



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

v.

RAWSON CONTRACTORS, INC.
Respondent.

**OSHRC DOCKET
NO. 93-1901**

**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 April 7, 1994. The decision of the Judge will become a final order of the Commission on May 9, 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 April 27, 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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.
Ray H. Darling, Jr.
Executive Secretary

Date: April 7, 1994

DOCKET NO. 93-1901

NOTICE IS GIVEN TO THE FOLLOWING:

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Benjamin R. Loye
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SECRETARY OF LABOR,

Complainant,

v.

RAWSON CONTRACTORS, INC.,

Respondent.

OSHRC DOCKET
NO. 93-1901

APPEARANCES:

For the Complainant:

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

For the Respondent:

Thomas G. Kreul, Esq., Wauwatosa, Wisconsin

DECISION AND ORDER

Loye Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq. hereafter referred to as the Act).

Respondent, Rawson Contractors, Inc. (Rawson), at all times relevant to this action maintained a place of business at 68th and Maple Terrace, Wauwatosa, Wisconsin, where it was engaged in installation of a pressurized water main (Tr. 117-19). Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 8, 1993, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Rawson's Wauwatosa worksite (Tr. 12). As a result of the inspection, Rawson was issued a citation alleging a "serious" violation of 29 CFR §1926.652(a)(1) of the Act, with a proposed penalty of \$2,500.00. Rawson filed a timely notice contesting the citation and penalty, bringing this proceeding before the Occupational Safety and Health Review Commission (Commission). The Secretary's complaint amended the pleadings to allege a "willful" violation with a proposed penalty of \$17,500.00.

On November 16, 1993, a hearing was held in Milwaukee, Wisconsin on the contested issues. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violation of §1926.652(a)(1)

Serious citation 1, item 1 alleges:

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 one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

(a) On June 6, 1993, an employee working in a 30-inch wide trench greater than five feet in depth was not protected at all times by an adequate system of sloping or equivalent protection. This condition exposed the employee to injury due to failure and/or collapse of the trench walls and displacement of pavement being supported by such walls.

Facts

OSHA's June 8, 1993 inspection was the result of an accident in which a Rawson trench collapsed, causing a slab of pavement to slide into the trench and strike an employee (Tr. 12).

On that date Rawson was installing a water main in an open trench approximately 40 feet long (Tr. 18, 58, 119). The east half of the excavation was seven feet two inches deep or more and three to four feet wide (Tr. 21, 23; Exh. C-1). Two aluminum hydraulic shores were placed seven feet four inches apart in the that portion of the trench (Tr. 22). The west end of the trench was inclined and stepped up to ground level (Tr. 138).

At the time of the inspection, the south side of the west 20 feet or so of the trench had collapsed, and the Compliance Officer (CO) was unable to measure the width of the trench in that location (Tr. 21). The CO stated that the trench was approximately four feet two inches deep at the point where the buried boot of the injured employee was found (Tr. 26). The CO was unable to state the depth of the trench prior to the collapse; however, he speculated that the possible depth was five feet four inches, adding the measured depth of four feet two inches to the height of the buried boot, one foot two inches (Tr. 26-27, 29, 43). The CO did not speculate as to the slope of the trench at the west end.

The employee involved in the accident, Richard Radke, testified that he was standing approximately chest deep in the stepped portion of the trench, ready to guide the next section of pipe into the trench prior to placing the next speed shore (Tr. 118-19, 131-32, 152). Radke stated that the trench was between four feet two and four feet three inches deep where he stood (Tr. 123-24). Radke believed that the slab of asphalt may have pushed him deeper into the trench on impact (Tr. 159).

Discussion

The cited standard requires that:

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.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia*, that the cited standard applies, and that employees had access to the violative condition. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). The evidence in this case fails to establish that Rawson's employee was working in an excavation exceeding five feet in depth, or that examination of the ground in which the cited trench was dug would have provided some indication of a potential cave in.

The Secretary maintains that the depth of the excavation in this matter is the depth from the bottom of the trench at its deepest point to ground level, i.e. over seven feet, and that the cited standard is, therefore, applicable. Alternatively, Complainant argues that the evidence shows that Rawson's employee was standing in a portion of the trench which was five feet four inches deep. The undersigned finds the Secretary's arguments unpersuasive.

The sloped end of a trench is, in fact, the bottom of the excavation at that point, unlike a "bench," which is cut from the side or face of an excavation. *See, §1926.650(b) Definitions.* CO Sherman recognized that the slope on the west end of the trench was not a bench (Tr. 85), and described the west end of the trench as "an area left unexcavated until [Rawson was] ready to dig [it] out to create room for the next piece of pipe" (Tr. 65). The depth of the trench is correctly measured from where Rawson's employee was working on the sloped surface of the west end to ground level.¹

The OSHA CO, however, was unable to measure the depth of that portion of the trench in which the injured employee was standing. His estimate, based on the presence of Mr. Radke's buried boot, is inconclusive. As Rawson suggests, the movement of the asphalt slab could have moved Mr. Radke downhill from his original position. Moreover, CO

¹ The Secretary's reliance on *Trumid Construction Co., Inc.*, 14 BNA OSHC 1784, 1987-90 CCH OSHD ¶29,078 (No. 86-1139, 1990) is misplaced. *Trumid* states merely that the depth of a benched trench is correctly measured from the base to ground level, rather than from the base to bench.

Sherman's conclusion is directly contradicted by Mr. Radke, who convincingly testified that the excavation was only chest high, four feet two inches to four feet four inches deep, where he was standing at the time of the collapse.

Section 1926.652(a) is inapplicable to excavations under five feet in depth unless examination by a competent person provides indication of a potential cave-in. Mr. Radke, a certified competent person (Tr. 114-16), testified that he observed nothing indicating a possible cave-in (Tr. 134, 156-58). The Secretary presented no evidence on this issue.

The record fails to show by a preponderance of the evidence that the cited standard is applicable to the circumstances cited. The citation will, therefore, be dismissed.

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. Citation 1, item 1, alleging violation of §1926.652(a)(1) is VACATED.



Benjamin R. Loye
Judge, OSHRC

Dated: April 1, 1994