

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

SECRETARY OF LABOR,

Complainant,

v.

D.W.K. CONTRACTORS, INC.,

Respondent.

DOCKET NO. 98-1948

Appearances:

Maureen Russo, Esquire
Maria L. Spitz, Esquire
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

Nathan Criste, Esquire
5301 Tollgate Road
Pipersville, Pennsylvania
For the Respondent

Before: Administrative Law Judge Covette Rooney

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”). Respondent, D.W.K. Contractors (“DWK”), at all times relevant to this action maintained a job site at 2775 Buck Road, Bryn Athyn, Pennsylvania, where it was engaged in trenching. DWK admits it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and that it is subject to the requirements of the Act.

On September 15, 1998, OSHA compliance officer (“CO”) Mark Stelmack conducted an inspection of DWK’s job site. As a result, on October 5, 1998, DWK was issued a citation alleging two serious violations with a proposed total penalty in the amount of \$1,500.00. DWK brought this matter before the Commission by filing a timely notice of contest, and a hearing was held before the undersigned on May 10, 1999, in Philadelphia, Pennsylvania. Counsel for the parties have submitted post-hearing briefs and reply briefs, and this matter is ready for disposition.

Background

DWK was engaged in installing a rainwater conductor system at the site. DWK began the job on September 14, 1998, by digging a trench about 5 feet long to expose an existing drainpipe located 12 feet from the field house at the site. This trench ran from the field house and toward a road that was parallel to the field house. At the time of the inspection on September 15, 1998, DWK had dug a second trench that was about 23 feet long; this trench was perpendicular to the first trench and was parallel to and midway between the field house and the road, and there was a spoil pile of excavated earth on either side of the trench. Upon arriving at the site, CO Stelmack held an opening conference with Steve McKenna, the general contractor's superintendent. During their walk-around, they came upon the two trenches; the first had been partially backfilled, while the second had a pipe laid in it with one end that was not yet connected to anything. The CO observed that one of the sidewalls in the second trench was higher than the other and that there was no protective system in that trench. McKenna told the CO that DWK was the subcontractor and that DWK's foreman, who was on a backhoe at the time, was the person in charge. The CO summoned the foreman, who introduced himself as Scott Price. Price told the CO that the new drainpipe in the second trench had been tied into the existing drainpipe in the first trench. Stelmack noted the sidewall he had observed in the second trench and asked what protective system had been used, and Price indicated no protective system had been used when they were doing the work. Stelmack also noted that the spoil piles were not set back 2 feet from the edge, and Price explained that there had not been much room to work in because of the curb that was adjacent to the trench and that he had had to dig across the trench. The CO took various measurements of the trench, and one of his depth measurements on the side with the higher sidewall was 8.5 feet.¹ (Tr. 22-39, 47-49, 89, 135, 223).

The Secretary's Burden of Proof

The Secretary has the burden of proving her case by a preponderance of the evidence. In order to establish a violation of an OSHA standard, the Secretary must show (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access

¹R-4 is the CO's sketch of the site, although Price made the red markings on R-4; the subject sidewall was on the side shown as "spoil pile #1" on R-4. G-2-4 are DWK's photos of the trench, and G-5 is the CO's video of it. (Tr. 24-28, 39-46, 53-57, 112-16, 135, 140-42).

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

Citation 1, Item 1a

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

The citation alleges as follows:

a) Asplundh Field House Site - Shoring or other protective systems were not used to protect employees from cave-in hazards when installing a roof drain connection at the site. The trench was excavated through a spoil pile thus increasing the depth of one side wall to approximately 8 feet 6 inches. An employee was thus exposed to a cave-in hazard on this side of the trench.

CO Stelmack testified that he took depth measurements from two locations on the field house side of the trench, indicated as "A" and "B" on photo G-2, and that these measurements revealed depths of 8.5 and 6 feet, respectively; he also took depth measurements from three locations on the other side of the trench, indicated as "C" on G-2, and these measurements revealed depths from 4.5 to 5 feet.² The CO said that his tape measure was essentially vertical when he took his depth measurements and that he rounded his measurements down to the nearest half foot to allow for uneven surfaces at the bottom. He also said his measurements in the "A" and "B" areas on G-2 were taken from the top of the spoil pile down. The CO noted the spoil pile on the field house side of the trench had been incorporated into the sidewall and that there was no delineation between the two. He accordingly made no determination as to where the grade level was when he took the "A" and "B" measurements, stating that "as far as [he] was concerned, grade was where [he] took the

²The 4.5 to 5-foot measurements were obtained by measuring down to the "shelf" or "bench" on which the gray telephone conduit, shown on the left side of G-2, rested; the very bottom of the trench in this area was a foot below the bench. (Tr. 32-34, 42).

measurements.”³ In this regard, the CO pointed out that the spoil pile on the road side of the trench had formed an “angle of repose,” the natural angle that earth makes when it is piled up, while the spoil pile on the field house side had no such angle. (Tr. 26-39, 42, 61-68, 98-101; G-2-5).

The CO further testified that based on what he learned during the inspection, an employee had been in the trench to uncover the telephone conduit, shown on the left side of G-2, and to install and connect the new drainpipe, shown on the right side of G-2. The CO said that the employee would have entered the trench at the shallow end, where the worker and the open end of the pipe are depicted in G-2, and that the trench was deeper at the other end, where the drainpipe was connected; he also said that his 8.5-foot measurement was approximately in the middle of the trench and that his 6-foot measurement was towards the area the connection was made and in the area where the employee would have used a shovel to uncover the telephone conduit. The CO noted that the employee had been exposed to a cave-in of the wall shown on the right side of G-2 because it was over 5 feet deep and there was no protective system in place. (Tr. 49-53, 68, 97-98, 121-23).

³Q Did you consider where grade level was when you were taking these measurements?

A No, as far as I was concerned, grade level was where I took the measurements to.

Q Can you explain what you mean by that?

A Well, yes. That was where -- that was in the area where I considered the top of the trench wall to be, on both the measurements for A and the measurements for B. That's where I considered the top of the trench wall to be.

Q Okay. And with regard to the grade that would have been or may have been the original grade before the excavation, did you make any determination as to where that would have been?

A No.

Q Is there anything about the conditions in the trench that would tell you where that might have been?

A No.

Q And in your opinion, does it matter where the original grade level was in this excavation?

A No.

Q And why is that?

A Because the areas where I measured, they were essentially part of the trench wall. There was no delineation between the top of the trench wall to where I measured it and what may or may not have been the ground level prior to the excavation. (Tr. 35-36).

DWK has stipulated that one of its employees worked in the trench referred to in Citation 1, Item 1a. *See* J-1, No. 11.⁴ However, it is clear from the language of the citation and the CO's testimony that the alleged hazard was the employee's exposure to the side of the trench where the CO obtained his 8.5 and 6-foot measurements. It is also clear that the CO obtained both of these measurements by measuring from the top of the spoil pile down to the bottom of the trench. DWK contends that the CO's manner of measuring the cited sidewall was improper and that the Secretary has not established the alleged violation. I agree, for the following reasons.

29 C.F.R. 1926.650(a) defines "trench" as "a narrow excavation ... made below the surface of the ground." The Commission has recognized that a trench's depth is properly measured from the original ground level. *Trumid Constr. Co., Inc.*, 14 BNA OSHC 1784, 1786 (No. 86-1139, 1990). The record in this case establishes that the CO's depth measurements of the cited sidewall were taken from the top of the spoil pile down to the bottom of the trench. He readily acknowledged he had no information as to the location of the original ground level on that side and that he took his measurements without regard to the original ground level. I find that it was improper for the CO to include the spoil pile material to determine the depth of the cited sidewall and that his measurements in this regard were inaccurate. I also find, in light of his measurements of the cited sidewall, that the CO's measurements of the other wall are suspect and not persuasive evidence that the trench was over 5 feet deep; this finding is supported by DWK's witnesses, who all testified that the trench was under 5 feet deep. (Tr. 166, 188, 203-08, 223-31, 239). Finally, G-3 and G-4 do not convince me the trench was over 5 feet deep. As the CO indicated, G-3 shows an individual in the deeper end of the trench holding a tape measure that is extended to over 6 feet, while G-4 show the same person in the conduit area holding a tape measure that is extended to over 5 feet. (Tr. 39-46). However, that the cited sidewall, shown on the left in G-3, appears to be over the top of the tape measure is of no moment as the CO never determined the ground level of the trench on that side. Moreover, as the CO did not specify where the ground level of the trench was on G-4, the location of the tape measure's 4-foot and 5-foot markers in that photo is meaningless. In any case, photographs can be misleading and provide a distorted view of a scene. On the basis of the record, the Secretary has not demonstrated the alleged violation. This citation item is accordingly vacated.

⁴Exhibit J-1 is a list of the parties' stipulations.

Citation 1, Item 1b

29 C.F.R. 1926.651(j)(2), the cited standard, provides as follows:

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The citation alleges as follows:

a) Asplundh Field House Site - Spoil piles were not kept at least two feet back from the edge of the trench. The spoil piles on both sides of the trench were placed right at the edge of the trench sides walls.

CO Stelmack testified that on both sides of the trench, the spoil piles were within 2 feet of the edges of the trench. He said that on the drainage pipe side, where the spoil pile was incorporated into the sidewall, there was an enhanced cave-in hazard because the pile consisted of material that was not compacted and was prone to sloughing off or rolling into the trench. He also said that on the conduit side, the angle of the spoil pile was such that the bottom of the pile was right at the sidewall. The CO stated that the average weight of soil is 100 pounds per cubic foot and that while he had not determined how much soil was in the piles there was enough to represent a serious hazard. He opined that the placement of the spoil piles increased the probability of a cave-in occurring because of the additional weight on the sidewalls. (Tr. 48-49, 68-73, 78, 118; G-2, G-5).

The preamble to the standard states that its intent is to protect employees from materials, equipment and spoil piles that might fall into excavations. The preamble notes that “[o]bviously, materials such as excavated soil ... can superimpose loads on the walls of an excavation ... [that] can be the cause of cave-ins.” The preamble further notes that “employers who encounter site conditions that do not permit a 2-foot set-back must use retaining devices to prevent materials or equipment from falling into the excavation.” 54 Fed Reg. 45894, 45925 (1989). The CO testified that it was his impression that the spoil piles could have been moved back or out of the area completely and that even if they could not have been, a protective system such as shoring or trench boxes could have been used to protect the employees working in the trench. (Tr. 82-83).

In view of the foregoing, which DWK did not rebut, the spoil piles were not set back 2 feet from the trench edges and no protective measures were used to prevent the spoil piles from falling

into the trench. Accordingly, I find that the cited standard applies to the circumstances of this case. I further find that the Secretary has demonstrated a violation of the standard. The record shows that on September 15, 1998, Price broke the gray telephone conduit while digging the trench and a DWK employee entered the trench to uncover the conduit to see what it was. DWK then contacted an electrician, who had the employee expose more of the conduit, after which the electrician went into the trench to repair the conduit. The new pipe was then put in and the DWK employee went back in the trench to connect the new pipe to the existing one. (Tr. 49-53, 79, 84, 121-22, 158-62, 166-67, 174, 199, 202). These tasks exposed the DWK employee and the electrician to the spoil piles and sidewalls, and although both individuals were in the trench for brief periods of time, their exposure was sufficient to establish the alleged violation. *See Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992); *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042 (No. 76-4765, 1981).

DWK has stipulated that one of its employees worked in the trench referred to in Citation 1, Item 1b, and that its management knew or could have known with reasonable diligence of the cited condition. *See J-1*, Nos. 10, 12. In addition, the testimony of Price and Joel Harris, DWK's general manager, clearly shows that DWK's management was aware that the spoil piles were placed at the edges of the trench because of space limitations. (Tr. 169, 227, 239-40). When a supervisory employee has actual or constructive knowledge of the violative condition, that knowledge is imputed to the employer. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-0862, 1993); *Dun-Par Eng'd Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986). This citation item is therefore affirmed.

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result." To establish a violation is serious, the Secretary need not show that an accident is likely, but, rather, that an accident is possible and that it is probable that death or serious physical harm could occur. *Flintco, Inc.*, 16 BNA OSHA 1404, 1405 (No. 92-1396, 1993). Based on the record, Item 1b was properly classified as serious. The photographs and video show a substantial amount of excavated earth at the trench's edge, and, as the CO testified, if a cave-in had occurred, serious physical harm or death could have resulted. (Tr. 79). Citation Item 1b is consequently affirmed as a serious violation.

Turning to the assessment of an appropriate penalty, the Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These

factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones, supra*. I find the severity of the violation in this case to be high because of the injuries that could have resulted from a cave-in. However, since the record does not establish that the trench was over 5 feet in depth, I conclude that there was a lesser probability of a cave-in and that a gravity-based penalty of \$2,500.00 is appropriate. I further conclude that adjustments for size and history are warranted, as DWK had only ten employees and no history of previous serious OSHA violations, and that no credit for good faith is due because the company provided no cave-in protection. In light of these conclusions, a penalty of \$1,000.00 is assessed for this citation item.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes my 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:

1. Citation 1, Item 1a, alleging a serious violation of 29 C.F.R. § 1926.652(a)(1), is VACATED.

2. Citation 1, Item 1b, alleging a serious violation of 29 C.F.R. § 1926.651(j)(2)652(a)(1), is AFFIRMED, and a total penalty of \$1,000.00 is assessed.

Covette Rooney
Judge, OSHRC

Dated:

Washington, D.C.