

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. :
:
PICKUS CONSTRUCTION AND :
EQUIPMENT COMPANY, INC., :
:
Respondent. :

OSHRC DOCKET NO. 99-0331

APPEARANCES:

Leonard Borden, Esquire
Chicago, Illinois
For the Complainant.

Louis W. Brydges, Jr., Esquire
Waukegan, 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”). On July 21, 1998, the Occupational Safety and Health Administration (“OSHA”) inspected a work site in Round Lake, Illinois, where Respondent (“PCE”) was engaged in trenching activities that were part of a renovation project (“the Project”) taking place in downtown Round Lake. As a result of the inspection, OSHA issued PCE a citation alleging a serious violation of 29 C.F.R. 1926.652(a)(1). PCE contested the citation, and this matter was designated for E-Z Trial pursuant to Commission Rule 203. The hearing in this case was held in Chicago, Illinois, on June 22, 1999. Both parties have submitted post-hearing briefs.

The OSHA Inspection

OSHA Compliance Officer (“CO”) Anthony Smith went to the site on July 21, 1998, after his office received a complaint indicating that the trenching operation was in violation of OSHA

standards; Smith arrived at the site around 1:30 p.m., at which time he observed an employee who was doing grading work in the excavation with a shovel.¹ The CO spoke to George Papadakis, the PCE job site foreman, who told him the employee worked for PCE, and the CO learned later that the employee was Ted Papadakis, the foreman's brother. CO Smith measured the depth of the trench and found it to be 6 feet deep; he also picked up a sample of the soil in the trench, and, by performing a penetration test with his thumb, found the soil to be Type B. The CO determined that PCE had violated the cited standard because the trench was over 5 feet deep and an employee had been working in it without any cave-in protection. (Tr. 40-50; 60-62).

The Cited Standard

29 C.F.R. 1926.652(a)(1) provides 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.

It is undisputed that there was no cave-in protection in the area of the trench where the CO saw Ted Papadakis working. The Secretary contends that PCE violated the standard because the unprotected trench was over 5 feet deep. PCE, however, contends the trench was less than 5 feet deep. Alternatively, PCE contends the violation was due to unpreventable employee misconduct.

Whether the Trench was Over 5 Feet Deep

Brian Galassini, the engineer who was in charge of the administration of the Project and whose company developed the contract specifications, testified the trench at the site was 470 feet long and 3 feet wide. He further testified the specifications required the water piping being installed to have a minimum cover of 6 feet and that, due to the 12-inch width of the piping and the bedding it rested on, the trench would have been excavated to about 7.4 feet. Galassini indicated that the water main construction began on July 15 and took about a month, that he visited the site almost

¹Patrick Walker, a lieutenant with the Greater Round Lake Fire Protection District, called OSHA on the morning of July 21, 1998, after observing the trenching operation; Walker also took C-1, various photos of the operation he had seen that morning. (Tr. 5-10).

daily during this period, and that the trench depth met the specifications. He also indicated that he had measured the trench twice, both times after July 21; he measured from the top of the pavement covering the soil down to the top of the piping, and the depth was at least 6 feet.² (Tr. 11-27; 34-39).

CO Smith testified that he measured the trench depth twice, once shortly after speaking to the foreman and again around 3:00 p.m., when Robert Schiller, the company's safety director, arrived at the job site. The CO said he measured the depth with a ruler, that he measured from the bottom of the trench up to the top of the soil, and not to the top of the pavement, and that his measurements revealed a depth of 6 feet. The CO also said that his second measurement was done in the presence of Schiller, who agreed that the depth of the trench was 6 feet. (Tr. 45-47; 62-66).

In comparing the testimony of the Secretary's two witnesses, I note that Galassini and the CO arrived at the same 6-foot depth measurement, despite the fact that Galassini's measurements included the layer of pavement covering the soil while the CO's measurements did not. However, it is clear from the record that Galassini did not take his measurements on the same day or in the same area where the CO took his measurements. (Tr. 16-27; 32-35; 45; C-3). Moreover, the CO testified that the pavement was less than 12 inches deep, and Galassini's testimony indicates not only that he was unsure of the pavement's depth but also that his measurements revealed that the trench was over 6 feet deep. (Tr. 18-20; 36-39; 65). I conclude that the Secretary has made a prima facie showing that the trench was 6 feet deep where the CO observed the employee working.

As rebuttal, PCE presented the testimony of Brian Oberle, the company's construction safety specialist.³ Oberle testified he was at the site daily, that he was there from about 6:30 to 7:30 a.m. on July 21, and that he returned around 3:00 p.m. upon learning of the inspection. Oberle further testified that he and Schiller used the CO's tape measure to measure the trench; they found it to be 62 inches deep, but, given the 12 to 16 inches of pavement over the soil, the actual depth of the trench itself was 4 feet. Oberle indicated that there was a 4-foot cover requirement in the specifications, that there were many changes to the plans, and that cover requirements at trenching

²Galassini marked his measurements as "A" on page 3 of C-3, a diagram of the trench; he marked as "B" on C-3 the area depicted in C-1. (Tr. 21-27).

³Oberle left PCE near the end of 1998, when he began working as a safety consultant for a contractor's organization. (Tr. 92).

sites were not always strictly followed. Oberle also indicated that the CO never said anything about issuing a citation in regard to the employee working in the trench. (Tr. 91-100; 112-16).

PCE also presented the testimony of Robert Schiller, the company's safety director, who arrived at the site at about the same time as Oberle. Schiller's testimony indicated he did not observe either the CO's or Oberle's measurement of the trench. Schiller's further testimony was that the CO neither asked him to abate any hazard nor told him he had seen workers in a trench over 5 feet deep and that OSHA at no time, including the closing conference on December 16, 1998, advised the company that it would be cited for the condition of the trench. (Tr. 207-12).

Based on the foregoing, I note that Oberle's testimony conflicted with Schiller's in one significant regard; in particular, Oberle indicated that Schiller participated in measuring the trench, while Schiller indicated he did not even see Oberle's measurement. (Tr. 99; 112-13; 207-08). I note also that the testimony of Schiller conflicted with that of the CO, in that Schiller indicated he did not observe the CO's measurement, whereas the CO testified Schiller was there when he measured the trench and agreed it was 6 feet deep. (Tr. 46-47; 207-08). Finally, I note that Oberle's testimony was contrary to that of Galassini and to the specifications themselves, which the Secretary presented as part of her case; as Galassini noted, the specifications set out a 6-foot cover requirement, and it was his observation that the requirement was met at the site. (Tr. 13-27; 98-99; C-2-3).

In addition to the above, the CO testified that no one at the site said anything to him about having taken measurements showing that the trench was less than 6 feet deep. (Tr. 225-26). While Oberle indicated that he did not tell the CO about his own measurement because he did not believe the trench depth was an issue, I find this testimony unpersuasive. (Tr. 113). I also find unpersuasive the testimony of Oberle and Schiller to the effect that the CO never stated that PCE might be cited for the condition of the trench, especially since the CO went to the site specifically because of the complaint OSHA had received about the trench. (Tr. 113; 208-12). In any case, I observed the demeanor of CO Smith as he testified and found his statements consistent, convincing and credible. For this reason, and those set out *supra*, the CO's testimony is credited over that of Oberle and Schiller. The Secretary has accordingly established a violation of the cited standard.⁴

⁴In so concluding, I have considered R-3, a portion of the CO's videotape of the site, which
(continued...)

Whether the Violation was due to Unpreventable Employee Misconduct

As noted above, PCE contends that the violation was the result of unpreventable employee misconduct. To meet this affirmative defense, an employer must demonstrate that it (1) had established work rules designed to prevent the violation, (2) had adequately communicated the work rules to employees, (3) had taken steps to discover violations of the rules, and (4) had effectively enforced the rules when violations were discovered. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). As the Secretary points out, a supervisor's misconduct is strong evidence of a lax safety program and makes the defense more difficult to prove, since it is the supervisor's duty to protect the safety of the employees under his supervision. *See L.E. Myers Co.*, 16 BNA OSHC 1037, 1041 (No. 90-945, 1993), and cases cited therein.

Pursuant to an administrative subpoena, PCE delivered to OSHA numerous documents having to do with its safety program. *See* C-4. Upon reviewing C-4, CO Smith noted that George Papadakis, the job site foreman, had been issued several warning letters but had not been disciplined. He therefore concluded that the company's disciplinary procedures were lax, and he so testified at the hearing. (Tr. 50-53; 57-58; 66-73; 86-88). I agree, for the reasons that follow.

Exhibit C-5 consists of various of the documents making up Exhibit C-4. Pages 5 and 6 of C-5 are PCE's safety rules, and rule number 22 on page 6 states, in relevant part, that "[n]o employee will enter a trench or excavation that has not been properly sloped or shored."⁵ Pages 36 through 45 of C-5 are PCE's procedures for excavations and trenching. Page 41 contains essentially the same language as the cited standard, and pages 42 through 44 describe soil classification and protective systems to be used, including sloping, shoring, shield systems and trench boxes; page 45 discusses "competent person" responsibilities.

⁴(...continued)

was viewed at the hearing, and R-4-6, photos that Schiller took at the site on July 21. However, the CO testified that the employee depicted in R-3 was not the basis for his determining that there was a violation, and R-4-6 have been withdrawn from evidence due to the failure of PCE to provide copies to the Secretary. (Tr. 91; 111-12). Regardless, in light of my credibility findings *supra* and the record as a whole, R-3-6 provide no basis for changing my conclusion in this case.

⁵Each page in C-5 has a number appearing at the bottom right-hand corner, which are the numbers the CO stamped on the documents in C-4. (Tr. 52-53).

Page 60 of C-5 is a copy of page 2 of PCE's safety rules; the bottom of the page shows the signature of George Papadakis and is dated September 27, 1997.⁶ The certification appearing above his signature states as follows:

I have read and agree to follow the General Safety Rules as written above. Deliberate violations of these rules is sufficient cause for disciplinary action, including suspension or termination of employment. I have read and understood the above rules and have been supplied a copy of this document.

Page 360 of C-5 is a letter dated May 28, 1998, signed by an official of the Construction Safety Council, advising that George Papadakis successfully completed the NUCA Competent Person Course on September 15, 1994.

Despite the foregoing, C-5 contains 12 documents in which PCE officials memorialized safety problems on sites where George Papadakis was foreman.⁷ These are summarized as follows:

1. May 28, 1998 "Certificate of Re-Training" -- States that after a May 27, 1998 OSHA inspection of a PCE work site, Brian Oberle gave a "very detailed, site specific training lecture" to George Papadakis and crew, which included Ted Papadakis. The training addressed, *inter alia*, trench protection and competent person responsibilities.

2. May 28, 1998 Memo from Brian Oberle to George Papadakis -- Written follow-up to the training held earlier that day. Instructs Papadakis to comply with OSHA standards and to use his competent person training in regard to "trench shoring, sloping and benching." Warns Papadakis that "[y]our failure to do so can and may result in your replacement."

3. June 1, 1998 Memo from Brian Oberle to James Pickus [vice-president of Pickus] -- Written documentation of a further discussion with George Papadakis regarding excavation safety on May 29, 1998. States that the failure of Papadakis to work safely "will not be tolerated," that "he must be forced to follow these guidelines," and that "[c]ontinued and constant surveillance will be needed to ensure George follows my direction...."

4. June 4, 1998 "Record of Disciplinary Action and Training" -- States that he (Oberle) "[o]nce again, on ... June 3, 1998" observed George Papadakis' crew not complying with safety requirements; specifically, a trench about 8 feet deep was not sloped. Oberle notes that he told Papadakis that if work under his direction is not "totally safe ... he will not work for this company any longer." Oberle also notes that "I will continue to document this negative performance, but feel something more drastic must be done to avoid unnecessary safety exposures."

⁶Pages 61-63 of C-5 are copies of page 2 of the safety rules signed by three other employees, including Ted Papadakis.

⁷These documents are pages 343 through 353 and page 355 of C-5.

5. June 11, 1998 Memo from Robert Schiller to Brian Oberle and George Papadakis -- Written documentation of discussion earlier that day in which Papadakis told to “make positively sure” that no employee enters a trench “unless it is in 100% OSHA compliance.” States that if Papadakis cannot work safely, “he will be replaced immediately, without hesitation.” Also states that he (Schiller) and Oberle will inspect the operation daily and that “[i]t is apparent that George Papadakis’ safety training must be updated to ensure ... total OSHA compliance.”

6. June 22, 1998 Memo -- Documents training session Brian Oberle conducted on June 19, 1998 for George Papadakis and crew, including Ted Papadakis. States that a “very detailed training session” was held about trenching and excavation and that all employees were instructed to comply with applicable OSHA regulations and company policies and procedures; employees were also warned that “[f]ailure to comply with PCE safety rules would result in termination....”

7. July 2, 1998 “Employee Warning” submitted by Brian Oberle -- Documents Oberle’s presence when Robert Schiller gave George Papadakis a “very serious employee warning to comply with company and OSHA [trenching] safety rules, or look for another job.” Oberle states he is documenting conversation to show he is continuing to scrutinize crew and that he “will in no way be held responsible should this crew cause an accident or receive citations.” Oberle also states that he has “recommended that this foreman be replaced, and it has not happened.”

8. July 7, 1998 Memo from Brian Oberle to Don Cox, Site Superintendent -- Reiterates that Oberle has had problems with George Papadakis as to trenching safety. States that “George must be forced to follow established safety procedures/guidelines/OSHA regs. or find a sewer foreman that will....I have been unable to get through to George the seriousness of his failure to comply....”

9. July 16, 1998 “Near Miss Incident Report” from Brian Oberle to James Pickus -- States that Oberle was forced to stop work at job site due to unsafe conditions, which included two unprotected trenches 7 and 12 feet deep. July 20, 1998 Update -- Notes that trench box and metal plates were delivered to site for use in trenches, that George Papadakis was given “yet another warning,” and that recommendation is to “find a replacement for the foreman position on this crew.”

10. July 17, 1998 “Employee Warning” submitted by Brian Oberle -- Documents meeting James Pickus held with George Papadakis and project manager in regard to unsafe trenching activities; Papadakis was advised that further disregard of safety rules would not be tolerated. Also documents Oberle’s own opinion that Papadakis needed to be replaced.

11. July 21, 1998 Memo from James Pickus to Robert Schiller -- Advises that due to “poor performance on this job site, Don Cox will be acting as site superintendent until this project is finished....No unsafe conditions will be tolerated during excavation work and Don will be personally responsible for ensuring safety compliance.”

12. September 16, 1998 Memo from Brian Oberle to James Pickus, Robert Schiller, John Porter [project manager], George Papadakis -- Documents phone call from PCE work site that PCE employees had been seen riding in backhoe bucket and being lifted out of trench by backhoe. States that “[t]his type of unsafe behavior is inexcusable, and I look forward to talking with George and that entire crew in the near future.”

Page 356 of C-5, dated September 17, 1998, is a memo from James Pickus to Robert Schiller, John Porter and Brian Oberle. The subject of the memo is "George Papadakis and Ted Papadakis." The memo reads as follows:

At 5:00 P.M. today, George Papadakis and Ted Papadakis were terminated from Pickus Construction & Equipment Co., Inc. George Papadakis and Ted Papadakis have been reprimanded on several previous occasions. They have been given continuous safety training and George has been certified as a competent person. Their continuous disregard for company safety rules and regulations is obvious. Employee misconduct will not be tolerated at Pickus Construction & Equipment Co., Inc.

Although Brian Oberle and Robert Schiller testified at length in an effort to downplay George Papadakis' refusal to comply with PCE's safety rules, I find that the documents summarized above speak for themselves. Based on those documents, PCE was well aware of the failure of George Papadakis to follow its safety rules regarding trenching protection before work began at the subject site on July 15. In fact, items 1 through 8 above show that PCE gave Papadakis at least five separate warnings dating from May 28 to July 2, and while each of the warnings indicated that further violations of the rules would result in termination, PCE took no such action. PCE was also aware that Papadakis was not following its rules at the subject site before the OSHA inspection. Items 9 and 10 show that PCE gave Papadakis two more warnings, one on July 16 and another on July 17, due to unsafe conditions on July 16. The conditions, which included two unprotected trenches 7 and 12 feet deep, were sufficiently serious to cause PCE to stop work at the site. However, despite the prior warnings and the two new warnings indicating that further noncompliance would not be tolerated, Papadakis was still the job site foreman and was still not following PCE's trenching protection rules on the day of the inspection. Although PCE made Don Cox responsible for the site after the inspection, the company did not dismiss Papadakis until September 17, 1998, after a further safety infraction at another site.

PCE notes certain testimony of Oberle and Schiller in support of its position that it did in fact effectively enforce its work rules. Taken together, the testimony of Oberle and Schiller was that George and Ted Papadakis were sent home for three days when the subject job was shut down, that they were also demoted to lesser positions, and that George Papadakis was not a foreman on the job from which he was fired. Their further testimony was that George Papadakis was not dismissed earlier for several reasons, *i.e.*, there were days he did a good job and they thought he was "coming

along,” it was difficult to find a replacement, and PCE did not want to be sued. Oberle and Schiller indicated that George Papadakis was removed from the subject job because he had been extremely rude and adversarial with the CO; they also indicated that while there was no documentation of it, Ted Papadakis was verbally warned several times for not following PCE’s rules before he was fired.⁸ (Tr. 125-31; 140-44; 154-55; 185; 188-90; 201-02; 208; 214-22).

In considering the above testimony, I note first that the entire crew, and not just George and Ted Papadakis, was sent home July 16. (Tr. 185). I note also the lack of documentation as to the demotion of the two brothers and the failure of Ted Papadakis to follow PCE’s work rules. I find this lack of documentation significant, in light of the company’s records of the performance of George Papadakis, and the testimony of PCE’s witnesses indicating that PCE did not document the performance problems of laborers does not persuade me otherwise. (Tr. 141-44; 218). Finally, I note that while the CO agreed he had a confrontation with George Papadakis, the testimony of Oberle and Schiller suggesting this was the main reason he was taken off the job was not convincing in view of the rest of the record. (Tr. 46-47; 188; 221-22). Regardless, the evidence in this case clearly demonstrates that PCE did not effectively discipline George Papadakis and that it continued to employ him long past the point that was reasonable, and the explanations of Oberle and Schiller do not justify PCE’s failure to dismiss him earlier. Based on the record, I conclude that PCE did not effectively enforce its work rules and that it has failed to prove the defense of unpreventable employee misconduct. Its asserted defense is accordingly rejected, and this citation item is affirmed as a serious violation.

Penalty Assessment

The Secretary has proposed a penalty of \$3,000.00 for this citation item. CO Smith testified that the penalty was based on the size, good faith and history of PCE. (Tr. 61). In light of this testimony, I conclude that the proposed penalty is appropriate and it is accordingly assessed.

⁸Schiller testified that while he would have left anyway because he and his brother worked as a team, Ted Papadakis was fired because he had the same disregard for proper professional behavior that George Papadakis did. (Tr. 220-21).

Conclusions of Law

1. Respondent, Pickus Construction & Equipment 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 in serious violation of 29 C.F.R. 1926.652(a)(1).

Order

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

1. Item 1 of Citation 1 is AFFIRMED, and a penalty of \$3,000.00 is assessed.

Irving Sommer
Chief Judge

Date: 4 OCT 1999