

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Ric-Man International, Inc.,

Respondent.

OSHRC Docket No. **09-0742**

Appearances:

Amy Walker, Esquire, Atlanta, Georgia
For Complainant

Kenneth A. Knox, Esquire, Ft. Lauderdale, Florida
For Respondent

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

DECISION AND ORDER

Ric-Man International, Inc., is engaged in construction contracting. On March 6, 2009, the Occupational Safety and Health Administration (OSHA) conducted an inspection at the Respondent's jobsite in Pompano Beach, Florida. As a result of this inspection, OSHA issued a citation to Ric-Man on April 15, 2009. Respondent timely filed a notice contesting the citation and proposed penalties. A hearing was held, pursuant to Simplified Proceedings, in Miami, Florida, on October 9, 2009.

Prior to the hearing, the parties resolved Citation No. 1, Items 1 and 2 and Citation No. 2, Item 1. Remaining at issue is the alleged violation in Citation No. 1, Item 3. For the following reasons, the alleged serious violation of 29 C.F.R. § 1926.652(a)(1) as described in Citation No. 1, Item 3, is affirmed and a penalty of \$1,000.00 is assessed.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law (Tr. Pages 176-186) are attached hereto in accordance with 29 C.F.R. § 2200.209(f).

FINDINGS OF FACT AND CONCLUSION OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED:

Citation No. 1, Item 3, alleging a serious violation of 29 C.F.R. § 1926.652(a)(1) is affirmed and a penalty of \$1,000.00 is assessed.

/s/
JUDGE STEPHEN J. SIMKO, JR.

Date: November 6, 2009

1

DECISION AND ORDER

2

3 JUDGE SIMKO: Let's go ahead and go on the record.

4 All of the testimony has ended today and the
5 record is closed. I have heard closing arguments from both
6 sides, and I might state that this case was very well tried
7 on both sides and I appreciate the hard work that was put
8 into this case. What I am going to do now is go through the
9 background of the case, the testimony of all of the
10 witnesses; the compliance officer, Mr. Gayle, Mr. Angilot,
11 Mr. Miller, and then I am going to discuss the various
12 elements of the case that are involved and render my
13 decision.

14 As we noted before this case was held here in
15 Miami on the ninth of October of 2009, as a result of an
16 inspection that was conducted by the Occupational Safety and
17 Health Administration on March 6, 2009, in Pompano Beach,
18 Florida, at the southwest corner of Powerline Road and Wiles
19 Road intersection.

20 At the beginning of the hearing there was one
21 stipulation that the soil type involved in this case was
22 Type C soil.

23 The case began when OSHA had received an anonymous
24 complaint, by telephone I presume, of conditions in this
25 location. As a result of that anonymous complaint the

1 compliance officer, Miguel Leorza was dispatched to the
2 site. He was driving up northbound on Powerline Road when
3 he saw an individual with a hardhat on, or a helmet, in a
4 trench from his car. Initially he was in the left-hand
5 lane, looking to his left, and then he proceeded to park the
6 car and conduct the inspection. By the time he got to the
7 site itself it was approximately twenty minutes after he
8 first observed the individual in the trench.

9 On arrival at the site he met with a Mr. Smith,
10 who was the project superintendent; Mr. Bailey, who was the
11 foreman, they were working within sight of the trench
12 approximately twenty to thirty feet facing the work that was
13 being done. Mr. Smith had indicated that he was responsible
14 for the safety of the site. The compliance officer took
15 measurements, conducted interviews and had an opening
16 conference with Mr. Smith and Mr. Bailey. There was an
17 excavator working on the north side of the trench, which was
18 moving, and the project involved pipe laying. They were
19 laying a sixteen-inch pipe onsite. Measurements of the
20 trench according to the compliance officer were that the
21 east-west measurement of the trench was 22 feet long, and
22 the trench was eight-feet wide. He testified that the walls
23 were virtually vertical, and in sandy soil, which was Type C
24 soil with no protective systems. He also testified that the
25 foreman, Mr. Bailey stated that he knew the trench was not

1 sloped or protected. He took one measurement of the depth
2 of the trench and only one. That measurement is shown in
3 Exhibit C4, a photograph, indicating the depth of the trench
4 was approximately five-feet two inches at the point of
5 measurement.

6 The compliance officer was at this site for
7 approximately three hours, during which time he took his
8 measurements and conducted interviews. When he first
9 arrived at the site he noticed one employee, Mr. Angilot on
10 a ladder in the trench, and that employee is depicted in
11 Exhibits C1 and C2 on a ladder in the trench.

12 The compliance officer testified that he measured
13 in the area where he thought the employee had been working
14 as observed from the road approximately 75 to 100 feet away
15 when he was in his car. He further testified that the
16 ladder, with the employee Mr. Angilot on it, was
17 approximately four feet west of the measurement location,
18 and the end of the pipe, depicted in Exhibit C3 was two to
19 three feet east of the location of the measurement. This
20 put the measurement according to the compliance officer's
21 testimony approximately halfway between the ladder the
22 employee was on and the end of the pipe. The ladder is
23 depicted in Exhibits C1 and C2, and the pipe is portrayed in
24 C3.

25 I might note that the measurement made by the

1 compliance officer was done with a trench rod, and that was
2 the only measurement that was conducted at the site that was
3 according to the evidence.

4 There is also evidence that the employee that was
5 on the ladder exited the trench, got off that ladder shortly
6 after the photo was taken, and no other employees were in
7 the trench after that time. There is also testimony that
8 all of the work stopped when the compliance officer arrived
9 at the site.

10 There was another perpendicular trench
11 perpendicular to the east-west trench, which was a north-
12 south line. This was actually a little trench that had
13 preexisting cable in it, two cables that ran, and this east-
14 west pipe had to be laid underneath that cable. The trench
15 was dug north-south so that the excavator could raise up the
16 cables and allow the east-west pipe to be placed below that,
17 slid into place.

18 On rebuttal, the compliance officer testified that
19 the measurement between where the employee was on the ladder
20 in C2 and the bell end of the pipe depicted in Photo C3, the
21 measurement was made there, that's an area where an employee
22 must travel through the area of measurement from the bell to
23 the ladder to perform their work.

24 Additional testimony was given by three employees
25 on behalf of the company. The first employee was Mr. Robert

1 Gayle. Mr. Gayle identified himself as a foreman, and my
2 understanding initially was he was a foreman on this site.
3 And he testified that this was a sixteen-inch water pipe
4 being installed for reclaimed water. He also testified that
5 there was another contractor onsite named Sky; I believe
6 that was performing some other work laying drainage pipe
7 near the Respondent's operations, and they would have laid
8 that pipe nine-feet deep, not the Respondent.

9 Mr. Gayle testified that these pipe sections are
10 laid in twenty-foot lengths. He was not there when the
11 compliance officer arrived the site. He was at a yard
12 getting parts approximately a quarter of a mile away. When
13 the compliance officer arrived at the site the compliance
14 officer took photographs of Mr. Angilot on the ladder; Mr.
15 Gayle was not there when that happened.

16 Mr. Gayle testified that the location of the
17 measurement was 20 to 25 feet away from the ladder to the
18 west, or left in the photographs. Now he wasn't as foreman
19 on that site on that day but initially it appeared that he
20 claimed that he was a foreman. His testimony was a bit
21 confusing on these matters.

22 Mr. Gayle testified that the ladder was out of the
23 hole when he got to the site, but another point he testified
24 that he said he saw the ladder in the hole. Now when did he
25 see the ladder in the hole and where did he see it that was

1 not explained. That testimony is internally inconsistent.
2 His testimony is also inconsistent with that of the
3 compliance officer.

4 Mr. Angilot testified that he is a pipe layer and
5 has been a pipe layer for the Respondent for the last nine
6 years. He guides the pipe in while the backhoe moves the
7 pipe itself. And Mr. Angilot was the employee depicted on
8 the ladder getting out of the hole in Exhibits C1 and C2.
9 Only I found curious about Mr. Angilot's testimony was that,
10 he said, that the hole was waist high and he was standing at
11 the bottom of the trench at the ladder location. Later he
12 testified on cross-examination that the top of the trench
13 was at his waist when he was on the ladder. Now when he was
14 on the ladder he was above the bottom of the trench. His
15 testimony is inconsistent with regard to the depth of the
16 trench while he was on the ladder or at the bottom of the
17 ladder in that same location, both ways he said it was waist
18 high.

19 Now the witness did not know where the ladder was
20 in relation to the pipe in C3. He testified that he does
21 not know what he was doing before the photos taken in C1 and
22 C2, but he does know that he was coming out on the ladder,
23 and questioned at a later time he repeated that he did not
24 know what he was doing in the hole prior to that.

25 His testimony is also confusing and inconsistent.

1 It is inconsistent with the photographs. He has testified
2 that the measurement was taken 25 feet to the left of the
3 ladder. The Photograph C2 shows him on the ladder. It
4 shows the end of the trench just a few feet on the other
5 side of it. It is certainly 20 to 25 feet. And his
6 testimony and the testimony of Mr. Gayle is inconsistent
7 with the compliance officer's testimony and the photographs
8 that were taken.

9 Mr. Trevor Miller was called by the Respondent and
10 he also testified that the measurement was taken about 20 or
11 25 feet to the west of the ladder location. That's
12 inconsistent with the photographs. He testified first that
13 "No one was in the trench when the compliance officer
14 arrived." However he later qualified that by saying that
15 Julian was on the ladder," that's Mr. Angilot was on the
16 ladder, but he had no knowledge of what Mr. Angilot was
17 doing or how long he had been in the trench.

18 He testified that the compliance officer arrived
19 at the site about 11:30 a.m. and the work had started about
20 nine-o'clock. The compliance officer testified he got there
21 approximately 10 a.m.

22 Mr. Miller testified that he personally does not
23 do measurements of the depth of trenches and that was the
24 job of the superintendent and of the foreman. However, Mr.
25 Angilot testified that he took the measurements of the depth

1 of the trench, and that he got in the trench often without
2 the supervisor saying go in or not go in.

3 Now if as the compliance officer testified that
4 the trench was 22 to 23 feet long, there is a question of
5 how could a measurement be taken, could he have taken
6 measurements which were 20 to 25 feet away from the ladder
7 location. The testimony of the compliance officer is
8 accepted to be credible in that it is internally consistent,
9 consistent with the photographs, and consistent with all
10 evidence submitted, other than the testimony of the three
11 employees. The three employees' testimony I find to be
12 lacking in credibility because of internal inconsistencies,
13 and inconsistencies with other evidence in the nature of
14 photographs and each other's testimony.

15 I don't believe there is a dispute as to
16 applicability of the standards. It is construction
17 standards. It's clearly excavation, which is construction
18 work. I find that the standards apply.

19 The standard's terms were violated in that the
20 trench was more than five-feet deep. There was no form of
21 protection, or sloping, shoring, trench boxes, or any other
22 protection, as admitted by the foreman.

23 There was knowledge of the violative conditions,
24 actual knowledge by the foreman who knew the sides were not
25 sloped, knew there was no form of protection, and if they

1 didn't actually know they should have known that the
2 employees were in the trench. They were facing the trench.
3 Both supervisors were approximately twenty to thirty feet
4 from the excavation, facing the excavation. Mr. Smith
5 indicated that he was responsible for safety on the job.
6 Both men appeared to know what the requirements of the
7 trenching standards were.

8 There was exposure of at least one employee, Mr.
9 Angilot, who was on the ladder coming out of the trench. He
10 testified that he was the individual who laid the pipe. The
11 end of the pipe was approximately seven feet from the ladder
12 that he was on. The point of measurement of a depth of
13 five-feet two inches I find was where the compliance officer
14 testified it was, about halfway between the ladder and the
15 end of the pipe, the bell end of the pipe.

16 There was a question raised by the Respondent as
17 to the delay in the measurements taken by the compliance
18 officer. I find that has no bearing in this case in that
19 all work stopped when the compliance officer arrived at the
20 job, no further digging was made, so the conditions were the
21 same when he arrived and three hours later when he left.

22 The employee that was exposed being on the ladder
23 in the trench need not be actually exposed to a level below
24 five-feet three inches, does not need to be standing at the
25 bottom of that trench. He has to have access to the area

1 however, and he had access to this area. It wasn't like it
2 was a newly dug; it was newly dug but it wasn't an area
3 beyond which the employees were working. It was in between
4 the ladder and the bell end of the pipe that was already in
5 the trench. So, in order to get to the bell end he would
6 have to traverse from the ladder to the bell end and back
7 and forth. There was a bucket of soap at the bottom of the
8 trench, there was the end cap on the bell end of the pipe
9 that was placed by someone, so there was access to the area
10 of measurement, and, therefore, there was employee exposure.

11 So I find that the Government has proven its case.
12 I find that the violation was a serious violation, one that
13 if there was a collapse death or serious harm would be the
14 likely result. I find that the penalty in this matter of
15 one thousand dollars would be appropriate. The measurements
16 were close, it was five-feet two inches and it was five feet
17 or more that something has to be done.

18 In addition, as the Government has pointed out,
19 there is a requirement that not only it be at or greater
20 than five feet, but there is also the requirement to do
21 that. Under the exception, if it's not done to stable rock
22 another exception is if the excavation is less than five
23 feet deep, and the examination of the ground by a competent
24 person provides no indication of a potential cave-in. This
25 was Type C sandy soil, and there was no testimony that the

1 Respondent did an examination of that ground, or who the
2 competent person on that job was to indicate that that
3 element was taken care of also. And there was no allegation
4 of unpredictable or employee misconduct here by either the
5 supervisor or one of the employees.

6 So given that I find a violation of 29 CFR §
7 1926.652(a)(1), and assess a penalty of one thousand
8 dollars.

9 Is there anything further?

10 MR. KNOX: Not from the Respondent.

11 MS. WALKER: No, Your Honor.

12 JUDGE SIMKO: All right. And I will get out a
13 written decision, which incorporates the transcript pages,
14 and if there is anything further that I need to add to that
15 that will be in the order, or in the decision, and that will
16 come out shortly after I get the transcript from the court
17 reporter. I think on the simplified proceedings we have
18 like twenty days, and then after that it shouldn't be more
19 than a few days before I get the decision out.

20 Thank you. We're adjourned.

21 [Whereupon, the hearing was concluded at 3:34
22 p.m.]

23 \\

24 \\

25 \\