



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

Complainant,

v.

ARAPAHOE UTILITIES AND  
INFRASTRUCTURE, INC.,

Respondent.

OSHRC DOCKET NO. 03-1194

**APPEARANCES:**

For the Complainant:

Kim Prichard Flores, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

James J. Gonzales, Esq., Holland & Hart, LLP, Denver, Colorado

Before: Administrative Law Judge: Sidney J. Goldstein

**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").

Respondent, Arapahoe Utilities and Infrastructure, Inc. (Arapahoe), at all times relevant to this action maintained a place of business at the Canterbury Golf Course in Parker, Colorado, where it was engaged in excavation. On April 8, 2003 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Arapahoe's work site. As a result of that inspection, Arapahoe was issued a citation alleging violation of 29 CFR §1926.652(a)(1) of the Act. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

By filing a timely notice of contest Arapahoe brought this proceeding before the Occupational Safety and Health Review Commission (Commission). Prior to hearing, Arapahoe moved to dismiss the above captioned matter on grounds that 1) the OSHA inspection was conducted in violation of Respondent's Fourth Amendment rights, and 2) the violation was erroneously classified as a "repeat" violation. Those motions were taken under consideration and remain pending. On December 16, 2003

a hearing was held in Denver, Colorado. The parties have submitted briefs on the issues and this matter is ready for disposition.

### **Facts**

On April 8, 2003, OSHA Compliance Officer (CO) Joseph Padilla was driving past the Canterbury Golf Course when he noticed an excavator, and saw an employee going down a ladder into a trench on the site (Tr. 11, 13). Padilla began videotaping the work site from his vehicle, and continued to tape as he walked the 30 or 40 yards to the work site (Tr. 13, 61; Exh. C-1). The golf course, though privately owned, is open to the public (Tr. 12). Neither the golf course, nor the trench itself, was fenced off (Tr. 13). People were playing golf near the excavation site (Tr. 57). When he arrived at the trench, Padilla saw one man standing in the bottom of the trench, and a second smoothing concrete in a manhole in the bottom of the trench (Tr. 14-15, 175; Exh. C-2). At that point, the foreman/excavator operator, Ramon Trillo, approached Padilla and told him to stop until such time as he could contact Arapahoe's risk manager, Mr. Leary Jones (Tr. 19, 31, 147). When Mr. Jones arrived he refused to allow the CO to continue his inspection (Tr. 20, 77-78, 150). Padilla then drove to the clubhouse and asked the assistant manager of the golf course, Shane Smith, for his permission to conduct an inspection on the grounds (Tr. 20-22; Exh. C-3). After obtaining Smith's consent, Padilla returned to Arapahoe's work site, and informed Jones that he intended to proceed with the inspection (Tr. 22-23). CO Padilla admitted that he failed to present his credentials to Mr. Jones, as is required under §8(a) of the Act (Tr. 78).

### **Respondent's Motion to Suppress**

**The Fourth Amendment.** While the Secretary is subject to the constraints of the Fourth Amendment, *see Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). The Commission has recognized that what is observable by the public is also observable without a warrant by an OSHA inspector. *L.R. Willson and Sons, Inc.* 18 BNA OSHC 1698, 1999 CCH OSHD ¶31,796 (94-1546, 1999). The Fourth Amendment protects against intrusions only into areas where an employer has a reasonable expectation of privacy. An employer can have no reasonable expectation of privacy where its activities are conducted out of doors and open to public view. *Gem Industrial, Inc.*, 17 BNA OSHC 1861, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996).

In this case, Arapahoe's activities were conducted on a golf course from which the public was not excluded. Anyone, including a government inspector, could obtain access with the payment of a fee, or the permission of the course operator. The area was, therefore, not subject to Fourth Amendment

protections. **Section 8(a) of the Act.** The record establishes that CO Padilla failed to comply with OSHA regulations when he failed to present his credentials as is required by §8(a) of the Act. However, §8(a) does not require the suppression of evidence obtained before the presentation of credentials, unless the employer can show that it had a reasonable expectation of privacy in the work site. As noted above, an employer cannot claim a reasonable expectation of privacy where the work site is observed from an area open to public view. *Well Solutions, Inc.*, 15 BNA OSHC 1718, 1991-93 CCH OSHD ¶29,743 (No. 89-1559, 1992). *See; Concrete Constr. Co.*, 15 BNA OSHC 1614, 1991-93 CCH OSHD ¶29,681 (No. 89-2019, 1992). Moreover, no remedy is available for a CO's failure to comply the provisions of §8(a), unless the record reveals that such noncompliance substantially prejudiced Respondent. *Gem Industrial, Inc.*, *supra*. Arapahoe does not allege that the CO's failure to present his credentials resulted in substantial prejudice, and this judge can find none.

Respondent's motion to suppress is DENIED.

#### **Alleged Violation of §1926.652(a)(1)**

Serious citation 1, item 1 alleges:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section:

(a) On or about April 8, 2003 and at times prior employees were exposed to cave-in hazards while working on a man hole in a trench over 5 feet deep without a protective system in place.

#### **Facts**

As part of his inspection of Arapahoe's work site, Padilla took a sample of soil from the spoil pile and sent it to the OSHA Lab in Salt Lake City (Tr. 29). The lab determined that the soil in the trench was type B (Tr. 29). Padilla estimated the depth of the Arapahoe's trench by placing his "story pole" against the side of the trench near the south end where he had seen men working. The side of the trench measured nine feet (Tr. 25, 114, 124; Exh. C-4, C-5). Padilla approximated the depth of the trench at a bit more than seven feet, but did not take an actual measurement that was perpendicular to the bottom (Tr. 121). Using an angle finder, Padilla determined that the slope of the trench wall at the point measured was 56° (Tr. 27, 115; Exh. C-1, C-6). The width of the trench at that point was 15 feet from side to side, though Padilla agreed that the trench could have been wider at other points (Tr. 28, 124).

Leary Jones testified that after the CO took his measurements, he used a grade rod to measure the trench. He found that the excavation was 6 ½ feet deep and 18 feet across (Tr. 156-57, 168; Exh. R-7, R-8, R-9). Jones stated that the width of the trench bottom was approximately three feet, "give or take a few"

(Tr. 161, 64). According to Jones, CO Padilla laid his story pole on top of a clod of dirt, and so got an inaccurate reading of the slope of the trench (Tr. 169). Jones found that the slope of the south wall varied between 45 and 49 degrees (Tr. 159). Next to the manhole, where Arapahoe's employees were working, the slope measured about 48° (Tr. 183; Exh. R-10).

CO Padilla testified that if the bottom of a 6 ½ half foot trench was 2 feet wide, and the trench were sloped 1:1, or 45° (as is required in Type B soils), the trench would be 15 feet across at the top (Tr. 141-42). If the bottom of a trench were 3 feet wide, the trench would have to be 16 feet across at the top to comply with the 1:1 sloping requirement (Tr. 142). If 4 or 5 feet wide, the trench must be 17 or 18 feet, respectively, across at the top (Tr. 142). Padilla testified that a standard manhole like the one in the bottom of the cited trench measures 36 inches across (Tr. 143; Exh. C-2).

### Discussion

The cited standard 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. . .

Paragraph (b) directs the employer to Appendices A and B, which state that the maximum allowable slope in Type B soil is 1:1 or 45°.

The record establishes that variations in the width and sloping of the cited trench account, in part, for the different figures provided by the parties. Moreover, it is clear from the videotape and from Respondent's photographic evidence that slope measurements may be affected by the placement of the story pole, or grade rod. Upon a careful viewing of the evidence, this judge is persuaded that Jones' measurements of the trench slope more accurately reflected the pitch of the excavation wall on April 8, 2003 than did CO Padilla's. Nonetheless, Arapahoe's own measurement of the slope in the area where employees were working on the manhole establish that the excavation was inadequately graded. The *maximum* allowable slope for an excavation dug in Type B soil is 45°. Arapahoe's risk manager testified that the slope of the trench in the area where employees were working was about 48°-- 3° steeper than the maximum slope allowable under the standard. The violation must be affirmed.

### **Repeat Classification**

Citation 1, item 1 was classified as "repeated," stating:

Arapahoe Utilities & Infrastructure, Inc. Was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent standard, 29 CFR 1926.652(a)(1), which was contained in OSHA inspection number 304978695, Citation Number 1, Item Number 1, issued on July 7, 2002, with respect to a workplace located at 100th and Downing, Thornton, CO. 80229

A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16183, 1979).

The citation issued as a result of inspection number 304978695 included an alleged violation of §1926.652(a)(1). The item was amended and affirmed as an “other than serious” violation of §1926.651(k)(1) (Tr. 35-37, 95-96; Exh. R-4). CO Padilla testified that he would not have recommended the violation be classified as repeated had he known that the previous citation had been amended (Tr. 96-97).

There is no prior final order against Arapahoe establishing a violation of §1926.652(a)(1). The facts alleged in the earlier citation were contested, and no hearing was held establishing the accuracy of the facts alleged in that citation. As the citation was affirmed as an “other than serious” violation of §1926.652(k), this judge agrees with CO Padilla that it would be inappropriate to classify this violation as repeated.

Reclassification of a citation is not grounds for dismissal, however, and Respondent’s motion requesting such relief is DENIED.

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#### **Penalty**

Arapahoe argues that any violation should be *de minimis*, as the evidence shows, at best, a technical violation of the standards. As noted above, Respondent’s evidence establishes that the cited trench was only 3° out of compliance in the area where its two employees were working. However, when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335, 1978 CCH OSHD ¶22,525 (No. 15983, 1978). The standard prescribes a 1:1 slope, a requirement with which Arapahoe failed to comply. The CO testified, and the standard presumes that inadequately sloped excavations are subject to cave-ins. An employee trapped in a cave-in can be covered with soil and suffer serious injury or death (Tr. 30, 43). The violation, therefore, is “serious” in nature.

The gravity of the violation was overstated, however. CO Padilla believed that the probability of an accident occurring on this site was high, relying on his belief that the slope of the cited trench was 56° (Tr. 43). As noted above, this judge finds that the Respondent’s slope readings were more accurate, and that the probability of an accident occurring was lesser. Taking into account the relevant factors, this judge finds that a penalty of \$2,000.00 is appropriate, and that amount will be assessed.

**ORDER**

1. Citation 1, item 1a, alleging violation of 29 C.F.R. 1926.652(a)(1) is AFFIRMED as a serious violation of the Act, and a penalty of \$2,000.00 is ASSESSED.

/s/  
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Sidney J. Goldstein  
Judge, OSHRC

Dated: February 19, 2004