



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

Secretary of Labor

Complainant,

v.

D,Allesandro Corporation

Respondent.

OSHRC DOCKET NO. 07-0533

APPEARANCES:

Paul J. Katz, Esquire  
U.S. Department of Labor  
Boston, Massachusetts  
For the Complainant.

Jerrold Solomon, Esquire  
Newton, Massachusetts  
For the Respondent.

Before: Chief Judge Irving Sommer

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a work site of Respondent, D’Allessandro Corporation (“Respondent” or “D’Allessandro”), located in South Boston, Massachusetts, on September 13, 2006. As a result of the inspection, Respondent received a serious citation alleging violations of OSHA’s excavations

standard.<sup>1</sup> Respondent contested the citation, and the hearing in this matter was held on January 10, 2008, in Boston, Massachusetts. Both parties have submitted post-hearing briefs.

### ***The OSHA Inspection***<sup>2</sup>

CO Scott Kennedy drove by the subject site on the way to another site he was to inspect that day when he noticed an excavation with the tops of two hard hats protruding from it. The CO went by the site, parked his car and called his supervisor, and then walked to the trench.<sup>3</sup> He saw two employees in it, and he announced who he was and why he was there, and he asked them to exit the trench. The CO learned the two employees were Dennis Woleskas, the foreman at the site, and David Gall, a laborer, and that they worked for D'Allessandro. He also learned the employees had been setting up a "cutter" on a preexisting 12-inch-diameter pipe in the trench in order to cut the pipe and add a fitting; the cutter sat on top of the pipe, and a chain went around the pipe and was attached to the cutter on the other side. C-1 and C-2, photos the CO took, show the employees in the trench as the CO saw them and how the trench looked after they got out, and C-2 shows the cutter on the pipe. The CO took various measurements of the trench and found it to be 27 feet long, 4 feet 3 inches wide at the top and the bottom, and 4 feet deep in the middle and at one end; however, the other end of the trench, where the employees had been working, was 5 feet 6 inches deep, and the sides of the trench were vertical. The CO used a steel tape measure to take his measurements, and he also used a trench rod to measure the part of the trench that was 5 feet 6 inches deep; the CO had Mr. Woleskas assist him by holding the trench rod in the 5.5-foot-deep part of the trench while the CO

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<sup>1</sup>As issued, the citation alleged serious violations of 29 C.F.R. §§ 1926.651(k)(1), 1926.21(b)(2) and 1926.652(a)(1). On May 18, 2007, the Secretary filed a motion seeking to vacate Items 1a and 1b, consisting of the first two alleged violations. The motion was granted May 21, 2007, leaving for resolution Item 2, alleging a violation of 29 C.F.R. 1926.652(a)(1).

<sup>2</sup>The following information is based upon the testimony of Scott Kennedy, the OSHA compliance officer ("CO") who inspected the work site, and from R-1 and R-2, the CO's notes and trench data from his inspection.

<sup>3</sup>OSHA has a nationwide program that requires any CO, upon viewing an excavation, to inspect it. (Tr. 6-7).

photographed the measurement from the other side of the trench. C-3 is the CO's photo of that measurement, and C-4 is a close-up of what is shown in C-3. (Tr. 4-19, 26-38).

According to the CO, the soil at the site was granular, sandy and crumbly; in addition, the pipe was preexisting and was thus in previously-disturbed soil, making the soil "Type C," and the trench was adjacent to a road with heavy traffic, which would create vibrations. The CO concluded that all of these factors, combined with the trench's depth and vertical side walls, could have resulted in a cave-in and serious injuries or even death. (Tr. 8, 21-27, 39-46, 53-54).

### **Discussion**

The cited standard, 29 C.F.R. 1926.652(a)(1), provides as follows:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system ... except when (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than five feet ... in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

To prove a violation of a standard, the Secretary must show that (1) the standard applies, (2) the terms of the standard were not met, (3) employees had access to the cited condition, and (4) the employer knew, or could have known with the exercise of reasonable diligence, of the cited condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). As the Secretary notes, there is no contention here the trench was made in stable rock. Further, the CO conceded he saw nothing about the condition of the trench that would have required sloping or a trench box if the trench had been less than 5 feet deep. (Tr. 56-57). Thus, the issue to resolve is whether the trench was 5 feet or more in depth. The Secretary contends that the CO's testimony and photos show the trench was more than 5 feet deep. Respondent, however, contends that the CO's testimony was unreliable and that the credible evidence of record shows the trench was under 5 feet deep. In support of its contention, Respondent presented the testimony of Mr. Woleskas and Mr. Gall, the two D'Allessandro employees the CO saw in the trench.

Mr. Woleskas, the foreman, testified he had worked for the company for 11 years, that he was trained in excavation safety, and that he had an "OSHA 10-hour card." He said the subject job had started in July 2006, that by the time of the inspection he had laid about 3,000 feet of pipe for the job, and that he had used a trench box for the entire 3,000 feet of the job. He also said it was his practice to measure the trench "every time we went in," that he had measured it the day of the inspection in

about the same area the CO later measured it, and that, because the depth was 4 feet 9 to 4 feet 10 inches, he had concluded he did not need to use the trench box. Mr. Woleskas noted that the backhoe operator had excavated the trench “a little bit further” in the cited area that morning so they could cut the pipe; he further noted that he himself had then done some hand digging around the pipe so that they could get the “snapper” around it. Mr. Woleskas stated he did have to use the box later, after they cut the pipe, when they had to dig a little deeper to install the new pipe. (Tr. 102-13, 116).

Mr. Gall, the laborer, testified he had worked for the company for three years. He said it was normal practice to check the trench, that he himself had measured it before going in it that day, and that it was 4 feet 10 inches deep. He noted he was 5 feet 9 inches tall, that he could see over the top of the trench when he was in it except when he bent over, and that he was in the trench to help put the snapper on and to pass the chain under the pipe. He also noted that the deepest part of the trench, which was about 5 feet 6 inches, was the hole in which the water pump sat; that hole was on the opposite side of the trench from where Mr. Woleskas held the trench rod. (Tr. 117-24).

It is clear from the foregoing and the summary of the CO’s testimony, set out *supra*, that there are significant differences between the statements of Respondent’s witnesses and those of the CO. I observed the demeanor of all three witnesses on the stand, and while I found the CO to be a credible and convincing witness, I found Respondent’s witnesses to be less than candid in their testimony.<sup>4</sup> I therefore credit the testimony of the CO over that of Respondent’s witnesses.

In finding the CO a persuasive witness, I have noted Respondent’s efforts to discredit him at the hearing. For example, Respondent elicited testimony that the inspection took only about a half hour, that the CO did not turn in his report on the inspection until February 2007, when the citation was issued, and that the CO did not remember all the details of his inspection. (Tr. 57, 62, 84-85). I disagree with Respondent’s assertion that these factors render the CO’s testimony unreliable, particularly because of his statement that he made notes at the time of the inspection to support his findings; many of these are set out in R-1 and R-2. (Tr. 62-67, 82-83). Respondent also questioned the CO about the depth measurement of 5 feet 6 inches shown in R-1, stating that it looked “like it was written over.” (Tr. 72). The CO explained that he first wrote 5 feet 8 inches on R-1 because the

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<sup>4</sup>In this regard, I have noted that Mr. Woleskas and Mr. Gall still work for Respondent.

5.6 measurement obtained with the trench rod, which is calibrated in tenths, was actually 5 feet 7.8 inches, or nearly 5 feet 8 inches; he further explained that as he had measured that same area to be 5 feet 6 inches with the steel tape measure, he decided to use the lower number. (Tr. 71-74, 96). I found the CO's explanation reasonable, and I credit his testimony about his depth measurement. Finally, Respondent questioned the CO about C-3, showing the measurement with the trench rod, suggesting that the photo indicated a measurement of less than 5 feet rather than 5.6. (Tr. 75-78). However, the CO disagreed, stating that he had a view "straight across" from the measurement when he took C-3 and that he observed the measurement showing the surface of the ground to be 5.6 at that time. (Tr. 77-79). I credit the CO's testimony in this regard, and I note that C-4, the close-up view of C-3, reflects the trench rod's 5.6 depth measurement.

Based on the foregoing, I find that the credible evidence of record demonstrates that the area of the trench where the employees were working when the CO saw them was 5 feet 6 inches deep. The Secretary has therefore established that the standard applies, that its terms were not met, and that employees had access to the cited condition.<sup>5</sup> With respect to the employer's knowledge of the cited condition, the CO testified that when he informed Mr. Woleskas of his depth measurement, Mr. Woleskas made no response.<sup>6</sup> (Tr. 35). The CO further testified that Mr. Woleskas did tell him, at some point after learning of the depth measurement, that since he had been standing on the pipe when he was in the trench he was at less than 5 feet; as the Secretary notes, this statement indicates that Mr. Woleskas knew the trench was over 5 feet deep. Finally, the CO testified that he spoke to D'Allessandro's project manager, Paul Seidenberg, that day at the site and that Mr. Seidenberg told him, after learning of the CO's depth measurement, that the employees should have been using the trench box. (Tr. 42). In light of these statements of management employees, the Secretary has established that the employer either knew or should have known of the cited condition.

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<sup>5</sup>As the Secretary points out, due to the exception set out in the standard, the Commission has placed upon the employer the burden of proving that the depth of a trench was under 5 feet. *A.E.Y. Enter.*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006). As the Secretary also points out, Respondent plainly has not met its burden here.

<sup>6</sup>Mr. Woleskas confirmed this was the case at the hearing. (Tr. 113).

The Secretary has classified this citation item as a serious violation and has proposed a penalty of \$1,225.00. The violation is clearly serious, as a trench wall collapse can result in serious injuries or death. With respect to the penalty, the CO testified that he considered the gravity of the condition to be medium. He also testified that the employer was given reductions of 40, 10 and 15 percent, respectively, for size, history and good faith, and that abatement was accomplished by the employees exiting the trench and the employer's statement that they would use the trench box that was present at the site. (Tr. 42-45). In view of the record, I find that the proposed penalty is appropriate. A penalty of \$1,225.00 is accordingly assessed.

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 2 of Serious Citation 1 is AFFIRMED, and a penalty of \$1,225.00 is assessed.

/s/  
Irving Sommer  
Chief Judge

Date: Mar 7, 2008  
Washington, D.C.