

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

BILRAN EXCAVATING COMPANY,

Respondent.

DOCKET NO. 98-0141

Appearances: For Complainant: Troy E. Leitzel, Esq. and Matthew J. Rieder, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, PA.; For Respondent: Michael A. Moore, Esq., Barley, Snyder, Senft & Cohen, Lancaster, PA.

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)(“the Act”). Respondent, Bilran Excavating Company, at all times relevant to this action maintained at a job site at Welsh Road, North Wales, Pennsylvania where it was engaged in excavation work. Respondent admits that it is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(a). Accordingly, Respondent is subject to the requirements of the Act.

On November 19, 1997, Respondent had created a trench for the purpose of the installation of a water line (Tr. 13, 80-81).¹ At approximately 10:45 a.m., Compliance Safety and Health Officer (“CO”) Mark Stelmack was driving on Welsh Road and observed an individual coming up out of the trench (Tr. 9). In light of the fact that OSHA had initiated a National Emphasis Program with respect to trenches and excavations, he stopped to inspect the protective system employed in the trench (Tr. 11). As a result of this inspection, on December 9, 1997, Respondent was issued one citation alleging a serious violation with a proposed total penalty in the amount of \$2,500.00. By timely Notice of Contest Respondent brought this proceeding before the Review Commission. A hearing was held before the undersigned on May 12, 1998. Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

SECRETARY’S BURDEN OF PROOF

The Secretary has the burden of proving his case by a preponderance of the evidence.

¹ “Tr” refers to the official trial transcript. “Ex.” refers to exhibits introduced into evidence..

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

CITATION 1, ITEM 1

29 CFR §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.

a) Waterline Installation Project, Welsh Road - Employees installing a waterline worked in a trench approximately 8.5 feet deep. No shoring nor other adequate protective system was used while employees were in the trench.

There is no dispute that the standard is applicable. The record contains un rebutted evidence that the cited trench was more than 5 feet in depth (Tr. 86). Section 1926.652(a)(1) requires the use of a protective system for excavations 5 feet or more in depth, and permits several alternatives to designing and installing various systems, described in §1926.652(b)[sloping and benching systems] and (c)[support systems, shield systems, and other protective systems]. It is Complainant's position that Respondent violated the cited standard because there was no protective system in the excavation made on November 17, 1997, that complied with the requirements of §1926.652 (b) or (c), and there were employees in the excavation

CO Stelmack testified that upon his arrival, he learned that the individual he had observed exiting the trench was the foreman of the job site, Clete Faus. He testified that Mr. Faus informed him that he was the competent person on site who would determine the soil type. However, he informed him that he had not done so at this trench (Tr. 10-11, 47-48). He also met the field supervisor of the job site, Kenneth Hertzog. Mr. Hertzog expressed to him that the slope of the trench appeared fine to him because the soil was tight (Tr. 14). CO Stelmack took measurements of the trench. The trench measurements were approximately 20 feet long, 8 1/2 feet deep, 2 1/2 feet wide at the bottom, and 7 1/2 feet wide at the top. The slope did not begin until 4 1/2 feet from the bottom of the trench and the upper portion of the trench was sloped to 58 degrees from horizontal (Tr. 14-17; Exs. G-1 and 2). CO Stelmack further testified that the trench was approximately 15 to 20 feet from Welsh Road where traffic was very heavy (Tr. 9, 19).

At the time of the inspection, Respondent was in the process of connecting the water line which they had just installed to the existing water line. They had come to the end of the water line where the trench was to cross under the road and were installing a pipe from the valve to the plug end of the line which was comprised of two pieces of pipe connected together with a cap on one end of the line. The two pieces of pipe had been connected together and then lowered into the trench at the valve site by a mechanical means (Tr. 22, 84-85). CO Stelmack testified that he had observed Mr. Faus exit the trench from the west end of the trench where the "T" and valves

were located (Tr. 21). CO Stelmack took a soil sample from spoil pile from the trench. He put the sample into a plastic bag and eventually forwarded it to the OSHA lab in Salt lake City for analysis (Tr. 22-23). The results of the sample indicated that the soil was Type B (Tr. 25). The maximum allowable slope of Type B soil is 45 degrees, 29 C.F. R. Pt. 1926, Subpt. P., App. B, Table B-1. In order for the trench to have met the requirements for Type B, the width across the top of the trench should have been 19 1/2 feet, instead of the 7 1/2 feet measured (Tr. 27).

The Secretary's expert in soil classifications, Dr. Alan Peck, analyzed the soil sample and determined the soil as Type B. He found the sample indicative of a cohesive or clay type with fissures present (Tr. 59- 65, Exs. G-5 to 7). He also opined that the traffic in the roadway depicted in the videotape (Ex. G-3) would cause vibrations in the trench which would weaken the strength of Type A soil, and thus, Type A soil would be downgraded to Type B (Tr. 67-68, 71).

In light of the fact that CO Stelmack learned that no sampling of the soil had been conducted prior to the entering the trench, he determined that Respondent should have sloped the walls of the trench in accordance with specifications for Type C soil - no steeper than 1 and 1/2 horizontal or 34 degrees measured from the horizontal. *Id.* at Table B-1; 29 C.F.R. §1926.652(b)(1)(ii). The walls of the cited trench were 58 degrees. The width across the top of the trench should have been 27 feet (Tr. 27). Furthermore, for either Type B or C soil, there is no allowance for any vertical sides prior to the beginning of the slope (except for cohesive soil), and thus, the slope should have began at the very bottom of the excavation.

Respondent presented the testimony of Kenneth Hertzog. He testified that both he and Mr. Faus were competent persons at the job site on the day of the inspection (Tr. 81). He testified that the trench varied in depth. It was 8 1/2 feet at the end of the pipe, and 6 1/2 feet at the valve area. He performed no calculations of the slope (Tr. 86). He stated that on the day a visual observation of the soil indicated that it was tight and cohesive. The Respondent had been on this job site 2 to 3 months prior to the instant inspection. He testified that he had initially determined that the soil was Type A or "a very high" Type B. He then made a daily visual classification as they were going along the project and would occasionally roll it in a ball to be sure it was cohesive. He also relied upon the competent person on site (Tr. 87, 90-91). He testified that Mr. Faus would have determined the configuration of the trench as it was dug on the day of the inspection (Tr. 88). On the morning of the inspection he had been at the job site, however, they had not dug the trench by the time he left (Tr. 89). He acknowledged that the traffic on Welsh Road was "fairly heavy" (Tr. 90). The Respondent also presented the testimony of Timothy Hess, field operations manager for Respondent. He visited the worksite in late October 1997, and based upon his visual observation, classified the soil as Type A (Tr. 100-01). He also visited the worksite about a week after the subject inspection. The trench had been backfilled. He conducted a manual review of the soil with a pocket penetrometer in the area immediately surrounding the pipe valve and determined that the soil was Type A. He testified that he did not believe the traffic from Welsh Road would affect the stability of the trench because rubber tires were against the road which was layered with asphalt which was on top of a layer of concrete (Tr. 111).

The record establishes that no shoring materials were present at the trench (Tr. 29). When an employer elects to protect employees by sloping several options are available. Section 1926.652(b)(1), *Option 1* requires the sloping of the sides of a trench at an angle not steeper than

1 1/2 horizontal to 1 vertical (34 degrees measured from the horizontal), unless the employer uses another option described in the standards. Section 1926.652(b)(2) permits sloping or benching in accordance with Appendices A and B in Subpart P. When the employer elects to use sloping *Option 2*, soil classification per the requirements of Appendix A, is mandatory. Appendix B contains the specifications for sloping and benching where an employer designs a protective system under §1926.652(b)(2). The undersigned finds that the Secretary presented un rebutted evidence that on the day of the inspection, a visual and manual analysis of the soil had not been performed by Mr. Faus nor Mr. Hertzog. Thus, the requirements at *Option 2* were not available to Respondent. Where an employer fails to conform a trench in accordance with the Appendices A and B, which mandate soil classification, the slope of the trench must conform to the requirements for a trench in Type C. *See* 29 C.F.R. §1926.652(b)(ii). The undersigned finds that the slope of the cited trench did not meet the requirements for Type C soil. Again the slope measured 58 degrees as opposed to 34 degrees. The undersigned also notes that the slope did not meet the requirements for Type A or B soil. Additionally, the undersigned finds that the record reveals that the subject trench was subject to vibrations from traffic, and thus, a Type A soil classification was not appropriate.²

The undisputed presence of the foreman, Mr. Faus in the trench establishes employee exposure. The depth of the trench at both ends was greater than 5 feet. Mr Faus acknowledged to CO Stelmack that he was aware of the OSHA standards (Tr. 12). His admitted knowledge of the standards governing trenching standards establish actual knowledge of the violative condition. His knowledge is imputed to the Respondent in view of his supervisory capacity.³ Accordingly, the Secretary has established a prima facie violation of the cited standard by a preponderance of evidence.

SERIOUS CLASSIFICATION

Section 17(k) of the Act, 29 U.S.C.. §666(k) of the Act, provides that a violation is “serious” if there is “a substantial probability that death or serious physical harm could result” from the violation. In order to establish that a violation should be characterized as serious, the Secretary need not establish that an accident is likely to occur, but must show that an accident is possible and it is probable that death or serious physical harm could occur. *Flintco Inc., 16 BNA OSHA 1404, 1405 (No 92-1396, 1993)*.

CO Stelmack testified that serious physical harm death would result from the hazard of a trench failure (Tr. 29). The Review Commission has recognized that “[i]f a cave-in occurred in an 8-foot deep trench, it is clear that there is a substantial probability that the likely result would be death or serious physical harm.” *DiGioia Brothers Excavating Inc., 17 BNA OSHC 1181, 1183 (No. 92-3024, 1995)*, citing *Trumid Construction Co., 14 BNA OSHC 1784, 1789 (No. 86-1139, 1990)*. The undersigned finds that the serious nature of the aforementioned citation has been

² The undersigned finds Mr. Hess’s reasoning with regard to this issue unpersuasive in light of the heavy flow of traffic on Welsh Road.

³ Review Commission precedent has established that actual or constructive knowledge of the employer’s foreman or supervisor can be imputed to the employer. *Jersey Steel Erectors, 16 BNA OSHC 1162 (No. 90-1307, 1993)*.

established by the Secretary.

PENALTY

Once a contested case is before the Review Commission, the amount of the penalty proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties “due consideration” must be given to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These “penalty factors” are: the size of the employer’s business, the gravity of the violation, the employer’s good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation 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. *J.A. Jones, supra*.

CO Stelmack testified that the gravity of the violation was high. He testified that he determined that the severity of the expected injury was fatal. He determined that the probability of an injury occurring was greater because of the heavy traffic flow from Welsh Road which presented potential vibration in the excavation which had not been properly sloped (TR. 30). These factors resulted in a \$5,000.00 gravity-based penalty. This penalty was adjusted to reflect the small size of the Respondent and for a lack of any serious violations in the past 3 years. In light of the high gravity, no adjustment was given for good faith. The undersigned finds that the record supports the aforementioned findings, and that the proposed penalty in the amount of \$2,500.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing, it is hereby ORDERED that:
Citation 1, Item 1, alleging a violation of 29 C.F.R. §1926.652(a)(1) is Affirmed as a serious violation with a penalty of \$2,500.00.

Dated:

Covette Rooney
Judge, OSHRC
Washington, D.C.