

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Purler-Cannon-Schulte, Inc.,

Respondent.

OSHRC Docket No. **04-0524**

Appearances:

Aaron Rittmaster, Esq., U. S. Department of Labor, Office of the Solicitor, Kansas City, Missouri  
For Complainant

Mr. Robert J. Cannon, Vice President, Purler-Cannon-Schulte, Inc., St. Charles, Missouri  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

On January 15, 2004, Purler-Cannon-Schulte, Inc. (PCS), a utility contractor, was installing a new underground sewer line along Forder Road, Oakville, Missouri, when the worksite was inspected by a safety compliance officer with the Occupational Safety and Health Administration (OSHA). As a result of the inspection, PCS received a repeat citation on February 23, 2004. PCS timely contested the citations.

The repeat citation alleges that PCS violated 29 C.F.R. § 1926.652(a)(1) by failing to provide cave-in protection for an employee in an excavation approximately 11 feet deep. A penalty of \$6,000.00 is proposed. The repeat classification is based a prior citation issued to PCS on November 29, 2001.

The hearing was held on September 13, 2004, in St. Louis, Missouri. Jurisdiction and coverage are stipulated (Tr. 5, 7). PCS is represented *pro se* by its vice-president, Robert Cannon. PCS denies the alleged violation and argues that the excavation was not unsafe.

As more fully discussed, the alleged violation of § 1926.652(a)(1) is affirmed and a penalty of \$3,000.00 is assessed.

### The Inspection

PCS is an apparent family-operated business engaged in the installation of underground sewer lines in Missouri. PCS employs approximately 40 employees and its office is in St. Charles, Missouri (PCS's Answer; Tr. 27).

On January 15, 2004, PCS's crew, under the supervision of foreman Dale Purler,<sup>1</sup> was installing a new 72-inch inside diameter storm sewer line along Forder Road, Oakville, Missouri (Exhs. C-3, C-5; Tr. 11, 45-46, 79). PCS's project was part of the Forder Road extension to add a center lane to the existing two-lane road (Tr. 79-80). The project began in October 2003 with St. Louis County (Tr. 48, 78). The PCS crew consisted of foreman Purler, two laborers including Purler's son, two traffic flagmen, an excavator operator, and a skid load operator (Tr. 78). Foreman Purler was also the competent person on site (Tr. 56, 85).

At approximately 12:30 p.m., the OSHA area office received an anonymous complaint about an unsafe excavation along Forder Road (Tr. 10-11). OSHA safety compliance officer Joe Czaicki was assigned the inspection and he arrived at the Forder Road site at approximately 1:00 p.m. (Tr. 44). The excavation ran along one side of Forder Road approximately 7 feet from the road (Tr. 15). Upon arriving, Czaicki observed foreman Purler in the bottom of the excavation raking gravel bedding and aligning a section of sewer pipe (Exh. C-3; Tr. 14, 69, 82).

The excavation measured 22 feet wide at the top and approximately 20 feet long (Tr. 49, 59). The south wall, which was closest to Forder road, was 11 feet high and according to Czaicki, was within 5 degrees of vertical (Tr. 36, 49). A bundle of underground fiber optical cables was seen running along the south wall approximately 6 feet from the bottom of the excavation (Tr. 71). The north wall, which Czaicki considered adequately sloped and benched, was approximately 12 feet high (Exhs. ALJ-1, Tr. 49-50, 51). The bottom of the excavation was approximately 11 feet wide (Tr. 50, 69). Based on a soil analysis by the OSHA's laboratory in Salt Lake City, the soil was classified as Type B soil (Tr. 31). Czaicki observed foreman Purler working within 5 feet of the south wall (Tr. 64).

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<sup>1</sup> Dale Purler is the nephew of one of the owners (Tr. 78).

Foreman Purler told Czaicki during the inspection that he thought the excavation could be sloped better but he did not feel it was unsafe. He believed that if there was a cave-in, he would be able to get inside the 72-inch sewer pipe (Tr. 17).

Based on Czaicki's inspection, PCS was issued the repeat citation on February 23, 2004.

#### *Discussion*

The Secretary has the burden of proving a violation.

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 (*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).

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#### Alleged Violation

#### Serious Violation of 29 C.F.R. § 1926.652(a)(1)

\_\_\_\_\_The citation alleges that PCS failed to protect the south wall of the excavation from cave-ins by an adequate protective system. Section 1926.652(a)(1) provides that:

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.

PCS does not dispute the application of the excavation standard at § 1926.652(a)(1) to its sewer line project along Forder Road. The exceptions in subsections (i) and (ii) to § 1926.652(a)(1) involving stable rock or excavation less than 5 feet in depth are not applicable. PCS does not dispute that its excavation was in Type B soil, not solid rock (PCS's Notice of Contest, March 3, 2004).<sup>2</sup>

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<sup>2</sup> During the hearing, PCS attempted to compare the excavation to the no sloping exception for house basements and foundations (Tr. 33). However, clearly the excavation in this case was not for a house basement and the exception applies to excavations less than 7½ feet deep. *See* OSHA Memorandum to Regional Administrators dated June 30,

Also, it is noted that the bundle of fiber optics along the south wall indicates previously disturbed soil at least to the 5 foot depth (Exh. C-5). The record shows that the excavation was approximately 11 feet deep, substantially in excess of 5 feet in depth requirement of § 1926.652(a)(1) (Tr. 13, 49, 69).

The Secretary does not dispute that the north wall of the excavation was properly sloped or benched and asserts that only the south wall was in violation<sup>3</sup> (Tr. 14, 50).

Adequate protective systems recognized by § 1926.652 include sloping, benching, support systems, shield systems, and other protective systems. The record shows that the south wall of the excavation was not properly shored or sloped in compliance with § 1926.652(a)(1) at the time of OSHA's inspection. The south wall was within 5 degrees of vertical (Exhs. C-3, C-5; Tr. 13, 36). The maximum allowable slope for an excavation less than 20 feet is 45 degrees (Table B-1 in Appendix B to § 1926.652).

Foreman Purler's testimony that the south wall was benched is rejected (Tr. 71, 86). His testimony is contrary to PCS's stipulation (Tr. 7 and Secretary's Prehearing Statement B.1.d.). Purler's testimony is also specifically contradicted by Czaicki's testimony and by the photographs of the south wall (Exhs. C-3, C-5; Tr. 13, 36). Even if the south wall had some benching, it failed to comply with the requirements and foreman Purler acknowledged the lack of compliance during the inspection (Tr. 17, 71). The first of the alleged benching was more than 6 vertical feet above the bottom of the excavation instead of the maximum vertical side of 3½ feet above the bottom (Tr. 71, 86). *Also see* Figure B-1 in Appendix B to § 1926.652.

Any assertion that proper sloping or benching as not feasible because of the bundle of optic cables which ran along the south wall is rejected (Tr. 88-89). PCS waived the affirmative defense of infeasibility because it did not properly plead the defense.<sup>4</sup> *National Engineering & Contracting*

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1995.

<sup>3</sup> Although the north wall was adequately sloped, a violation of § 1926.652(a)(1) still exists if the south wall was vertical and the employee was not otherwise protected from cave-ins. See *Broshear Contractors, Inc.*, 16 BNA OSHC 2094, 2096 (No91-2125, 1994), aff'd 17 BNA OSHC 1609 (D.C. Cir. 1996).

<sup>4</sup> To establish the affirmative defense of infeasibility, an employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically

*Co.*, 16 BNA OSHC 1778, 1779 (No 92-73, 1994) (if an affirmative defense is not raised in the answer, it should not be considered). Also, the record fails to support the defense. Even if PCS had shown that the cables could not have been moved to allow for proper sloping or benching, there is no showing that other protective methods such as shoring or the use of shields could not have been utilized. The extenuating circumstances that prevent the use of one method of cave-in protection is no excuse for not choosing a different method that would provide the level of protection required by § 1926.652.

PCS's argument that the sewer pipe provided cave-in protection is not supported by the record. At the time of the inspection, foreman Purler was outside the pipe and there is no showing that he would have had sufficient time in an emergency to enter the pipe during a cave-in (Exh. C-3; Tr. 45, 82-83). Also, there is no evidence that the use of the sewer pipe for cave-in protection complied with the requirements of "other protective systems" to be within the manufacturer's specifications, recommendations and limitations or approved by a registered professional engineer. *See* § 1926.652(c). It is noted that the standard requires a continuous protective system to prevent cave-ins; not merely for emergency protection.

In addition to establishing the application and PCS's noncompliance with § 1926.652(a)(1), the record establishes employees' exposure and employer knowledge. There is no dispute that foreman Purler was standing in the bottom of the 11-foot excavation within 5 feet of the south wall (Exh. C-3; Tr. 45, 69). Purler testified that his son was also in the excavation standing on top of the sewer pipe while another section of pipe was being placed (Tr. 71, 83-84). Without an adequate protective system, both employees were exposed to a possible cave-in hazard.

Dale Purler was the PSC's foreman and competent person on site (Tr. 46, 78, 85). As foreman, his knowledge of the inadequately sloped or shored excavation is imputed to PSC. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (when a supervisory employee has actual knowledge of the violation conditions, his knowledge is imputed to the employer)

A violation § 1926.652(a)(1) is established.

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infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *Armstrong Steel Erectors*, 17 BNA OSHC 1385 (92-262, 1995).

### Repeat Classification

The Review Commission has long considered a violation as a repeated violation under § 17(a) of the Occupational Safety and Health Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979).

PCS does not dispute and the record shows that PCS received a serious citation for violation of 29 C.F.R. § 1926.652(a)(1) on November 29, 2001 at a worksite in Wentzville, Missouri (Exh. C-6; Tr. 21, 24). According to the OSHA worksheet, the excavation was 9 feet deep and not adequately sloped or otherwise protected from cave-ins (Exh. C-2). The worksheet also states that “the operator continued to work while the foreman/competent person watched and the laborer was in the unprotected trench.” Pursuant to an informal settlement, the citation became a final order on December 21, 2001.

A repeated violation of § 1926.652(a)(1) is established in this case.

### Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer’s business, history of previous violations, the employer’s good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

PCS is a small employer with less than 40 employees. PCS is not entitled to credit for history because it has received serious citations within the preceding 3 years (Exh. C-6). PCS is given some credit for good faith because it does maintain a written employee safety handbook (Exh. R-1).

A penalty of \$3,000.00 is reasonable for a violation of § 1926.652(a)(1). One employee was observed exposed to the south wall of the excavation. The employee was approximately 5 feet from the 11-foot vertical wall. However, the north wall was adequately benched. Although the compliance officer observed a truck on the road, he was unable to show that the road was a highly traveled road during the inspection (Tr. 26). Czaicki had lived in the area and classified the road as residential (Tr. 55). However, at the time of the inspection, PCS was exercising traffic control and the lane closest to the excavation was blocked (Tr. 56, 81).

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

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

**ORDER**

Based upon the foregoing decision, it is ORDERED that:

\_\_\_\_\_ Citation no. 1, item 1, alleged repeat violation of 29 C.F.R. § 1926.652(a)(1), is affirmed and penalty of \$3,000.00 is assessed.

/s/ Ken S. Welsch

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KEN S. WELSCH  
Judge

Date: November 26, 2004