

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 02-0246
D.R.B. BORING AND DRILLING	:	
CONSTRUCTION CO., INC.,	:	
Respondent.	:	

Appearances: Diana L. Jacobs, Esq.
U.S. Department of Labor
Office of the Solicitor
Philadelphia, PA
For Complainant.

Don Beyerl
D.R.B. Boring & Drilling
Allison Park, PA
For Respondent, *pro se*

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) (“the Act”). On November 30, 2002, a Compliance Officer (“CO”) from the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent’s work site. As a result of the inspection, OSHA issued a four-item serious citation to Respondent alleging violations of construction safety standards appearing in Title 29 of the Code of Federal Regulations (“C.F.R.”). Respondent timely contested the citation. The case came on to be heard in Pittsburgh, Pennsylvania under the Commission’s EZ-Trial procedures (29 C.F.R. §§ 2200.200 - 211).

Jurisdiction

It is undisputed that at all relevant times Respondent has been an employer engaged in excavating and underground boring. In addition, Respondent handles goods or materials which have moved in interstate commerce. I thus find that Respondent was engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Occupational Safety and Health Review Commission (“the Commission”) has jurisdiction over the parties and the subject matter.

Discussion

The relevant evidence can be summarized succinctly.

It is undisputed that the business of Respondent, D.R.B. Drilling and Boring (“DRB”) is excavating and boring. It is also undisputed that Don Beyerl, DRB’s president was engaged in this work on his own property at the time and place of the OSHA inspection. Mr. Beyerl was drawing a salary from DRB and had at least one paid employee, Mr. Ganon, who was also being paid by DRB, working on the project. Coverage of the Act is thus clear.

The excavation inspected was determined to be approximately 10 feet wide, 32 feet long and 9 feet 8 inches in depth. At least three of the sides were virtually unsloped. The OSHA CO, Ms. Prino, testified as to each item in the citation¹ and referred to photographs and/or signed employee statements (CX 1, 3, 4, 5, 6 & 7; ALJ -1 & ALJ-2) in support of her points.² In each instance, she testified about the existence of a condition that failed to meet the cited standard. In addition to her testimony which I find to be credible and reliable, each item was supported by a clear photograph illustrating the condition. The CO also testified as to employee exposure (either that of Mr. Beyerl or that of Mr. Gamon, or both) for each item. She asserted that DRB knew or should have known of the existence of the cited conditions since each was in plain view of Mr. Beyerl and each had

¹ The text of the standards cited appear in Appendix 1, attached.

² See *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

been in that condition for some time.³ My conclusions as to each item and DRB's arguments are set forth below.

In regard to item 1, DRB maintains that the means of getting into and out of the excavation, a combination of an aluminum ladder and walking up a steeply sloped "ramp," was safe access. This argument is rejected. The access and egress means used by both Mr. Beryl and Mr. Ganon included the steps on an extension ladder that was in an un-extended position. The ladder was leaning against a trench wall, but it did not extend above ground level at the top of the wall. This arrangement required the employees to transfer their weight from the ladder to the dirt ramp to get in or out of the trench. The ramp, in turn, was composed of fairly loose earth which slipped under foot. I find that the photographs and credible testimony of both Ms. Prino and Mr. Gamon, either individually or taken together, demonstrate that neither the ladder nor ramp, nor the combination of the two, was a safe means of access or egress. It is irrelevant whether the ladder was placed in a position such that an employee in the excavation had less than 25 feet of lateral distance to travel to reach the egress. Wherever it was, it was an unsafe means of egress/access and it thus failed to meet the requirements of the cited standard. Item 1 is therefore AFFIRMED.

As to item 2, the evidence establishes quite clearly that water had accumulated in the excavation and that no particular precautions had been taken as a result of such water. Regardless of the source of the water, it was present in significant amounts, and the fact that the seepage of creek water into the excavation could not be prevented did not in any way lessen the need for additional protection. The alleged violation is established and Item 2 is AFFIRMED.

Item 3 alleges a lack of proper protection for employees in the excavation against objects rolling or falling in from above. All of the testimony in the record in addition to the photographs establish the existence of conditions that I find to be violative of the cited standard's requirements. Accordingly, Item 3 is AFFIRMED.

Item 4 alleges that given its size and the surrounding soil conditions, the excavation did not have proper cave-in protection. The CO testified that she took a soil sample from a spoils pile, had it analyzed by OSHA's lab in Salt Lake City, and relied on the OSHA analysis classifying the soil

³ Indeed, Mr. Beyerl had used the cited access and egress route and ladder at the work site.

as type C for her calculations as to the nature of cave-in protection (or degree of sloping) required. She also stated that even if the soil test results had shown a type A or B soil, there was inadequate cave-in protection. An examination of the cited standard supports the CO's conclusion.

Mr. Beyerl, DRB's President is highly experienced in excavating. He testified that the walls of the excavation were stable and noted that the excavation had been in place with no sloughing or cave-ins for a substantial period of time. Mr. Beyerl's testimony does not, however, warrant much probative weight. He has a direct interest in the outcome of this matter and, more importantly, he was less than candid about whether Mr. Ganon had been in the trench until confronted with Mr. Ganon's testimony and signed statement. Moreover, the very purpose of standards such as the one cited here is to replace the subjective judgment of individuals as to soil stability with a far more careful analytical approach. Finally, Mr. Beyerl's assertions that using trench boxes or sloping would have been impossible is rejected in the absence of specific evidence supporting these claims. Thus, I find that the absence of any appropriate cave-in protection constituted a condition failing to meet the requirements of the cited standard. Item 4 is consequently AFFIRMED.⁴

Turning to a determination of appropriate penalties for the violations, consideration is given to four criteria including the size of the employer's business, the gravity of the violation, and the employer's good faith and prior history of OSHA violations. The gravity of the violation is generally the primary element in penalty assessment. All of the factors, however, are not necessarily accorded equal weight. In this case, the hazard faced by anyone in an excavation of this size and depth was the somewhat limited possibility of serious injury in the event of significant materials falling into the trench. (Item 3). In contrast, the likelihood of serious injury or death was great if the excavation collapsed altogether. (Item 4). The danger of drowning in a few inches of water in the trench as described by the CO must be regarded as minimal and the amount of water did not create but added

⁴ Mr. Beyerl initially asserted during preliminary telephone conferences that there was no employee exposure to any cited condition. A cursory examination of the evidence adduced at the hearing, however, made it not difficult to vaticinate the final resolution of DRB's assertion. Employee exposure is undoubtably established by the record. As discussed above, credible un rebutted testimony and the credible signed statement of Mr. Ganon, as well as Mr. Beyerl's concession as to the accuracy of Mr. Ganon's statements, demonstrate at least minimal employee exposure to each of the cited conditions.

to the likelihood of collapse. (Item 2). A fall from the sides when attempting to enter or exit the trench posed a significantly lesser danger. (Item 1). In sum, each of the violations posed varying potentials for serious injury or death and thus each was properly classified as a serious violation under the Act. While not specific in her testimony, the CO pointed out that DRB had had at least one earlier serious violation within the past three years. The most compelling factors in arriving at an appropriate penalty here are DRB's good faith belief that the excavation was not in significant danger of collapsing, the minimal exposure of employees both in terms of number and duration and the very small size of the business. With only a few employees total and only two at the most exposed to the cited conditions, I find that penalties of \$250, \$150, \$500 and \$1,000 for items 1, 2, 3 and 4, respectively are appropriate.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651-678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standards as alleged in Citation 1, Items 1, 2, 3 and 4.

4. Each of the violations of the Act was serious.

5. Penalties of \$250, \$150, \$500 and \$1,000, for items 1, 2, 3 and 4, respectively, are appropriate.

ORDER

In the matter of Secretary of Labor v. D.R.B. Boring and Drilling Construction Company, Inc., OSHRC Docket No. 02-0246, IT IS ORDERED THAT:

1. Citation 1, Items 1, 2, 3 and 4 are AFFIRMED.
2. A total civil penalty of \$ 1,900 is assessed.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated: June 24, 2002
Washington, D.C.

Appendix 1
Secretary v. D.R.B. Boring & Drilling Construction Co., Inc.
Docket No. 02-0246

Full Text of Standards Cited

Item 1

1926.651(c)(2)

Means of egress from trench excavations. A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

Item 2

1926.651(h)(1)

Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

Item 3

1926.651(j)(1)

Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

Item 4

1926.652(a) Protection of employees in excavations.

1926.652(a)(1) 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:

1926.652(a)(1)(I) Excavations are made entirely in stable rock; or

1926.652(a)(1)(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.