



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

GUSTAFSON CONSTRUCTION CO.
Respondent.

**OSHRC DOCKET
NO. 93-1824**

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 2, 1994. The decision of the Judge will become a final order of the Commission on September 1, 1994 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before August 22, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. (SKA)
Ray H. Darling, Jr.
Executive Secretary

Date: August 2, 1994

DOCKET NO. 93-1824

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,

v.

**GUSTAFSON CONSTRUCTION
CORP.,**
Respondent.

OSHRC Docket No. 93-1824

APPEARANCES:

**Cyrus A. Alexander, Esq., Office of the Solicitor, U.S. Department of Labor,
Chicago, Illinois**

Steven J. Slawinski, Esq., O'Neil, Cannon and Hollman, S.C., Milwaukee, Wisconsin

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

Respondent, Gustafson Construction Corporation (Gustafson), at all times relevant to this action maintained a worksite at Forest Hill Heights Subdivision, Oak Creek, Wisconsin, where it was engaged in water main and sewer construction. Gustafson admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 26, 1993 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Gustafson's Oak Creek worksite (Tr. 27-28). As a result of

the inspection, Gustafson was issued citations, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to hearing, Gustafson withdrew its notice of contest to the cited items, as amended, with the exception of Serious citation 1, item 2, alleging violation of 29 CFR §1926.652(a)(1) (Tr. 6, 11). On November 17, 1993 and April 5, 1994 a hearing was held in Milwaukee, Wisconsin, on the matter remaining at issue. The parties have waived or submitted briefs and this matter is ready for disposition.

Alleged Violation

Serious citation 1, item 2 states:

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 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than (sic) one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

(a) A trench, located in the Forest Hill Heights Subdivision, was (6) feet deep and 16 feet long and did not have the North and South walls sloped nor was an alternative support system provided.

The cited standard states:

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.

Facts

At approximately 12:30 p.m. on May 26, 1993, Compliance Officer (CO) Donald Zehm arrived at the Oak Creek worksite (Tr. 28). Zehm observed an excavator in the process of opening a trench (Tr. 30). The excavation was 16 to 20 feet long (the length of a single pipe section), approximately 36" wide, and had vertical walls (Tr. 33-34, 55). Station points were marked by stakes on which the station points were written (Tr. 44). Zehm stated that the trench was cut to a position between station points .38 and .50 (Tr.

39, 44-45)¹. Zehm estimated the depth of the trench based upon his observation of the .50 stake and the valve stem, and upon the cut sheet provided by the city inspector, which places the Watrous valve at station .38 at a depth of 6.25, and the trench depth at the .50 stake at 6.33 feet (Tr. 35, 39, 45; Exh. C-4). Zehm did not measure the trench's depth (Tr. 44).

Dennis Sauer, the land surveyor who prepared the Oak Creek cut sheets (Tr. 148), testified that the depths on the cut sheet are the specification depths from the tops of the station markers, or stakes, to the invert, or the inside of the pipe at its lowest point (Tr. 151). The stakes themselves extended nine inches above the ground surface (Tr. 146). The specification depth at station .38 was, therefore, 6.25 feet, or 6 feet 3 inches less 9 inches, or 5 feet 6 inches (Tr. 151-52). At station .50 the trench depth was specified at 5 feet 7 inches (Tr. 155, 207-08).²

Sauer testified that the cut sheets were not a measurement of the actual depth of the trench (Tr. 184). However, Frederick Fairbanks, Jr., the city water inspector who was on site the day of the inspection (Tr. 80), testified that Gustafson met the depth specifications on that date, plus or minus an inch (Tr. 234, 236).

In addition, Zehm testified that he observed a Gustafson employee, Jim Knapp, exiting the trench after making connections at the valve (Tr. 34, 319). Zehm stated that the trench was deep enough that he did not see Knapp, who is approximately 5'8" (Tr. 47), until he walked up the ramp at the west end of the trench (Tr. 35, 49, 321).

Rich Dunderman, the excavator operator, was also the "competent person" on site (Tr. 31). Dunderman told Zehm that, based on visual and manual tests, he had classified the soil in the trench as type B (Tr. 32-33). No shoring system was in place

¹ The transcript refers to a point between stations .38 and .350. The undersigned finds, however, that the witness intended to state that the trench extended to a position between points .38 and .50. No station .350 is noted on the cut sheet (Exh. C-4); moreover, the depth at station .50 is 6.33 feet, the depth testified to by the CO.

² The trench is originally dug approximately four inches deeper than the invert specification in order to accommodate a layer of bedding sand (Tr. 210). The evidence indicates that the sand bed, as well as the pipe had been laid at the time of the inspection (Tr. 215, 272)

(Tr. 35). Trench shields arrived on the site during the OSHA inspection and were placed in the excavation (Tr. 38).

Respondent's foreman, Robert Francis Leszczynski, Jr. (Tr. 251), testified that his crew excavated only the cross at station .00 before lunch on the day of the inspection (Tr. 258-59). The crew returned from lunch at approximately 12:30, shortly after which Leszczynski left to get the trench shields (Tr. 260-61). Leszczynski testified that when he returned, he found CO Zehm on the site. He stated that the crew had excavated for only one length of pipe, approximately 19-1/2 feet, plus the length of the graded ramp on the west side (Tr. 262, 265). Leszczynski stated that the trench could not have extended past station .38, which is 38 feet outside the cross (Tr. 263).

Leszczynski maintained that the trench was less than 5 feet deep at the time of the inspection, based on the cut sheets and his observation of his pipe layer, Knapp (Tr. 274). The cut specification at station .00 was 5.23, indicating a trench depth of 4 feet 6 inches (Tr. 270-71; Exh. R-3). Leszczynski believed that the trench ended about 20 feet from the cross, and that the depth at that point must be between 4 feet 6 inches and the 5 foot 6 inch depth specified at station .38. Leszczynski stated that he observed his pipe-layer standing in the trench to chest level (Tr. 275).

Leszczynski admitted that his recollection of this particular trench was vague (Tr. 274), and that the only time Leszczynski observed Mr. Knapp in the trench was prior to the crew's lunch hour, when the crew put a pump in the trench at the cross (Tr. 297-98). Leszczynski did not actually measure the trench (Tr. 278, 315).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.

See, e.g., Walker Towing Corp., 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991)

The uncontroverted evidence establishes that the cited trench did not contain a protective system of any kind, that a Gustafson employee was working in the trench, and that Gustafson supervisory personnel were aware of the conditions. The sole issue to be decided is whether §1926.652(a)(1) is applicable; specifically, whether the cited trench exceeded 5 feet in depth.

The matter at issue rests on the credibility of the two witnesses, CO Zehm and Foreman Leszczynski. Of the two, the undersigned finds CO Zehm's testimony more believable.

Leszczynski did not measure the depth of the trench following the OSHA inspection, though he had ample opportunity to do so, nor did he dispute CO Zehm's assessment of the depth of the trench or the need for a trench box. Leszczynski admitted that his recollection of the day of the inspection was vague; his estimate of the trench's depth was based on the amount of time excavation had been proceeding, the cut sheets, and his observations of Mr. Knapp, which were made before the cited trench was even excavated.

On the other hand, Zehm clearly testified to seeing the valve stem, which was to be located at station .38 at a depth of 6.25 feet, and to watching Mr. Knapp walk out of a trench deeper than the top of his head.

The undersigned finds CO Zehm's estimate of the trench's depth credible, and that the trench was more than five feet deep. "Estimations of distance based on observations are admissible and may be dispositive in the absence of proof to the contrary." See Fed.R.Evid. 701; *Well Solutions, Inc.*, 15 BNA OSHC 1718, 1721, 1992 CCH OSHD 29,743 (No. 89-1559, 1992).

The Secretary has shown the cited violation.

Penalty

CO Zehm testified, without contradiction, that an employee caught in a collapsing trench would probably suffer serious bodily harm in the form of fractures (Tr. 67-68). The violation was, therefore, serious.

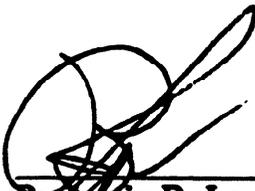
At the hearing, Gustafson stipulated that the proposed penalty of \$1,200.00 was appropriate in the event that the violation was affirmed as serious (Tr. 8). Mitigating factors (prior history with OSHA, good faith, employee exposure and likelihood of an accident actually occurring) cannot, therefore, be considered. The proposed penalty will be 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 found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Serious citation 1, item 2, alleging violation of §1926.652(a)(1) is **AFFIRMED**, and a penalty of \$1,200.00 is **ASSESSED**.



Benjamin R. Loye
Judge, OSHRC

Dated: July 22, 1994