



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1120 20th Street, N.W., Ninth Floor
 Washington, DC 20036-3419

SECRETARY OF LABOR, :

Complainant, :

v. :

RAUSCH CONSTRUCTION COMPANY, :

Respondent. :

OSHRC DOCKET NO. 97-1604

APPEARANCES:

Steven E. Walanka, Esquire
 Chicago, Illinois
 For the Complainant.

Robert E. Mann, Esquire
 Chicago, Illinois
 For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected an excavation site in Chicago, Illinois, where Respondent Rausch Construction Company (“Rausch”) was engaged in sewer line connection work, on May 21, 1997; as a result, Rausch was issued a serious citation alleging violations of 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(1). Rausch contested the citation, the case was designated for E-Z Trial pursuant to Commission Rule 203(a), and a hearing was held on February 25, 1998. Both parties have submitted post-hearing briefs.

The OSHA Inspection

Anthony Smith, the OSHA compliance officer (“CO”) who inspected the site, testified he was driving by the job on May 21, 1997, when he observed an excavation; he parked his car and went over to the excavation, where he saw two employees at the bottom digging with shovels. Smith proceeded to video and measure the excavation, which he found to be 6.5 feet deep, 11 feet wide and 11 feet long, and the employees in the excavation and the backhoe operator on the job told him they

worked for Rausch; the backhoe operator went to get Robert Broyles, the site superintendent, after which Smith introduced himself to Broyles and discussed the excavation with him. Smith pointed out that the soil was Type C, that the excavation walls were vertical, and that they should have been sloped at 34 degrees and the spoil pile on the excavation's north edge should have been set back at least 2 feet; Broyles agreed with Smith, and told him he would have the backhoe operator slope the walls and move the pile back from the edge. The citation was issued on August 21, 1997.¹ (Tr. 5-34)

Citation 1 - Item 2

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

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.

Table B-1 in Appendix A to the excavations standard sets out the following maximum allowable slopes for excavations less than 20 feet deep:

Stable Rock	Vertical (90 degrees)
Type A	3/4:1 (53 degrees)
Type B	1:1 (45 degrees)
Type C	1 1/2:1 (34 degrees)

The CO's testimony, as summarized above, was that the soil at the site was Type C, that the excavation was 6.5 feet deep, and that the north and south walls were vertical and should have been sloped at 34 degrees. (Tr. 10-17; 21-28; 32-33). Rausch does not dispute that the soil at the site was Type C, which, pursuant to Table B-1, is required to be sloped at 34 degrees. However, Rausch does dispute the CO's measurements, and contends that the Secretary has not demonstrated the alleged violation because she has not shown that the excavation's depth was 5 feet or more.

In support of its contention, Rausch notes the testimony of Robert Broyles, the site superintendent, that the depth of the excavation, which was down to the pipe the employees were standing on to work, was 4.7 feet, based on his knowledge of the site and contract drawings relating

¹Item 2 of the citation states that the excavation was 11 feet wide and 14 feet long and that it had "vertical unsupported side walls." However, it is clear from the CO's narration on C-1, his video, that he measured both the width and length to be 11 feet; it is also clear that the walls at issue were the north and south sides of the excavation. (Tr. 11-18; 22-26; C-1-4).

to the job. (Tr. 59-76; 89-95). Rausch also notes various problems with the way the CO measured the depth, *i.e.*, his placing his trench pole against the slope of the north wall, his embedding the pole into the soil at the bottom of the excavation, and his measuring the depth at a point other than where the employees were; according to Rausch, these actions rendered the measurement inaccurate. I disagree. First, the CO's testimony, as well as C-1, his video, and C-2-5, stills made from his video, convince me the north and south walls were essentially vertical and that placing the pole against the north wall, as shown in C-4, accurately measured the depth. (Tr. 10-11; 14; 17; 25-28; 36-40; 53-54). Second, while the CO agreed the pole was sunk into the soil about 6 inches, he indicated that this was because the soil was very loose, sandy and granular, and that the employees would also have sunk into the soil somewhat when walking on it. (Tr. 10-12; 33-36; 40-42; 54-58). Third, that the CO took his measurement at a point other than where the employees were standing to work, as shown in C-2-3, does not persuade me of Rausch's contention, particularly since C-4 shows the trench pole against the north wall just behind the ladder the employees used to access the excavation. Fourth, Broyles conceded at the hearing that the excavation was over the employees' heads and that he did not actually measure the depth, and he admitted on C-1 that the excavation was about 6 feet deep and that it was not sloped as required.² (Tr. 90; 94).

Rausch also contends the Secretary failed to establish that it knew or should have known of the alleged violation. However, CO Smith testified that both Broyles and the backhoe operator told him that they were "competent persons" within the meaning of the OSHA excavations standard.³ (Tr. 9-10; 18-21; 33). Moreover, Broyles testified that Rausch's trenching policy, which he said basically followed the OSHA guidelines, was that sloping or trench boxes were required in excavations 5 feet or more in depth; he further testified that the subject excavation was begun about mid-morning on the day of the inspection and that the employees had been in it for about an hour when the CO arrived

²On C-1, the CO is heard identifying himself upon Broyles' arrival at the excavation, after which Broyles identifies himself; the two are then heard discussing the excavation, and Broyles concedes that it is about 6 feet deep and that it is not properly sloped.

³The CO is heard questioning the backhoe operator and Broyles in this regard on C-1, to which both respond in the affirmative.

early that afternoon. (Tr. 76; 85). On the basis of the record, it is my conclusion that Broyles, as the on-site superintendent, should have been aware of the excavation's condition.

Rausch's final contention is that the Secretary did not show that the excavation's condition represented a serious hazard. William Rausch, the company's vice-president and a civil engineer, testified that the soil at the site was fine aggregate sand which would have sloughed off or flowed into the excavation rather than caving in like a more cohesive soil would have; he also testified that if the walls of the excavation had failed the sand would have flowed in until it reached its natural angle of repose of 34 degrees, resulting in 3 feet of sand at the bottom of the excavation, and it was his opinion, in essence, that the employees could not have been seriously injured in such a failure. (Tr. 98-105). CO Smith, an OSHA CO for over eight years, testified that the failure of the walls could have resulted in the soil falling on the employees and serious injuries such as fractures, and that the hazard was exacerbated by the spoil pile sitting on the north edge of the excavation. (Tr. 5; 29-36; 53; 56-58). In comparing these two opinions, I note that Rausch did not mention the spoil pile in his testimony and that the pile is not indicated on R-11, his diagram of the excavation. Moreover, the standard presumes the hazard of a cave-in, and the CO's opinion, when considered with this presumption and the record in this case, is simply more persuasive than that of Rausch. I find the serious characterization appropriate, and this citation item is affirmed as a serious violation.

The proposed penalty for this item is \$3,000.00. The record indicates that the initially-proposed penalty was \$5,000.00, that reductions of 30 and 10 percent, respectively, were given due to the company's size and lack of history of previous violations, and that no reduction for good faith was given because, *inter alia*, the condition was a high-gravity violation. (Tr. 8-9; 32-34; 49). *See also* R-1, Forms OSHA-1B. In light of the record as a whole, I conclude that the proposed penalty is appropriate; accordingly, the proposed penalty of \$3,000.00 is assessed.

Citation 1 - Item 1

This item alleges a violation of 29 C.F.R. 1926.651(j)(2), which provides as follows:

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 (.61m) 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.

The record establishes that the spoil pile on the north side of the excavation was not set back 2 feet from the edge as required by the standard; the record further establishes that the spoil pile was a serious hazard because, if the walls had caved in, the pile would have fallen into the excavation and onto the employees. (Tr. 15-16; 29-31). Rausch offered nothing to rebut the Secretary's evidence with respect to the existence of the alleged violation, and its contention that the violation was not serious is rejected for the same reasons set out above. This item is therefore affirmed as a serious violation, and the proposed penalty of \$2,100.00, which is based on an initially-proposed penalty of \$3,500.00 and the same reduction factors noted *supra*, is assessed.

Conclusions of Law

1. Respondent, Rausch Construction Company, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(2).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1 and 2 of serious citation 1 are affirmed, and penalties of \$2,100.00 and \$3,000.00, respectively, are assessed.

Irving Sommer
Chief Judge

Date: