.R. § 1926.652(a)(1). That violation could have resulted in death or serious physical harm to the employee in the trench. If the 14-foot wall of dirt collapsed onto the employee, he could be killed or severely injured by the cave-in. The violation of 29 C.F.R. § 1926.652(a)(1) is affirmed as a serious violation.

Penalty

Under § 17(j) of the Act, in determining the appropriate 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.

At the time of the inspection, one R & G employee was working in the trench. Respondent is a small employer with no history of OSHA serious violations within three years prior to this inspection. While the west end of the trench was not protected, respondent was in the process of removing dirt from that end. Mr. Releford was preparing to slope the unprotected vertical wall when the OSHA inspector arrived. R & G did try to protect its employee by using a trench box and by protecting the east end of the box with a metal plate. This demonstrates good faith by the respondent. Considering the severe gravity of the violation, the size of the company, its history and good faith, I conclude that a penalty of \$600 for the violation of 29 C.F.R. § 652(a)(1) in Citation No. 1, item 1b, is appropriate.

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(1).

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1a, is vacated.
2. Citation No. 1, item 1b, is affirmed as a serious violation and a penalty of \$600 is assessed.

STEPHEN J. SIMKO, JR.
Judge

Date: November 9, 1999