

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

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SECRETARY OF LABOR, :  
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 Complainant, :  
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 v. :  
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 THE RYAN COMPANY, INC., :  
 :  
 Respondent. :

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OSHRC DOCKET NO. 98-0565

APPEARANCES:

Troy E. Leitzel, Esquire  
Philadelphia, Pennsylvania  
For the Complainant.

Stewart S. Manela, Esquire  
Washington, D.C.  
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”). On January 29, 1998, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a work site in Philadelphia, Pennsylvania, where Respondent, The Ryan Company, Inc. (“Ryan”), was engaged in excavation work for the purpose of installing utility lines; as a result, OSHA issued Ryan a serious citation alleging a violation of 29 C.F.R. 1926.652(a)(1) and an “other” citation alleging a violation of 29 C.F.R. 1926.251(e)(8)(iii). Ryan contested both of the citations, and the hearing in this matter was held in Philadelphia, Pennsylvania, on November 19, 1998. Both parties have submitted post-hearing briefs.

The OSHA Inspection

On January 29, 1998, at about 9:00 a.m., Bruce Jones, a business agent of the Operating Engineers Union (“the Union”), visited the subject site, which was located on the Philadelphia Naval Base; Jones observed workers in an unprotected excavation that appeared to him to be in unstable

soil and over 6 feet deep, and, when no one would tell him who was in charge, he photographed the excavation, had the film developed, and took the photos to OSHA that morning.<sup>1</sup> Around noon that same day, Albert D’Imperio and Scott Cassidy, two compliance officers (“CO’s”) from OSHA’s Philadelphia office, went to the site. No one was in the excavation at that time, and the area Jones had observed had some backfill over the water pipe that had been installed. CO D’Imperio conducted an opening conference with Joseph Benoit, Ryan’s project superintendent, and the CO’s interviewed him and other Ryan employees at the site. The CO’s also videoed the excavation, and CO D’Imperio measured it. According to his measurements, the excavation was 67 feet long and 44 inches wide, and the depth in the area where Jones had seen the employee was 4.5 feet. The depth at the end of the water pipe, which was about 20 feet away and at the north end of the excavation, was 5 feet 2 inches; however, the employees told the CO’s they had not worked in that area of the excavation.<sup>2</sup> The CO’s took no soil samples because both Benoit and Edward Green, Ryan’s “competent person” at the site, agreed that the soil was Type C. (Tr. 5-17; 33-60; 63-67; 71-73).

#### Serious Citation 1

This item alleges a violation of 29 C.F.R. 1926.652(a)(1), which requires employees in excavations to be protected by adequate protective systems, such as sloping or shoring, unless (i) the excavation is made entirely in stable rock, or (ii) the excavation is less than 5 feet deep and examination by a competent person provides no indication of a potential cave-in. To establish the alleged violation, the Secretary has the burden of showing that the standard applied to the cited condition, that the employer violated the terms of the standard, that employees were exposed to the violative condition, and that the employer had actual or constructive knowledge of the violation; to meet her burden, the Secretary must prove all four elements by a preponderance of the evidence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

It is clear from the language of the citation, and CO D’Imperio’s testimony, that the citation refers to the area of the excavation that D’Imperio measured to be 5 feet 2 inches deep, which, as

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<sup>1</sup>Jones visited the project from time to time because it was a Union job; however, Ryan did not employ any Union members for its work at the site. (Tr. 7-8; 25-26).

<sup>2</sup>The only employees the CO’s saw in the excavation were at its south end; the excavation at that end was about hip-deep, and the employees were tamping down backfill. (Tr. 68; 72-73).

noted above, was at the north end of the 20-foot water pipe that had been installed. (Tr. 43-45; 54). However, both CO's testified that no one was in that part of the excavation when they were there and that all of the employees they spoke to said they had not worked in that area of the excavation. (Tr. 43-45; 53-54; 68; 71-73). Further, although the record shows that there was a shovel at the end of the pipe where CO D'Imperio took his measurement, as well as an upright board imbedded in the soil, these factors, without more, do not establish that employees had worked in that area. (44; 49-52; 59; C-7). The shovel could have been dropped inadvertently into the excavation, and Joseph Benoit's testimony that the board was part of the shoring that had been put in, and then removed, to support the walls while the water pipe was being installed, was consistent with the statements that Ryan's employees made to the CO's during the inspection.<sup>3</sup> (Tr. 59; 93-94; 97; 108). Finally, the Secretary essentially concedes her failure to show that employees worked in that part of the trench; in her brief, she states that she "is not limited to proving employee exposure at the exact location where the 5' 2" measurement was taken," and she then goes on to address the area of the excavation measured to be 4.5 feet deep.<sup>4</sup> *See* Secretary's brief, pp. 9-10. Based on the record, the Secretary has not demonstrated employee exposure with respect to the part of the excavation referenced in the citation.

As to the other area of the excavation at issue, the Secretary contends that the testimony and photographs of Bruce Jones, together with CO D'Imperio's measurements, establish a violation of the cited standard. I disagree. Jones, a Union business agent, was hardly a disinterested witness, especially in view of his testimony that he spoke to Ryan before the project began to request that it employ Union members. (Tr. 25-26). Further, as Ryan notes, Jones' photos are not probative of the depth of the excavation. Photos C-1 and C-2, which show two employees in the excavation, one at the far end and the other closer to the photographer, best illustrate this point. In both photos, the excavation appears to be just over the head of the worker at the far end. However, in C-1, the top of the excavation seems to be somewhere between the head and shoulders of the closer worker, while in C-2, a close-up view, the top of the excavation looks as though it is even with that worker's mid-

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<sup>3</sup>Benoit said that shoring is installed and removed from the top of the excavation. (Tr. 96-98).

<sup>4</sup>The Secretary's counsel made basically the same statement at the hearing, when the undersigned questioned him about which area the citation referenced. (Tr. 109-10).

section.<sup>5</sup> Although I will not address the many points set out in R-6, a written report made by a photographic evidence examiner retained by Ryan, I concur with the examiner's conclusion that the actual depth of the excavation cannot be ascertained by Jones' photos. Finally, in light of my findings in regard to the photos, and my findings below, Jones' and D'Imperio's estimates of the height of the worker shown at the far end of the excavation in C-1-2 are of no moment. (Tr. 23-24; 45-46; 60).

As to the 4.5-foot measurement, CO D'Imperio testified he obtained it by putting his tape measure down into the excavation and "on top of the pipe, and on top of some of the fill that was on there." (Tr. 43-44). Benoit indicated the pipe was 8 inches in diameter, which, added to 4 feet 6 inches, equals only 5 feet 2 inches. (Tr. 92). Moreover, while the CO testified about the backfill in the excavation, he never stated how much was on top of the pipe and whether he pushed the tape measure through the backfill and onto the top of the pipe to take his measurement. Even more significantly, the CO testified that he derived his measurement at the north end of the excavation by observing "where the top of the excavation hit the tape [measure]." (Tr. 44-45). Based on this testimony, and assuming he measured the 4.5-foot area the same way, it would appear the CO made his depth measurements at an angle. Joseph Benoit, who has been in the construction industry for 30 years, testified he was present during the CO's depth measurements and that this was in fact what happened. He said that the CO's measurements were inaccurate because they were taken diagonally, rather than vertically, and he explained that the proper way to measure the depth was to place a board across the top of the excavation, put the tape measure down to the bottom, and, while holding it in a straight line, measure up to the center of the board. (Tr. 76-77; 92-93; 102-03).

I conclude the Secretary has not met her burden of proving a violation of the cited standard. First, she made no attempt to rebut the testimony of Benoit set out above, and it is axiomatic that a vertical measurement, as Benoit described it, would be not only shorter than a diagonal measurement but also a more accurate measure of the depth. Second, Ryan offered extensive evidence of its safety practices and the safety training employees receive; in particular, Benoit testified about how the piping was installed at the site, the shoring systems and trench boxes that were used, and the fact that Ryan employees are constantly instructed to not enter unprotected excavations that are more than

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<sup>5</sup>In C-6, which shows only the closer employee, the top of the excavation appears to be about even with that employee's waist.

5 feet deep.<sup>6</sup> (Tr. 77-100). Third, I agree with Ryan that where, as in this case, the CO's depth measurement is only 2 inches over 5 feet, the possibility for error can seriously undermine the accuracy of the measurement; I also agree that where, as here, the evidence fails to clearly establish the depth of the excavation, the citation should be vacated. The Secretary contends the citation must be affirmed, even if the excavation was under 5 feet deep, as Ryan did not show that a competent person examined it for indications of a potential cave-in. This contention is rejected. Benoit testified that Edward Green, Ryan's competent person, was available whenever work was being done in the excavation and that he examined the excavation for safety at least three times a day; Benoit also testified that workers were required to check with Green before entering the excavation. (Tr. 83-84; 90-91). On the basis of the record before me, and for the foregoing reasons, this citation is vacated.

"Other" Citation 2

This citation alleges a violation of 29 C.F.R. 1926.251(e)(8)(iii), which requires synthetic web slings having "[s]nags, punctures, tears or cuts" to be immediately removed from service. The basis of this citation was a sling the CO's observed that had cuts, snags and abrasions in it. The CO's testified that the employees told them that the sling was used to remove shoring timbers from the excavation as well as to move and/or direct the timbers; D'Imperio noted that Jones' photos showed a sling being used to install a pipe, although he did not know if it was the cited sling, while Cassidy said the sling was not used for lifting heavy or overhead loads and that this was why the citation was issued as "other" rather than serious. (Tr. 48-49; 54-56; 69-70; 73-75).

Joseph Benoit testified that the slings at the site, when new, were rated for 15,000 pounds; he also testified that new slings were used for lifting pipes and other loads, and that when the slings became worn they were used only for removing shoring timbers. Benoit explained that the timbers were embedded in the excavation during shoring and that to pull them out required a sling and a crane or backhoe; he further explained that after a timber was pulled out, the sling was removed, and that employees then took the timbers and stacked them by hand. Benoit noted that the timbers weighed only 45 pounds apiece, and he indicated that while the cited sling was not suitable for lifting loads it was suitable for removing the shoring timbers. (Tr. 97-99; 103).

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<sup>6</sup>Benoit testified the piping was laid at a depth of about 4 feet 9 inches, but he agreed he probably told the CO's the excavation was "around 5 feet." (Tr. 91-92; 101-03).

In light of the foregoing, Ryan was not in violation of the cited standard. CO Cassidy himself testified that the employees stated that they had used the cited sling “mostly” for pulling the shoring timbers out of the excavation. (Tr. 70). Moreover, Benoit’s testimony about how worn slings were utilized at the site was credible, and, in my opinion, it rebutted the CO’s testimony about the cited sling being used for actual lifting; as I see it, the CO’s more than likely simply misunderstood what the employees told them. Finally, I agree with Ryan that the degree of the defect should be reasonably related to the use of the sling, and I conclude, based on the evidence of record, that the Secretary has not shown that employing the sling to pull 45-pound timbers out of the excavation represented a hazard justifying the issuance of the citation. This citation is accordingly vacated.

#### Conclusions of Law

1. Respondent, The Ryan Company, Inc., 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 not in violation of 29 C.F.R. §§ 1926.652(a)(1) and 1926.251(e)(8)(iii).

#### Order

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

1. Serious citation 1 and “other” citation 2 are VACATED.

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Irving Sommer  
Chief Judge

Date: