

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.

REVOLI CONSTRUCTION CO., INC.,

Respondent.

OSHR DOCKET NO. 99-1550

APPEARANCES:

For the Complainant:

Kevin E. Sullivan, Esquire, U.S. Department of Labor, Office of the Solicitor,
Boston, Massachusetts

For the Respondent:

Barrett A. Metzler, CSP, Northeast Safety Management, Inc., Columbia, Connecticut

Before: Administrative Law Judge Ann Z. Cook

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) 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 a trenching site of Revoli Construction Co., Inc. (“Revoli”), on May 27, 1999, in Wilmington, Massachusetts. As a result, Revoli was issued one serious and one “repeat” citation. Revoli contested the citations, and a hearing was held in Boston, Massachusetts on March 2, 2000.

The Secretary alleges, and Revoli does not deny, that it is an employer engaged in trenching work and related activities. (Answer ¶ III.). It is undisputed that Revoli was engaged in trenching activities at the time of the inspection, and Revoli does not deny that it uses tools, equipment and supplies that have moved in interstate commerce. I find that Revoli is engaged in a business affecting interstate commerce. I also find that Revoli is an employer within the meaning of section 3(5) of the Act and that the Commission has jurisdiction over the subject matter and the parties.

THE BURDEN OF PROOF

To establish a violation of a standard, the Secretary has the burden of proving, by a preponderance of the evidence:

(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 (*i.e.*, 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).

INTRODUCTION

On May 27, 1999, Compliance Officer ("CO") John Yanovitch stopped his car along Route 38 in Wilmington, Massachusetts to investigate a Revoli trenching operation at the side of the road. Two employees, Shaun Kelley, a laborer, and Joseph Jacobs, the foreman and backhoe operator, were attempting to locate a 12-inch water main. As the CO approached, he saw and photographed Kelley climbing out of the trench. After identifying himself to the employees, the CO measured the depth of the trench in three locations, obtaining measurements of 4.5 feet, 5.5 feet, and 7.5 feet. There was no protective equipment in the trench, which was 10 to 11 feet wide and 10 to 14 feet long. One side of the trench was sloped with a slight bench about 2 feet above the floor. After examining the soil and noting that it had been previously excavated to install the water main, the CO concluded that the soil was Type B. The lab report of the sample he took confirmed that the soil was Type B, noting in addition that it was "borderline Type C." (Tr. 37-89, 92-110, 112-29; CX-5-12).

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.651(c)(2)

The Secretary alleges that Revoli failed to provide a safe means of egress from the trench in violation of section 1926.651(c)(2), which provides as follows:

Means of egress from trench excavations. A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

Revoli concedes that the trench was 4 feet deep and that the standard is applicable. However, it contends that it provided both a ramp and a ladder and that the Secretary has not shown that Kelley's egress was by an unsafe means.

Kelley climbed out of the trench by placing a knee on a telephone conduit near the top of the unsloped trench wall and exiting from there. The CO measured the distance between the conduit and trench floor to be 4.5 feet, while Jacobs, the foreman, estimated it to be no more than 3 feet. The CO surmised that Kelley had stepped on a rock or something else to boost himself up to the conduit and then pushed himself up with one hand. Kelley, who is 5 feet 11 inches tall, denied doing so and testified that he had no difficulty exiting as he did, which both he and Jacobs considered safe. The CO testified that Kelley's egress was unsafe as he could have slipped or fallen backwards into the trench, and he observed that the wall was unsloped and in unstable soil that could have given way. (Tr. 43-45, 60- 62, 68, 103-05, 112-13, 117-18, 129; CX-6-9). I find the CO's assessment of Kelley's exit more convincing than that of the employees, who were not well versed in trenching requirements and seemed to place little importance on the soil's condition and lack of sloping. (Tr. 104, 116-17). I also find Kelley's credibility compromised by his testimony that he exited by walking out in front of the backhoe, which was in direct conflict with the rest of the record. (Tr. 122-23).

Revoli's assertion that a ladder or ramp provided safe egress is rejected. It is undisputed that there was no ladder in the trench when Kelley climbed out. That one was taken later from a nearby truck and placed in the trench does not alter the fact that there was no safe means of egress when the CO arrived at the site. (Tr. 44, 99, 113-14). I also reject Revoli's assertion that there was a ramp at the end of the trench immediately in front of the backhoe that provided safe egress. The CO did not testify that there was a ramp providing suitable egress, as Revoli represents. In fact, the CO testified to the contrary, explaining that a ramp leading out of an excavation must rise steadily and require no climbing to be acceptable. The CO observed that to exit in front of the backhoe, Kelley would have had to jump up onto the trench benching, and Revoli offered no evidence to counter this testimony. (Tr. 67-68).

The Secretary has established Revoli's noncompliance with the cited standard and the exposure of its employee to the hazard of slipping, falling or being injured by a wall collapse. Because the violation took place in plain view of its foreman, the Secretary has also established Revoli's knowledge of the hazard. The violation was serious, in that the condition could have resulted in serious injuries such as broken bones or injury to the head. Item 1 of Citation 1 is accordingly affirmed as a serious violation.

ALLEGED “REPEAT” VIOLATION OF 29 C.F.R. 1926.652(a)(1)

The Secretary alleges that Revoli violated section 1926.652(a)(1), based on the measurements the CO took, Kelley’s presence in the trench, the instability of the soil and the lack of any protective system in the trench. The cited standard provides as follows:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraphs (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.

Revoli contends that the trench was less than 5 feet deep where Kelley was and that he was not exposed to a cave-in hazard. The company maintains that Kelley was the only employee to enter the trench and that he did not go into any areas that were deeper than 5 feet. The company also maintains that there is no evidence showing that the footprints in other parts of the trench were Kelley’s and suggests that one of the policemen directing traffic on the road entered the pit to relieve himself while Jacobs and Kelley were on a lunch break. Kelley testified that when the CO observed him, he had entered the trench from the shallower end in front of the backhoe, located the water main gate box, marked it with a shovel, and exited. There was already a shovel in the trench when he entered, indicating he had been in the trench earlier, but there is no evidence as to how many times he had entered or what he had done. (Tr. 59-60, 95-98, 120-22). Revoli also disputes the CO’s measurements, arguing that because the water main was supposed to be 5 feet deep and it’s gate box had just been uncovered, the trench must have been less than 5 feet deep. However, there is no evidence that the water main was, in fact, no more than 5 feet below the ground level.

The Secretary contends the CO’s measurements show the trench was more than 5 feet deep and that it is reasonable to assume that, since Kelley was charged with locating the main and the first area excavated was the deepest, the footprints there and throughout the trench were those of Kelley. The CO testified he took measurements at three different locations where he saw footprints on the trench floor, using a metal measuring tape and dropping it as close to the trench wall as possible. His measurement of the trench from the top of the conduit to the bottom of the trench was 4.5 feet, while his measurements to the right and left of this area, towards the backhoe and away from the backhoe,

respectively, were 5.5 feet and 7.5 feet, from the top to the bottom of the trench. (Tr. 43-44, 52-58, 73-76, 80-81, 127-29). Jacobs indicated the CO's measurements were inaccurate, testifying that the CO lowered the tape at an angle. He said his own measurement of the area where Kelley climbed out, from the floor of the trench up to the street level, was 4.5 feet, while the CO's 4.5-foot measurement was from the floor only up to the conduit. Jacobs did not measure the area that the CO measured as being 5.5 feet, but he maintained the CO stuck the lower end of the tape into the 1-foot-deep hole that Kelley had dug around the water main gate box. Jacobs testified that he thought the depth of the trench was 4.5 feet at one end and almost 7 feet at the other end. (Tr. 94, 103-06).

I find the Secretary has established a violation of the standard. Had the CO's measurements been as careless as Jacobs testified, I believe Jacobs would have measured the other two areas as well as the conduit area. The CO's testimony was direct, consistent, and credible. The photographic evidence was of minimal help in judging the trench's depth. However, Exhibits C-5-7 show a shovel 3 to 3.5 feet in height stuck in the ground about a half foot, which tends to support the CO's measurements. According to Jacobs, the area the CO measured to be 5.5 feet deep was where Kelly dug out the gate box. Given that task and the shovel left there from a previous entry, I find it more plausible the footprints in the 7.5-foot area were also those of Kelley. I conclude that Revoli failed to comply with the standard and exposed Kelley to a cave-in hazard. I also conclude that employer knowledge is established, based on the foreman's presence, and that the violation was serious in that a cave-in could have caused serious injury or death. Finally, I conclude the violation was "repeated." The evidence shows, and Revoli concedes, there are two final Commission orders showing prior violations of the same standard. (Tr. 19-24; CX-2-4). This item is affirmed as a "repeat" violation.

PENALTIES

Section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history and good faith when determining penalties. The gravity of the violation, generally the most significant factor, depends upon such factors as the number of employees exposed, duration of the exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary has proposed a \$2,100.00 penalty for the serious violation and a \$15,000.00 penalty for the "repeat" violation. She has assessed the severity of both violations as high, because

of the likelihood of death or serious injury in the event of a trench collapse, and the only reduction she has given has been for the small size of Revoli's business. The Secretary notes that Revoli has a history of noncompliance, having been cited for trenching violations in November 1996 and again in April 1998, when a trench collapsed and partially buried two employees. (Tr. CX-2-4).

I agree with the Secretary's gravity assessment. The chance of a cave-in was greatly increased by the unstable soil, which was borderline Type C soil, and by the vibration of the nearby heavy traffic. (Tr. 40-41.) That only one employee was exposed for a brief time is outweighed by the high probability of the unsloped sides collapsing and by the lack of a safe means of egress. Revoli's recurring failure to adhere to OSHA's trenching standards also weighs heavily in penalty assessment. I conclude that the proposed penalties are appropriate, and they are accordingly assessed.

FINDINGS OF FACT

The foregoing constitutes my findings of fact in accordance with Federal Rule of Civil Procedure 52(a). Any proposed findings of fact inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to section 10(c) of the Act.
2. Revoli was in serious violation of 29 C.F.R. 1926.651(c)(2), and a penalty of \$2,100.00 is appropriate.
3. Revoli was in "repeat" violation of 29 C.F.R. 1926.652(a)(1), and a penalty of \$15,000.00 is appropriate.

ORDER

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

1. Citation 1, Item 1 is affirmed as serious, and a penalty of \$2,100.00 is assessed.
2. Citation 2, Item 1 is affirmed as "repeated," and a penalty of \$15,000.00 is assessed.

Ann Z. Cook
Judge, OSHRC

Dated: 8 AUG 2000
Washington, D.C.