

SECRETARY OF LABOR,
Complainant,
v.
D'ALLESSANDRO CORPORATION,
Respondent.

OSHRC DOCKET NO. 01-1313

APPEARANCES:

James Glickman, Esquire
Boston, Massachusetts
For the Complainant.

Richard D. Wayne, Esquire
Boston, Massachusetts
For the Respondent.

Before: G. Marvin Bober
Administrator Law Judge

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission (“the Commission”), pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”), to review (1) citations issued by the Secretary of Labor (“the Secretary”) and (2) proposed assessments of penalty therefor. On March 21, 2001, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of an excavation site in Boston, Massachusetts, where Respondent D’Alessandro Corporation was engaged in installing drain piping. As a result of the inspection, OSHA issued to Respondent a four-item serious citation alleging violations of 29 C.F.R. §§ 1926.651(k)(1), 1926.652(a)(1), 1926.652(e)(2)(i) and 1926.21(b)(2), respectively. Respondent filed a timely notice of contest, after which the Secretary filed her complaint and Respondent filed its answer. Prior to trial, the Secretary withdrew Items 3 and 4 of the citation, leaving for resolution the alleged violations of 29 C.F.R. §§ 1926.651(k)(1) and 1926.652(a)(1). The administrative trial in this case was held in Boston, Massachusetts, on March 14 and 15, 2002. Both parties submitted post-trial briefs on May 20, 2002, and this matter is ready for disposition.

Jurisdiction

The parties agree that Respondent is an employer within the meaning of section 3(5) of the Act and that the Commission has jurisdiction in this matter. (Tr. 5-6; J-1). I find, therefore, that the Commission has jurisdiction over the parties and the subject matter of this proceeding.

Background

The record shows that Respondent, a general contractor engaged primarily in utility work, had been working on a sewer and drain pipe project for the Boston Water and Sewer Commission for about two years at the time of the inspection. The record further shows that Respondent's work at the site involved laying 24-inch PVC drain pipe in a southerly direction along Freeport Street in the Dorchester area of Boston. Respondent had a five-man crew at the site, and the crew's foreman was Aderito Lopes. Mr. Lopes reported to John Bauld, an employee of Respondent and project manager of the entire project. On March 20, 2001, two separate areas were excavated. After the first area was dug out a trench box was put in it and pipe was laid up to the end of the trench box. Excavation then began in the second area, which was south of the first; an excavator dug down about 3 feet, and then about 2 more feet were dug by hand with shovels due to the presence of utilities. At the end of the workday, the excavation was covered with a steel plate and the trench box was left in place in the northern area. (Tr. 5-6; 227; 230-33; 238-44; 314-15; 360; 364; 374; C-8).

On March 21, 2001, at about 7 a.m., the crew began "setting up" at the site. Mr. Lopes and Mr. Bauld were both present, and the excavator began digging between the two areas so as to make a single trench. A drain pipe uncovered the day before was further exposed, a gas main along the west wall was uncovered, and a concrete duct bank encasing a power line was also uncovered about 4 feet 4 inches below ground level; the drain pipe spanned the width of the trench near the south end, while the duct bank, which crossed over the top of the pipe, went from the southwest corner to a manhole just southeast of the end of the trench box.¹ Around 8:30 a.m., Mr. Bauld left the site to take a family member to a medical appointment, and, at about that same time, Mr. Lopes and Roger Killelea, another crew member, were working on top of the duct bank. At approximately 9 a.m., three OSHA compliance officers ("CO's") were heading south on Freeport Street when they saw the

¹The drain pipe, which had been partially uncovered the day before, was evidently cut in two intentionally because it was in the way of the new pipe that was to be laid. (Tr. 242-43).

trench and workers in it. The CO's passed the trench, pulled over to observe it, and turned around and drove by it again. They then parked the car and got out to inspect the site. (Tr. 6; 22-31; 61-63; 92; 117; 140; 145-50; 159; 232; 244-47; 253-54; 261-69; 309-18; 361-66; 372; C-8).

CO Charles Williams reached the excavation first, with CO's James Mulligan and Edward Conway following him, and he saw a worker in a red hard hat standing in the trench and a worker in a white hard hat crouching or kneeling on the duct bank.² CO Williams asked the employees to exit the trench, which they did by means of the duct bank. The CO's then proceeded to observe, measure and photograph the excavation.³ The trench was essentially "straight cut" or "rough cut," with the south end above the duct bank somewhat sloped back, and there was no protection in it except for the trench box in the north end. The trench was about 5 feet wide at the north end and 10 feet wide at the south end, and measurements taken to the north and south of the manhole on the east side of the excavation showed these areas to be approximately 8.75 and 6.5 feet deep, respectively. (Tr. 30-46; 52-81; 138-40; 149-62; 185-90; 271; C-8; C-11-12).

CO Williams spoke with Mr. Lopes and asked him if he was the "competent person" at the site. Mr. Lopes said he was not and that the person who was, Mr. Bauld, had been there earlier but had had to leave to take a family member to a medical appointment. Mr. Lopes also said that Mr. Bauld had told him to shore the excavation, and, when the CO asked where the shoring materials were, Mr. Lopes said they were in the company's nearby yard and he then sent his crew to get the materials. CO Williams also spoke with Roy Dunham, the company's safety officer, who had just arrived at the site. Mr. Dunham reiterated what Mr. Lopes had said, that is, that the competent person, Mr. Bauld, had been there earlier but had had to take a family member to a medical appointment. Based on his conversations with Mr. Lopes and Mr. Dunham, and the fact that Mr. Lopes sent his crew to the yard, CO Williams was satisfied the trench would be properly shored. He and the other CO's finished the inspection and left around 10:30 a.m. (Tr. 86-100; 140; 269; 283).

²The employees were Mr. Killelea (red hard hat) and Mr. Lopes (white hard hat). (Tr. 318). CO Williams reached the excavation first, and, evidently, by the time CO's Mulligan and Conway got to the trench, the employees were getting out. (Tr. 150-54).

³CO Conway measured the trench with the aid of CO Mulligan. CO Conway also made a sketch of the trench, and C-8 is a replica of the sketch he made later in his office. (Tr. 154-60).

Whether the Inspection was Proper

Respondent contends that the citation items should be dismissed because the inspection was improper. Respondent asserts that the site was right across from an IBEW facility, that all three CO's were union members, and that none of the CO's could explain why, on their way back to their office, they had ended up on a congested Dorchester side street where Respondent was working. Respondent further asserts that CO Williams was "belligerent" and "abusive" during the inspection and that he told Jim Dooley, a Boston Water and Sewer Commission ("BWSC") engineer who was present at the site, that BWSC should replace Respondent with a union contractor.

The record shows that the site was in fact right across from an IBEW training center and that all three of the CO's were union members. (Tr. 122-24; 171; 184-85; 232). The record further shows that CO Williams and CO Conway had inspected another site on the morning of March 21, 2001, and had picked up CO Mulligan on the way back to their office in Braintree, Massachusetts. They got on the Southeast Expressway, with CO Conway driving, exited at Columbia Road, and then turned onto Dorchester and then Freeport. The CO's saw the trench and the workers because police officers were directing cars due to the construction and traffic was moving slowly. The CO's pulled over, observed the trench, and then called their office. The assistant area director of the Braintree office told them to go ahead and inspect the site. (Tr. 22-26; 116-22; 145-49; 183-85; 208-11).

CO Williams testified that he did not recall why they got off the expressway but that he often did so himself due to traffic and went down Freeport to reach the Braintree office. He further testified that he did not see the site from the expressway and that he did not go down Freeport with the intention of conducting an inspection. He noted, however, that OSHA had had a national emphasis program on trenching for many years and that any CO who saw an excavation that appeared to be a hazard was obligated to stop and inspect it.⁴ He also noted that he found out that Respondent was a nonunion company after arriving at the site, and he was adamant that although he spoke to Jim Dooley at the job site he did not state that Respondent should be replaced with a

⁴Patrick Catino, the assistant area director ("AAD") of the Braintree OSHA office, testified that the program had been in existence since 1985. (Tr. 208; 211).

union company. (Tr. 24-29; 91-92; 118-25). CO's Conway and Mulligan also testified that they made no such statement and that they heard no one else do so. (Tr. 172; 191).

I observed the demeanor of CO Williams and the two other CO's on the stand and I found their testimony credible and convincing. Based on their testimony, I conclude that their being on Freeport Street was fortuitous and that there was nothing improper about their decision to inspect the site. As to the assertion that CO Williams was "belligerent" and "abusive" during the inspection, Respondent points to nothing in the record to support its position.⁵ As to the assertion that CO Williams said that Respondent should be replaced, Mr. Lopes testified that he heard CO Williams tell Mr. Dooley that "they wouldn't get no union company [because] we did know our work." (Tr. 306). In evaluating this testimony, I have considered that Mr. Lopes speaks English as a second language. However, even if I were to interpret his testimony as Respondent apparently does, I would not find it reliable. I observed the demeanor of Mr. Lopes and found him a less than credible witness, a conclusion supported by the fact that his testimony was internally inconsistent as well as contrary to other evidence of record.⁶ This finding, together with my finding as to the credibility of the CO's, renders the testimony of Mr. Lopes unconvincing. Respondent's contention is rejected.

Citation 1, Item 2

This item alleges a violation of 29 C.F.R. 1926.652(a)(1), which provides as follows:

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.

Respondent stipulates that the soil at the subject site was "Type C." (Tr. 5-6). Pursuant to the standard, excavations in Type C soil require sloping at an angle of 34 degrees or protective systems such as shoring or shielding. *See* 29 C.F.R. 1926.652(b)-(c). The record shows that at the time of the

⁵Mr. Lopes testified the CO was asking an "awful lot of stuff" and "just babbling away" and not "really listening to anything [he] had to say." He also testified that "things got out of hand pretty quick." (Tr. 181; 299-300). Without more, this testimony does not prove Respondent's assertion.

⁶Examples of this are set out in my decision *infra*.

inspection, the trench was basically “straight cut” or “rough cut,” with the south end above the duct bank having a slight slope, and that there was no protective system in place other than the trench box in the north end. The record also shows that the depth of the trench to the north and south of the manhole on the east side of the excavation was 8.75 feet and 6.5 feet, respectively. (Tr. 6; 54-55; 154-162; 186-87; 251-52; 271; C-8; C-11-12). Based on the testimony of CO Williams, the Secretary contends that Mr. Killelea was in the trench just north of the duct bank, in the location indicated with an “R” on C-8, which was near the area that CO Conway measured to be 6.5 feet.

CO Williams testified that as he walked up to the trench on March 21, 2001, he saw one employee standing at the edge of the excavation, another in a white hard hat crouching or kneeling on the duct bank, and a third in a red hard hat standing in the trench. He further testified that the excavator’s arm was in the trench in the same general area and that it was excavating. The CO said that his main objective was to get the workers out of the trench, that when he got within earshot he identified himself and asked them to get out, and that they proceeded to do so via the duct bank. The CO also said that he was taking photos as he approached, and he identified C-3, C-4 and C-5 as the photos he took in sequential order. He noted that C-3 showed the worker in the white hard hat on the duct bank and, just to the right of that worker, the top of a red hard hat, that C-4 and C-5 showed the workers exiting the trench, and that C-5 also showed the duct bank and the drain pipe below it.⁷ He further noted that C-6, a photo that CO Conway took, showed the employees’ feet on the duct bank and, down below and in front of the drain pipe, the area where the employee in the red hard hat had been. The CO marked an “R” on C-8 to indicate where that employee had stood. (Tr. 29-52; 126-40).

Respondent contends that Mr. Lopes and Mr. Killelea were on the duct bank, which was less than 5 feet below the ground surface, and that no one else had worked in the trench that morning. In that regard, Mr. Lopes testified that the only digging on March 21, 2001, was between the north and south parts of the trench, and that all of that digging was done by the excavator; the excavator had dug down about 5 feet by the time Mr. Bauld left and about 1 foot more by the time OSHA

⁷The CO noted that the top of the red hard hat in C-3 was circled. He also noted that that employee had a shovel with him when he exited the trench. (Tr. 35).

arrived.⁸ Mr. Lopes said the north face of the duct bank was uncovered when the CO's got there but that the soil under it was still there; he and Mr. Killelea were on the bank shoveling soil off of it at that time, and no one else had been in the trench that morning.⁹ He also said his plan was to shore the trench after all the utilities were exposed and that he had been about ready to get the materials to shore the trench when OSHA arrived. Mr. Lopes marked on C-8 where he and Mr. Killelea had been on the duct bank. (Tr. 239-47; 251-67; 287; 296-300; 308-19).

In considering the foregoing, I note that Mr. Lopes has already been found to be an unreliable witness. However, there are specific reasons for not crediting his testimony about the work being done when OSHA arrived. Mr. Lopes testified that the area between the north and south parts of the trench, that is, the area north of the duct bank, was not excavated until March 21, 2001. He further testified that the only digging in that area was done with the excavator; however, he also stated that the utilities had to be uncovered by hand digging and that the drain pipe in the south part of the trench had been uncovered in that manner. (Tr. 241-43; 253-54; 261-67; 296-97; 308-16). It is clear from photos C-6 and C-12 that the drain pipe extended into the area north of the duct bank. It is also clear from those photos that the drain pipe was largely uncovered when the CO's got to the site. Although Mr. Lopes denied that any hand digging was done in the bottom of the trench in the area north of the duct bank, his own testimony indicates that hand digging had in fact occurred in the area around and under the part of the drain pipe shown in C-6 and C-12. This conclusion is supported by CO Williams' testimony, who said he saw an employee in the trench in the area in front of the drain pipe depicted in C-6. This conclusion is also supported by C-3, which shows Mr. Lopes on the duct bank and the very top of Mr. Killelea's red hard hat a significant distance below Mr. Lopes. For all of these reasons, as well as my credibility findings *supra*, the testimony of CO Williams is credited over that of Mr. Lopes, and I conclude that Mr. Killelea was working at the bottom of the trench in

⁸Mr. Lopes also testified that no digging was done in the south part of part of the trench on March 21. He said that area was dug to about 5 feet on March 20; the excavator dug about 3 feet, and the last 2 feet were dug by hand due to the drain pipe. (Tr. 242-43; 253; 296-97; 310-11; 315-16).

⁹The exception was Victor Lopes, Mr. Lopes' brother, who had been in the trench box that morning to fix the electric pump used to pump water out of the excavation. (Tr. 255; 307-08).

the area depicted in photo C-6 on March 21, 2001, when the CO's arrived at the site. The Secretary has accordingly met all of the elements to demonstrate a violation of the cited standard.¹⁰

The Secretary further contends that, even if Mr. Killelea had not been at the bottom of the trench, Respondent nonetheless violated the standard because both Mr. Lopes and Mr. Killelea had been standing on the duct bank. Respondent stipulates that Mr. Lopes and Mr. Killelea were standing on the duct bank inside the excavation on the day of the inspection and that the duct bank was about 4 feet, 4 inches down in the excavation. (Tr. 6). Respondent contends, however, that it did not violate the standard because the employees were not exposed to a side wall over 5 feet high.

In support of her contention, the Secretary cites to *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100 (1st Cir. 1997). There, the employer argued that because its employees were standing on a pipe spanning the width of the excavation, rather than on the bottom of the trench itself, they were not exposed to an excavation over 5 feet deep. The court first noted that the Commission had rejected a similar argument in *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2011 (No. 90-1505, 1992), and had held that the determining factor was the depth of the trench itself and not the position of the employees in the trench. The court then agreed with the Commission and stated as follows:

The safety standard is implicated by the depth of a particular trench, without regard to an individual worker's precise position in it. The notion that having workers stand on a laid pipe within a trench is a satisfactory method of protecting them from the risk of cave-ins is nonsense.

115 F.3d at 109, citing *Conie Constr., Inc. v. Reich*, 73 F.3d 382, 384 (D.C. Cir. 1995).

Respondent asserts that *P. Gioioso & Sons* and the cases it cites do not apply here because the concrete duct bank was part of the side wall and the "Secretary failed to establish how employees on the duct bank on the east side would be exposed to a hazard from failure of the west side of the trench." (R. Brief, p. 9). However, it is Respondent's burden to prove that it falls within the 5-foot depth exception to the standard, *see* 29 C.F.R. 1926.652(a)(1)(ii), set out *supra*, and I conclude that

¹⁰To prove a violation of a standard, the Secretary must show that (a) the standard applies, (b) the employer did not comply with the standard, (c) employees had access to the violative conditions, and (d) the employer knew, or in the exercise of reasonable diligence could have known, of the violative conditions. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). The knowledge element is established here because Mr. Lopes was clearly aware of the condition.

Respondent has not met that burden. Moreover, as the Secretary points out, the trench was clearly over 5 feet deep and the employees were exposed to a cave-in hazard; the soil was Type C and had been previously disturbed, there had been water in parts of the trench, and the trench was subject to the vibration of the traffic on Freeport Street. I agree with the Secretary that the employees' standing on the duct bank to work provides an additional basis for finding a violation of the cited standard, and Item 2 of Citation 1 is affirmed as a serious violation.

Citation 1, Item 1

This item alleges a violation 29 C.F.R. 1926.651(k)(1), which provides as follows:

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.

The term "competent person" is defined at 29 C.F.R. 1926.650(b) as follows:

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 alleges that the cited standard was violated because a competent person did not inspect the excavation for adequate shoring or other protective systems prior to employee entry. Respondent, on the hand, contends that Mr. Bauld, Mr. Lopes and others at the site were competent persons and that their actions were consistent with the standard.

The record shows that Mr. Bauld was the project manager of the entire project, that he has had many years of experience in utility contracting work, and that his qualifications include an associate degree in engineering and OSHA-approved confined space and competent person training. (Tr. 231; 358-60; 374). The record further shows that Mr. Bauld visited the subject site daily and that he was at the site early in the morning before the OSHA inspection. (Tr. 245-48; 268; 361-63). However, it is clear that Mr. Bauld was not present when the CO's arrived. (Tr. 245-48; 302; 361). Moreover, based on the testimony of Mr. Lopes, the area being excavated was about 5 feet deep when Mr. Bauld left and about a foot deeper by the time OSHA arrived. (Tr. 247; 251). Thus, even

if Mr. Bauld inspected the trench that day, its condition was plainly different when the CO's arrived.¹¹ The question to resolve, therefore, is whether there was a "competent person" at the site, to ensure that the trench was not a hazard prior to employee entry, after Mr. Bauld left. I conclude that there was not, in view of my findings relating to Item 2, *supra*. Additional reasons for reaching this conclusion are set out below.

CO Williams testified that when he asked Mr. Lopes if he was the competent person, Mr. Lopes said he was not, that Mr. Bauld was that person, and that Mr. Bauld had had to leave to take a family member to a medical appointment; CO Williams further testified that Mr. Dunham, upon arriving at the site, told him the same thing.¹² (Tr. 86-90; 93-95). At the hearing, Mr. Lopes denied telling the CO that he was not the competent person, but he admitted saying that Mr. Bauld was the competent person. (Tr. 280-81; 300-02). Mr. Lopes then attempted to explain his statements at the site, testifying that the CO was asking "an awful lot of stuff," that it was "one big chaotic situation," and that the CO's question had confused him because he had not known at that time what a competent person was; Mr. Lopes also testified that he had discussed the matter with a company official the next day, after which he had concluded, due to his many years of experience, that he had the skills to be considered a competent person. (Tr. 280-81; 301-05).

Based on my credibility determinations *supra*, the testimony of CO Williams and the other two CO's is credited over that of Mr. Lopes, and I find that Mr. Lopes made the statements that CO Williams said that he did. I further find that, in light of those statements and those of Mr. Dunham, Mr. Lopes was not the competent person at the site. Finally, I find that even if he had been so designated, he was not qualified to be the competent person and his actions did not meet the terms of the standard. First, Mr. Lopes admitted that he had never read the OSHA excavation standard. (Tr.

¹¹Although Mr. Bauld described the site generally and the work that was to occur that day, he never testified that he had actually inspected the trench that morning. (Tr. 363-70). Mr. Lopes, on the other hand, testified that he inspected the trench that day to determine where the utilities were and if there was water present. (Tr. 307). However, Mr. Lopes' inspection was plainly inadequate, in light of the conditions the CO's observed.

¹²CO Conway testified that he spoke to Mr. Dunham, who gave him the same information he had given CO Williams, and CO Mulligan testified that he was present when Mr. Lopes told CO Williams that he was not the competent person at the site. (Tr. 164; 185-86).

282; 288). Second, there was no evidence of any specific training that Mr. Lopes had had that would qualify him to be a competent person. Although Mr. Dunham indicated that he thought that Mr. Lopes had had 40 hours of OSHA training, Mr. Lopes, when questioned about training, testified it was “mostly” his experience that qualified him as a competent person.¹³ (Tr. 305; 350). Third, the conditions the CO’s observed upon arriving at the site clearly establish that Mr. Lopes was not acting in compliance with the standard, contrary to Respondent’s claim.¹⁴ In view of the record, Respondent was in violation of the cited standard. This item is accordingly affirmed as a serious violation.

Penalty Determination

As issued, the citation proposed a penalty of \$3,000.00 each for Items 1 and 2. At the hearing, evidence was presented as to the reasons the violations were classified as serious and how the penalties were calculated. Specifically, OSHA determined the violations were of high gravity and greater probability, based on the injuries that could have occurred and the likelihood of an accident, resulting in a base penalty of \$5,000.00 for each item. The base penalty was reduced by 40 percent due to the company’s small size, but no credit for good faith was given due to the high gravity of the violations. OSHA also gave no credit for history; however, evidence at the hearing showed that a 10 percent reduction should have been given because the company had had no serious violations in the past three years. (Tr. 213-22). In view of the record, I find that a penalty of \$2,500.00 for each item is appropriate. A total penalty of \$5,000.00 for these items is accordingly assessed.

ORDER

Based upon the foregoing decision, the disposition of the citation items, and the penalties assessed therefor, is as follows:

<u>Citation 1</u>	<u>Standard</u>	<u>Disposition</u>	<u>Classification</u>	<u>Civil Penalty</u>
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¹³Mr. Dunham also indicated that he thought that Mr. Killelea had had 40 hours of OSHA training. (Tr. 350). Without further evidence of such training, this testimony is not credited.

¹⁴This conclusion is supported by the fact, as noted above in the background portion of this decision, that Mr. Bauld had told Mr. Lopes before leaving the site that he (Mr. Lopes) was to shore the excavation. (Tr. 86-87; 95; 267-68; 369-70).

Item 1	1926.651(k)(1)	Affirmed	Serious	\$2,500.00
Item 2	1926.652(a)(1)	Affirmed	Serious	\$2,500.00
Item 3	1926.652(e)(2)(i)	Vacated		
Item 4	1926.21(b)(2)	Vacated		

Total Penalty Assessed: \$5,000.00

/s/

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Dated: September 20, 2002
Washington, D.C.