

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. Customs House, 721 19th Street, Room 407
Denver, Colorado 80202

SECRETARY OF LABOR,

Complainant,

v.

ROCK UTILITY, INC.,

Respondent.

OSHRC Docket No. 11-0166

Simplified Proceedings

APPEARANCES:

Kevin Sullivan, Esquire, Boston, Massachusetts
For the Secretary

Renso Perdoni, Natick, Massachusetts
For the Respondent, *pro se*

BEFORE: John H. Schumacher
Administrative Law Judge

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. § 659(c) (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a worksite of Rock Utility, Inc. (“Respondent” or “Rock Utility”) in Quincy, Massachusetts on November 22, 2010. As a result, OSHA cited Rock Utility for five serious violations of OSHA’s construction standard and proposed a total penalty of \$12,600. Rock Utility filed a timely notice of contest, bringing this matter before the Commission. A hearing was held in Boston, Massachusetts on August 3, 2011. Both parties have submitted post-hearing briefs.

Background

Rock Utility's primary place of business is Natick, Massachusetts. Rock Utility was contracted to install a 6-inch ductile water line for new construction in Quincy, Massachusetts. Rock Utility's president, Renso Perdoni, was operating the backhoe at the worksite. The other employee at the site, Elen Sarousi, was a general laborer. (Tr. 12-14, 19; CX-11.)

On November 22, 2010, OSHA received a telephone complaint about an employee working in what appeared to be an unprotected trench.¹ That same day, OSHA Compliance Officer ("CO") Salvatore Insogna went to the worksite to investigate. As he drove by, the CO observed an employee wearing a reflective vest in the deep end of the trench. This employee was later identified as Mr. Sarousi. As the CO approached the worksite, he saw Mr. Perdoni climb out of the trench's deep end and then pull the ladder out of the trench. (Tr. 45-51, 57, 65-66; CX-12.)

The CO took the measurements of the trench and Mr. Perdoni assisted by holding the grade measurement rod. CO Insogna took three measurements of the trench's depth. The measurements were 4.5 feet at the north end, 5.5 feet in the middle, and 6.3 feet at the south end. After measuring the trench depth, the CO collected a soil sample.² This sample was sent to OSHA's laboratory for testing. (Tr. 49-54, 62-64; CX-12, CX-13.)

Jurisdiction

Based on the record, I find that Rock Utility was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act.³ I conclude the Commission has jurisdiction over the parties and subject matter in this case.⁴

The Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable

¹ The telephone complaint to OSHA's Braintree Area Office was from an OSHA Boston Regional Office employee.

² CO Insogna used soil from an area near the trench that contained soil excavated from the trench. (Tr. 70-71.)

³ The Commission has held that construction activity, even a small project, affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983).

⁴ In its answer, Rock Utility did not dispute either that it is an employer under the Act or that the Commission has jurisdiction in this matter.

diligence could have known, of the violative condition. *Astra Pharm. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Serious Citation 1, Item 1

This item alleges a serious violation of 29 C.F.R. § 1926.95(a), which states:

(a) *Application*. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The Secretary alleges that Mr. Perdoni did not wear a reflective vest while working near the trench, which was located in a city street. Mr. Perdoni admitted that he did not wear his reflective vest after lunch. (Tr. 40-41.) While there is no dispute that Mr. Perdoni did not wear a reflective vest, the Secretary's citation cannot be affirmed.

When a "particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process."⁵ 29 C.F.R. § 1910.5(c)(1). The construction excavations standard includes a specific requirement to wear a warning vest when engaged in excavation activities near public vehicular traffic.⁶ Rock Utility was engaged in excavation work so the requirements of 29 C.F.R. § 1926.651(d) are specifically applicable in this case. I conclude that the cited standard, which is generally applicable, is preempted.⁷ This citation item is vacated.

Serious Citation 1, Item 2

This item alleges a serious violation of 29 C.F.R. § 1926.652(a)(1), which states:

⁵ In *Cincinnati Gas & Electric Co.*, the Commission stated that "[s]ection 1910.5(c)(1) provides that a specific standard preempts a general one only if 'a condition, practice, means, methods, operation, or process' is already dealt with by the specific standard." 21 BNA OSHC 1057, 1058 (No. 01-0711, 2005) (citations omitted).

⁶ 29 C.F.R. § 1926.651(d) provides: "*Exposure to vehicular traffic*. Employees exposed to public vehicular traffic shall be provided with, and shall wear, warning vests or other suitable garments marked with or made of reflectorized or high-visibility material." Additionally, the Secretary emphasizes the application of this standard for excavation work in her Interpretation Letter No. 20080829-8611, dated Aug. 5, 2009, which can be found at http://osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27155.

⁷ Because this citation item is vacated, I will not address the broader question of whether this is the proper standard to cite when a reflective warning vest is not used at a construction site. See *Ruhlin Co.*, 21 BNA OSHC 1779, 1781-83, (No. 04-2049, 2006).

(a) *Protection of employees in excavations.* (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: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Rock Utility was excavating a trench to install a new water line for tie-in to a city water main. During his testimony, Mr. Perdoni admitted that he did not measure the trench at any time prior to the CO's arrival. Mr. Perdoni further admitted that the trench's depth was over 5 feet.⁸ (Tr. 12, 19, 31-32.)

Rock Utility asserts that the trench was comprised of stable rock or "ledge." However, the OSHA analysis showed that the soil was Type C.⁹ Additionally, Mr. Perdoni testified that the trench included a pre-existing drain pipe. (Tr. 16, 33-34, 53; CX-6.) John McGrath testified that the presence of a pre-existing drain pipe showed the excavation was in previously disturbed soil.¹⁰ He further testified that previously disturbed soil is categorized as Type B or Type C.¹¹ (Tr. 96-97.) Because the trench was greater than 5 feet in depth and was not entirely comprised of stable rock, an adequate protective system was required.¹² CO Insogna testified there was no sloping or benching of the trench walls and that no trench box was in use. (Tr. 56.)

The Secretary must demonstrate that employees had access to the cited condition. The Secretary may show employee access through either actual employee exposure, or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). Mr. Perdoni asserts there was no violation of the cited standard because no one was in the area of the trench that was over 5 feet in depth. (Tr. 15, 21; R. Br. 1.) However, the Secretary

⁸ Mr. Perdoni admitted that he did not know what the depth was at the deep end of the trench, but he believed it was between 5.5 and 6 feet deep. He initially testified that he had dug the trench in excess of 6 feet at the worksite. He later offered different testimony as to the depth of the trench. (Tr. 14-15, 21, 23-26, 29, 31-32.) Given his inconsistent testimony, I find that Mr. Perdoni did not know the actual depth of the trench. I do not believe that he was attempting to mislead the Court; rather, he was simply providing a "guess." I conclude that the CO's measurements of the trench, which Mr. Perdoni witnessed, represent the trench's actual depth.

⁹ In his brief, Mr. Perdoni asserts the soil sample taken by the CO was not representative of the soil in the trench. This assertion is rejected. The record shows the sample was from the trench's excavated soil. (Tr. 53, 70-71.)

¹⁰ Mr. McGrath is an OSHA compliance officer with training in excavation hazards, a Bachelor's degree in chemistry and geology, and coursework in soil science. (Tr. 92-93.)

¹¹ In Appendix A to 29 C.F.R. 1926, Subpart P, previously disturbed soil is considered Type B unless it otherwise fits the definition of Type C. As noted, the OSHA analysis revealed the soil to be Type C. *See* CX-6.

¹² An adequate protective system can be provided by sloping or benching the trench's walls or by installing a trench box or other shield-type system.

established, and Mr. Perdoni agreed, that the deeper end of the trench was at least 6 feet deep. (Tr. 21, 63-64.) During his testimony, Mr. Perdoni marked two locations on a photograph of the deep end of the trench to indicate where Mr. Sarousi stood to install the pipe. (Tr. 23-26; CX-20.) Both locations were in the deeper end of the trench. I find that the Secretary has demonstrated actual employee exposure to the cited condition.

Finally, the Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The employer's knowledge is directed to the physical conditions that constitute a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). The Secretary need not show that an "employer understood or acknowledged that the physical conditions were actually hazardous." *Id.* Rock Utility's president, Mr. Perdoni, was at the worksite and had actual knowledge of the conditions of the trench. The Secretary has established a violation of the cited standard. This item is affirmed as serious.

Serious Citation 1, Item 3

This item alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), which states:

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

During the CO's interview, Mr. Sarousi indicated that he had not received training from Rock Utility.¹³ Mr. Perdoni acknowledged that Rock Utility provided no formal training. Mr. Perdoni stated that, instead, safety was discussed in the truck when they drove to a job.¹⁴ (Tr. 42-43, 51-52; 83-84.) The Secretary contends that such informal discussions are insufficient. (Tr. 119-20.) I agree with the Secretary.

The Commission has held that the instructions provided must be "specific enough to advise employees of the hazards of their work and the ways to avoid them." *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1425 nn. 6 & 7 (No. 90-1106, 1993). Mr. Perdoni's testimony demonstrated there was, at best, a general, informal discussion of safety. Specific

¹³ CO Insogna interviewed Rock Utility's general laborer, Mr. Sarousi, during the inspection.

¹⁴ Mr. Perdoni testified: "I would tell him, when we were in the truck, every day I would tell him about the dangers that we were facing, whether they were overhead wires, or gas lines that we would be crossing, other utilities that we would be working next to that would make it dangerous for us, as well as to take care not to break the utility. Every day we had those things there." (Tr. 42-43.)

instructions were not provided to Mr. Sarousi for recognizing the hazards of working in a trench and the means of controlling or eliminating those hazards. Additionally, there was no evidence of any instruction about OSHA's requirements for excavation work. (Tr. 42-43, 51-52; R. Br. 6-7.) The Secretary has established a violation of the cited standard. This item is affirmed as a serious violation.

Serious Citation 1, Items 4(a) and 4(b)

Item 4(a) alleges a serious violation of 29 C.F.R. § 1926.1053(b)(1), which states:

(1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

Item 4(b) alleges a serious violation of 29 C.F.R. § 1926.1053(b)(16), which states:

(16) Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

The Secretary grouped these two items for citation and penalty assessment purposes.

Regarding Item 4(a), the Secretary asserts that CO Insogna's testimony establishes the ladder used at the worksite did not extend more than a few inches above the side of the trench. (S. Br. 8.) Mr. Perdoni testified that the ladder was approximately 7 feet in length. The trench's depth was 5.5 feet in the middle and 6.3 feet at its deep end. The CO observed Mr. Perdoni in the deep end of the excavation. (Tr. 27, 63-34, 66; CX-12.) Given the depth of the trench and the length of the ladder, the ladder did not extend at least 3 feet above the edge of the trench. The Secretary has proved the alleged violation set out in Item 4(a). Item 4(a) is affirmed as a serious violation.

Regarding Item 4(b), CO Insogna testified that the ladder's side rails were damaged. (Tr. 58; CX-19.) In his testimony, Mr. Perdoni conceded that the ladder was defective because it was bent. (Tr. 26-27.) The Secretary has proved the alleged violation. Item 4(b) is affirmed as a serious violation.

Penalty Determination

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. In *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993), the Commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. [Citations omitted.] The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. [Citation omitted.]

A violation is classified as serious under section 17(k) of the Act if "there is substantial probability that death or serious physical harm could result." Commission precedent requires a finding that "a serious injury is the likely result should an accident occur." *Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000). Further, the Commission has recognized that a violation of the "OSHA trenching requirements warrant[s] a substantial penalty because the incidence of cave-ins is high, and the likelihood of death or severe injury to employees in a collapsing trench is also high." *Calang Corp.*, 14 BNA OSHC 1789, 1794 (No. 85-0319, 1990).

The affirmed citations items in this matter are affirmed as serious violations because a serious injury would have been the likely result had an accident occurred. This is especially true regarding Item 2, which addressed the failure to provide cave-in protection for employees working in the trench. The Secretary applied high gravity and greater probability factors to Item 2's penalty assessment. A moderate gravity factor was applied to the training and ladder penalty assessments. Further, the probability of the training violation was found to be greater, while the probability of the ladder violations was found to be lesser. Finally, the Secretary applied a 40 percent reduction to all of the proposed penalties based on the employer's size. No penalty adjustments were made for history or good faith. See CX-4-5, CX-7-9. I agree with all of the Secretary's determinations in regard to the proposed penalties, including the adjustments for size, probability, and gravity. I find all of the proposed penalties for the affirmed items appropriate. A total penalty of \$10,200 for the affirmed items is assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

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

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.95(a), is VACATED.
2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED, and a penalty of \$4,200 is assessed.
3. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1926.21(b)(2), is AFFIRMED, and a penalty of \$3,600 is assessed.
4. Citation 1, Items 4(a) and 4(b), alleging serious violations of 29 C.F.R. §§ 1926.1053(b)(1) and (b)(16), are AFFIRMED, and a penalty of \$2,400 is assessed.

/s/
John H. Schumacher
Judge, OSHRC

Dated: March 6, 2012
Denver, Colorado