

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

MIKE NERI SEWER & WATER
CONTRACTOR,

Respondent.

DOCKET NO. 11-1915

Appearances:

Marla J. Haley, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Mike Neri, Elk Grove Village, Illinois
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the Occupational Safety and Health Review Commission (“Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On May 18, 2011, the Occupational Safety and Health Administration (“OSHA”) inspected a Mike Neri Sewer & Water Contractor (“Respondent”) jobsite located at 9945 W. 55th Street, in Countryside, Illinois (“worksite”). As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* (“Citation”) to Respondent alleging serious, willful, and repeat violations of the Act with total proposed penalties of \$23,320.00. Respondent timely contested the Citation. A trial was conducted in Chicago, Illinois on August 14, 2012. The parties submitted post-trial briefs for consideration.

Jurisdiction

Respondent admitted in its *Answer* to the *Complaint* that: (1) the Commission has jurisdiction over this matter; (2) Respondent was a contractor doing business as Mike Neri Sewer & Water, with an office located at 1230 Dover Lane, Elk Grove Village, Illinois; and (3) Respondent had a workplace at 9945 W. 55th Street, Countryside, Illinois, where it was engaged in the construction of water and sewer mains, pipelines, communications and power lines, and other related activities. Respondent also admitted in its responses to Complainant's interrogatories, that work at the jobsite involved excavation of a trench and that Respondent employed one individual, Victor Guia, at the jobsite. *See Answer; Ex. C-5*. Therefore, the Court finds that Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). *Slingluff v. OSHRC*, 425 F.3d 861, 867 (10th Cir. 2005); *Clarence M. Jones*, 11 BNA OSHC 1529 (No. 77-3676, 1983). Further, the Commission has jurisdiction of the parties and subject matter pursuant to Section 10(c) of the Act, 29 U.S.C. § 659(c).

Discussion

Two witnesses testified at trial: (1) Joseph Knaff, OSHA Compliance Safety and Health Officer ("CSHO"); and (2) Mike Neri, Respondent's owner and operator. Based on their testimony and discussion of evidentiary exhibits, the Court makes the following findings.

After OSHA received a complaint about work activities at this jobsite, CSHO Joseph Knaff was assigned to travel to the location and conduct an inspection. (Tr. 31). Upon arriving at the location, he parked across the street, observed work activities for about fifteen minutes, and took several photographs. (Tr. 32-33, 37-39).¹ During that time, CSHO Knaff observed

¹ Complainant's photographs of the jobsite, Exhibits C-8 through C-22, are dated May 17, 2011. CSHO Knaff testified that he erroneously failed to change the date on his camera, and that the photographs were actually taken on

Respondent's owner, Mike Neri, and two other individuals, who were wearing safety vests and hard hats, working at the site. (Tr. 38; Ex. C-8 through C-12). When CSHO Knaff saw one of the workers, wearing a blue hard hat, crawl down into the bottom of the excavated trench, he drove across the street into a nearby parking area and entered the worksite. (Tr. 39; Ex. C-13, C-14). CSHO Knaff photographed the worker in the blue hardhat while he was standing in the bottom of the trench and talking to Mr. Neri, who was leaning out of the backhoe while looking directly into the trench. (Tr. 39-44, 148; Ex. C-13, C-14).

CSHO Knaff first spoke with the building owner, who explained that the building's water system was being upgraded and that Respondent was hired to perform the work. (Tr. 32, 36). CSHO Knaff then identified himself and explained the purpose of his visit to Mr. Neri. (Tr. 69, 83-84). Mr. Neri told CSHO Knaff that the employee in the trench was Victor Guia. (Tr. 70-71, 84-85; Ex. C-13, C-14). Mr. Neri first told CSHO Knaff that Mr. Guia entered the trench only to retrieve his hardhat, but after further questioning, acknowledged that the backhoe struck a sewer line and Mr. Guia entered the trench to find out if the line was "active." (Tr. 85, 125, 127).

CSHO Knaff then examined and measured the dimensions of the excavation. (Tr. 78-79, 133, 135; Ex. C-15, C-17, C-18, C-19). He first noted there was no ladder or other safe means of entering or exiting the trench. (Tr. 39, 41, 145). Mr. Guia was seen using the nearby building wall to steady himself as he "jumped" into the bottom of the excavation. (Tr. 39, 41; Ex. C-16). CSHO Knaff then observed that the walls of the excavation were essentially vertical. (Tr. 49-50; Ex. C-16, C-18, C-22). Using an engineering rod, he measured the depth of the excavation, where Mr. Guia had been standing, at 5.6 feet. (Tr. 45, 47, 79; Ex. C-15). The width of the excavation was approximately 12 feet. (Tr. 45, 51; Ex. C-17, C-18, C-22).

CSHO Knaff testified that the soil in the excavation was, at best, Type B soil, based on

May 18, 2011. (Tr. 33-35).

his observation of the spoil pile and the fact that the soil had been previously disturbed when the existing water and sewer lines were originally installed.² (Tr. 63-65, 67, 101). He further concluded that, as Type B soil, some type of protection such as sloping, benching or shielding was required. (Tr. 49-50, 66, 79, 100). CSHO Knaff also noted that the excavated soil had been placed directly at the edge of the trench opening. (Tr. 36, 116-117; Ex. C-13, C-14, C-22).

Based upon his interviews, observations, and measurements, CSHO Knaff recommended the issuance of the citation items that are in dispute in this case.

Complainant's Burden of Proof

To establish a violation of an OSHA standard, Complainant must establish that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

29 C.F.R. § 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees.

(a) On or about May 18, 2011, at the above addressed jobsite, safe access was not provided for employee entry and exit of the excavation.

The cited standard provides:

29 C.F.R. § 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or

² CSHO Knaff did not physically test the soil, either in the field or by sending samples to OSHA's laboratory in Salt Lake City, Utah. (Tr. 63).

more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

CSHO Knaff's testimony, summarized above, established that Respondent was engaged in excavation work and had created a trench that was 5.6 feet deep. There was no ladder or other safe means for employees to enter or exit the trench. (Tr. 39-40, 45-48, 82, 90; Ex. C-16). Mr. Guia was observed "jumping" down into the excavation, using the brick wall of the nearby building for support as he descended. (Tr. 39-44, 75, 90; Ex. C-16, C-22). CSHO Knaff's testimony and photographs also established that Mr. Neri saw Mr. Guia enter the excavation to inspect the sewer line that Mr. Neri struck with the backhoe. (Tr. 85, 127).

At trial, Mr. Neri disputed certain aspects of CSHO Knaff's testimony. Mr. Neri initially disputed that the trench was actually 5.6 feet deep, alleging that the engineering rod was slightly angled when CSHO Knaff took his measurements. (Tr. 133). However, he later acknowledged that the excavation was "about five, six feet deep." (Tr. 150). Mr. Neri also disputed that the individual in the blue hard hat was his employee, even though he was photographed standing in the bottom of the excavation looking directly at Mr. Neri, who was leaning out of the backhoe. (Tr. 139-141; Ex. C-13, C-14). In fact, Mr. Neri claimed that he did not know who the person in the trench was, or why that person was standing in the bottom of the excavation. (Tr. 141, 148, 150-151). Mr. Neri also claimed at a different point in the trial that no one was ever inside the excavation. (Tr. 125, 141, 145, 151-152). In weighing the credibility of the witnesses, the Court gives greater weight to CSHO Knaff's testimony on this issue. First, CSHO Knaff observed Mr. Neri working with the two individuals wearing safety vests and hard hats for about fifteen minutes before going onto the jobsite. (Tr. 32-33, 38, 72). So the person in the blue hard hat standing in the trench was not a stranger to Mr. Neri. Second, Mr. Neri testified that no other companies or individuals were working at the site. (Tr. 154). Third, and most importantly, there

are clear photographs of Mr. Neri leaning out of the backhoe looking directly at, and communicating with, the worker in the blue hard hat standing in the bottom of Respondent's trench. (Ex. C-10, C-13, C-14). Mr. Neri's testimony that he did not know the identity of the person standing in his trench, or why that person was there, was simply not believable.

The Court deems Mr. Neri's statements to CSHO Knaff at the jobsite, specifically regarding the identity of the person in the trench as employee Victor Guia, and the reason for his entry into the trench, to be party admissions pursuant to Federal Rule of Evidence 801(d)(2)(D). See also *Regina Constr.*, 15 BNA OSHC 1044 (No. 87-1309, 1991). Based on the foregoing, Complainant established that the cited standard applied; the terms of the cited standard were violated; Victor Guia, Respondent's employee, was exposed to the violative condition; and Mr. Neri had direct knowledge of the condition.

Complainant classified Citation 1, Item 1 as a serious violation. A violation is serious if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not prove that there was a substantial probability that an accident would actually occur; she need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Constr.*, 23 BNA OSHC 1044 (No. 08-631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072 (No. 88-0523, 1993).

The Court finds that Citation 1, Item 1 was properly characterized as a serious violation. As CSHO Knaff testified, not having a safe means for entering and exiting a trench could cause an employee to fall and receive significant injuries, such as broken bones. (Tr. 91, 95). Further, if an emergency occurred, such as a cave-in, not having a ladder or other safe means of egress

prevents prompt escape from a trench. (Tr. 90-91, 95). Accordingly, Citation 1, Item 1 will be AFFIRMED.

Citation 2, Item 1

Complaint alleged a willful violation of the Act in Citation 2, Item 1 as follows:

29 C.F.R. § 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 May 18, 2011, at the above addressed jobsite, an employee was exposed to the hazard of excavation wall collapse while working in a 6.5 foot deep excavation which was not protected by sloping, shoring, benching and/or shielding.³

The cited standard provides:

29 C.F.R. § 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: (i) Excavations are made entirely in stable rock; or (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.

Several of the factual findings discussed above with regard to Citation 1, Item 1 are relevant to Citation 2, Item 1 and are incorporated herein. The excavation was 5.6 feet deep, measured at the location in the trench where employee Victor Guia was standing. The walls of the trench were essentially vertical, and there was no sloping, benching, shoring or other excavation protection being used in the trench. (Tr. 49-53, 65-66, 100; Ex. C-18, C-21, C-22). The Court credits CSHO Knaff's testimony that the soil in the excavation was, at best, Type B soil, because the purpose of the project was to remove and replace previously installed pipes. (Tr. 63-65, 67, 101). Given the presence of previous underground installations, as well as the trench's location next to a building, the soil in this area was undoubtedly previously disturbed.

³ As issued, the citation described the trench as "a 6.5 foot deep excavation." The CSHO testified that this description was erroneously transposed, and that the trench's actual depth was 5.6 feet, as shown in Ex. C-15. (Tr. 46-48).

(Tr. 53, 63-67, 191; Ex. C-22). See 29 C.F.R. § 1926 Subpart P, App. A (“[N]o soil is Type A if... (iii) [t]he soil has been previously disturbed.”). Therefore, the maximum allowable slopes for the walls of the excavation were 1:1, or 45 degrees. See 29 C.F.R. § 1926 Subpart P, App. B, Table B-1. The vertical walls of the excavation were non-compliant.

Based on the foregoing, the Court finds that the cited standard applied, was violated, and Victor Guia was exposed to the condition while standing in the bottom of the excavation. The Court further finds, as with the previous citation item, that Respondent’s owner, Mike Neri, had direct knowledge of the violative condition since he was photographed looking directly at Mr. Guia while he was standing in the bottom of the excavation.

Complainant characterized Citation 2, Item 1 as a willful violation. In her *Complaint*, however, she alleged, in the alternative, that Citation 2, Item 1 was a repeat violation. A violation is willful if “committed ‘with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.’” *Kaspar Wireworks, Inc.*, 18 BNA OSHC 2178 (No. 90-2775, 2000); *Georgia Electric Co.*, 595 F.2d 309, 318-19 (5th Cir. 1979); *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983). The employer’s state of mind is the key issue. *AJP Construction, Inc.*, 357 F.3d 70, 74 (D.C. Cir. 2004). Complainant must show that Respondent had a “heightened awareness” of the illegality of its conduct. Heightened awareness is more than simple knowledge of the conditions constituting the alleged violation; such evidence is already necessary to establish the basic violation. Instead, Complainant must show that Respondent was actually aware of the unlawfulness of its action or that it “possessed a state of mind such that if it were informed of the standards, it would not care.” *Cranesville Block Co.*, 2012 CCH OSHD ¶33,227 (No. 08-0316, 2012); *Hern Iron Works*, 16 BNA OSHC 1206 (No. 89-433, 1993); *General Motors Corp.*, 14

BNA OSHC 2064 (No. 82-630, 1991).

To prove a repeat violation, Complainant has the burden of establishing that: (1) the same employer, (2) was cited at least once before, (3) for a substantially similar violation of the Act, and (4) the citation became a final order. *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). If an employer fails to file a timely notice of contest, the proposed violations are deemed a final order of the Commission, not subject to review by any court or agency. *Prime Roofing Corp.*, 22 BNA OSHC 1892 (No. 07-1409, 2009). Complainant can make a *prima facie* showing of “substantial similarity” by proving that the past and present violations are for failure to comply with the same standard. *Potlatch*, supra. The burden then shifts to Respondent to rebut that showing. *Monitor Construction Co.*, 16 BNA OSHC 1589 (No. 91-1807, 1994).

The record did not establish that Respondent committed this violation with either an intentional disregard for the requirements of the Act, or with plain indifference toward employee safety. Other than Mr. Guia’s brief entry into the excavation for three to four minutes, Respondent’s employees remained outside the excavation during the entire time CSHO Knaff was at this location (including the pre-entry period when CSHO Knaff observed their work from across the street). Prior to OSHA’s arrival, Respondent had already ordered a trench box, which was scheduled to arrive later that day. (Tr. 45-46). In fact, Mr. Neri was expanding the excavation when CSHO Knaff arrived so that the trench box would fit into it. (Tr. 45-46).

When CSHO Knaff was asked to explain why he characterized this violation as willful, his stated rationale was: “I had the owner of the company, Mike Neri, observing and speaking to the employee in the excavation, and that’s where the classification of willful comes from.” (Tr. 105). The Court finds that Complainant’s evidence clearly established direct employer knowledge of the violation, yet failed to rise to the more heightened level of plain indifference

toward employee safety or intentional disregard for the requirements of the Act.

The record did establish, however, that Citation 2, Item 1 was a repeat violation. In 2009, Respondent was issued a citation which included, in Item 6, a proposed violation of the same standard cited in this instance: 29 C.F.R. § 1926.652(a)(1). Respondent accepted that violation as part of an informal settlement agreement executed on December 3, 2009. (Ex. C-23). Accordingly, Citation 2, Item 1 will be AFFIRMED as a repeat violation.

Citation 3, Item 1

Complainant alleged a repeat violation of the Act in Citation 3, Item 1 as follows:

29 C.F.R. § 1926.651(j)(2): Protection was not provided by placing and keeping excavated or other materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

(a) On or about May 18, 2011, at the above addressed jobsite, an employee was exposed to injuries from excavated material falling back into the excavation as the spoil pile was within 2 feet of the edge of the excavation.

The cited standard provides:

29 C.F.R. § 1926.651(j)(2): Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

Complainant's investigative photographs clearly established that soil removed from the excavation, commonly referred to as a "spoil pile," was not kept at least two feet from the edge of the excavation. (Tr. 109-110; Ex. C-13, C-14, C-18). The cited standard applied and was violated. Victor Guia was exposed to the violative condition while standing in the bottom of the

trench, and Mr. Neri had direct knowledge of the condition as he was looking directly at Mr. Guia and the spoil pile from the cab of the excavator. (Ex. C-13, C-14, C-18).

Complainant also established that Citation 3, Item 1 was properly characterized as a repeat violation. In 2009, Respondent was issued a citation which included, in Item 4, a proposed violation of the same standard cited in this instance: 29 C.F.R. § 1926. 651(j)(2). Respondent accepted that violation as part of an informal settlement agreement executed on December 3, 2009. (Ex. C-23). Therefore, Citation 3, Item 1 will be AFFIRMED as a repeat violation.

Penalties

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Citation 1, Item 1 involved failure to provide a ladder or other safe means of egress in the trench. One employee was exposed for three to four minutes, and there was a low likelihood that an injury would have actually occurred in this instance. (Tr. 76, 87). CSHO Knaff, in calculating the proposed penalty, testified that he considered Respondent's status as a small employer as

well as Respondent's history of previous OSHA violations. (Tr. 91-92). However, the Court notes that Respondent typically employs only one person,⁴ and therefore is a *very* small employer. Based on the totality of the circumstances discussed above with regard to Citation 1, Item 1, the Court finds that a penalty of \$1,000.00 is appropriate.

Citation 2, Item 1 involved not providing any form of cave-in protection in the trench. This item was based on the same exposure of one employee for three to four minutes. (Tr. 76, 87). Complainant has determined that "excavation work is one of the most hazardous types of work done in the construction industry [and] [t]he primary type of accident of concern in excavation-related work is [the] cave-in." *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010). CSHO Knaff testified that he considered the gravity of this item to be "high" and the probability of an actual accident to be "greater." However, considering the totality of the circumstances, including the conditions depicted in the investigative photographs, the depth of the excavation, the brief exposure of the employee, the repeat nature of the violation, and the very small size of this employer, the Court finds that a penalty of \$2,000.00 is appropriate for Citation 2, Item 1.

Citation 3, Item 1 involved the spoil pile being placed directly at the edge of the excavation opening. This item was based on the same exposure of one employee for three to four minutes. (Tr. 76, 87). Placing a large spoil pile at the edge of an excavation put extra weight and burden on the trench walls, increasing the likelihood of collapse. (Tr. 110-111). Based on the totality of the circumstances pertaining to Citation 3, Item 1, including Respondent's very small size and violation history, the Court finds that a penalty of \$2,000.00 is appropriate for this item.

⁴ The second individual working at the site on the day of the inspection was Victor Guia's son, who does not usually work for Respondent. (Tr. 72-74).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED

that:

1. Citation 1, Item 1 is AFFIRMED as a serious violation of the Act, and a penalty of \$1,000.00 is ASSESSED;
2. Citation 2, Item 1 is AFFIRMED as a repeat violation of the Act, and a penalty of \$2,000.00 is ASSESSED; and
3. Citation 3, Item 1 is AFFIRMED as a repeat violation of the Act, and a penalty of \$2,000.00 is ASSESSED.

SO ORDERED.

Date: February 21, 2013
Denver, Colorado

 /s/ *Brian A. Duncan*
Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission