

Secretary of Labor,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 99-1264
Moniger Excavating, Inc.,	:	
Respondent.	:	EZ

Appearances:

Helen Schuitmaker, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Michael J. Brunton, Esquire
The Law Office of Michael J. Brunton
Collinsville, IL
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Moniger Excavating, Inc., is a corporation engaged in trenching and excavation contracting. The Occupational Safety and Health Administration (OSHA) conducted an inspection at respondent’s jobsite in Troy, Illinois, on June 7, 1999. As a result of this inspection, respondent was issued two citations.

Citation No. 1, item 1, alleges a serious violation of 29 C.F.R. § 1926.652(a)(1) as follows:

Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one-half to one:

- a) Jobsite, Highway 40 East, Troy, Il, trench opened from east to west, measuring 4 1/2 to 5 1/2 feet deep, approximately 40 inches wide, and no adequate protective system was in use, the sides were not sloped nor was any shoring in use in the trench.

Citation No. 2, item 2, alleges a violation of 29 C.F.R. § 1926.651(c)(2) as follows:

A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 ft. or more in depth so as to require no more than 25 ft. of lateral travel for employees:

- a) At the jobsite, where an open trench measuring approximately 50 ft. long,

and 4 1/2 to 5 1/2 deep, and 40 inches wide, had no safe means of egress available on site, such as a ladder, to enter and exit the trench.

Moniger filed a timely notice contesting the citations and proposed penalty. A hearing was held pursuant to the EZ trial procedures in St. Louis, Missouri, on October 5, 1999. At the conclusion of the hearing, a bench decision was issued vacating Citation No. 1, item 1, and Citation No. 2, item 1.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law, are attached hereto in accordance with 29 C.F.R. § 2200.209(f).

FINDINGS OF FACT AND
AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

- (1) Citation No. 1, item 1, is vacated and no penalty is assessed.
- (2) Citation No. 2, item 1, is vacated. No penalty was proposed, and none is assessed.

STEPHEN J. SIMKO, JR.
Judge

Date: October 29, 1999

1 where the lip is.

2 So, I kind of question the five-foot-six-inch
3 measurement in the first place. But, I think the only
4 direct evidence here is that there is no violation in
5 this case.

6 JUDGE SIMKO: All right. Give me about ten or
7 twelve minutes by myself, and I will enter a decision
8 at that time. Why don't you all come back at a quarter
9 to 12:00.

10 (Whereupon, a short recess
11 was taken off the record)

12 JUDGE SIMKO: We're back on the record. We took
13 a few minutes, and at this point I'm ready to enter a
14 decision in this matter.

15 This is an inspection that occurred at Respondent's
16 job site in Troy, Illinois, on Highway 40 East. It was
17 a trench construction job site. The trench in question
18 was to house a force main sanitary sewer line. This
19 line was to go approximately 5,000 feet.

20 The trench itself was approximately 40 inches wide,
21 four-inch PVC pipe, which may have been 13 to 20 feet
22 long, was to be installed in this trench. The depth of
23 the trench was scheduled to be approximately 48 inches.

24 The compliance officer, however, made three
25 measurements at one portion of the trench and found it

1 to be varying between four and a half and five and a
2 half feet, the three various measurements.

3 At the time the inspection occurred, it was
4 sometime between 3:00 and 3:30 p.m., the end of the
5 work day, which ends at 3:30. She determined the type
6 of soil to be varying between Type-B and Type-C soil.

7 No employee was observed in the trench at the time
8 of the inspection. Since it was the end of the work
9 day, a yellow tape, as shown in Exhibit C-1, was around
10 the end of the PVC pipe in the trench. At the time of
11 the inspection, only backfilling was being performed.
12 One employee was backfilling; one operator.

13 The area in question was open approximately 50 feet
14 in length. There was no ladder in the immediate area.
15 The walls of the trench were basically vertical. There
16 was no sloping or shoring.

17 The issues before me involve two items:

18 One is an alleged violation of 29 CFR Section
19 1926.652(a)(1). The citations allege that the trench
20 was open from east to west, measuring four and a half
21 to five feet deep, approximately 40 inches wide, with
22 no adequate protective system in use. The sides were
23 not sloped, nor was any shoring in use in the trench.

24 For Citation 1, Item I there was a proposed penalty of
25 \$600.00.

1 Citation 2, Item 1 alleges a violation of 29 CFR
2 Section 1926.651(c)(2), alleging that at the job site
3 where an open trench, measuring approximately 50 feet
4 long, and four and a half to five and a half feet deep,
5 and 40 inches wide had no safe means of egress
6 available on site, such as a ladder to enter and exit
7 the trench. There was no penalty proposed. This was
8 an alleged other violation. The first violation I
9 mentioned was an alleged serious violation.
10 Now, the burden in these cases falls on the
11 Secretary to prove violations of the Act.
12 Specifically, the Secretary must show that the standard
13 is applicable to the conditions; that the employer
14 failed to comply with the terms of the conditions; that
15 there was employee exposure or access to the hazard;
16 and that the employer had knowledge of the alleged
17 violation.
18 The first test as to applicability, I believe that
19 the construction standards are clearly applicable to
20 the trenching operation. The walls of the trench were
21 vertical.
22 We're now looking at the failure to comply with the
23 specific terms of the standards. This is where it gets
24 a little fuzzy. The walls were vertical. The
25 measurements by the compliance officer were basically

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1 undisputed. They may have been, I think the Respondent
2 admitted, they may have been up to five and a half feet
3 feet.

4 There is some question as to whether they varied
5 between 48 inches or four and a half feet or an
6 additional five or six inches was added by the teeth.

7 But, the problem area that I get into at this point is
8 the question of employee exposure.

9 During the hearing, which we've just completed, the
10 compliance officer testified that she saw no employees
11 in the trench.

12 The Respondent's president testified that there was
13 no reason for an employee to get into the trench; that
14 the job of a laborer is to measure the depth of the
15 trench. This is done from the ground level without the
16 necessity of entering the trench; that the pipefitter
17 puts the pipe together on the ground, belling it up on
18 the ground. And, then when a certain section gets
19 belled up, I believe, one of the operators testified
20 that in this instance, the pipefitter put together 60
21 to 80 feet of pipe on the ground and then rolled it
22 into the trench.

23 This was a forced main sanitary sewer system,
24 which I understand from the testimony, does not
25 require an employee to get into the trench to use a

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1 laser or to level this trench. It can vary in level
2 because the contents of the pipe are being forced
3 through the pipe.

4 It's not a gravity based system. On a gravity
5 based system, you have to sometimes get into the
6 trench to level it up and laser it to make sure you
7 have the right slope in the drop of the pipe so the
8 gravity can carry the waste away. In a forced system
9 it can vary.

10 There was no direct testimony that an employee was
11 in the trench, or was required to get in the trench, or
12 that ever got into the trench. It may have happened on
13 some unknown day.

14 There was, however, an interview conducted by the
15 compliance officer by telephone with an individual who
16 identified himself over the phone as Mr. Derrick
17 Donato. This interview was not conducted in person.
18 The individual did not give any positive identification
19 to the compliance officer that he was who he said he
20 was.

21 He indicated that he had been a laborer on the site
22 and that it had been in the trench. He indicated at
23 the time of the interview he was not then a current
24 employee of the Company.

25 Since he was not interviewed in person, so as to

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1 give a positive identification, there was no other
2 positive identification given to the compliance
3 officer, and this individual was not a current employee
4 of the Company, I award this testimony no weight.

5 There was also testimony that on occasion, at the
6 beginning of the work day, if the pipe is in the trench
7 as shown in Exhibit C-1, an employee might need to get
8 into the trench to pull the pipe out of there or put an
9 additional pipe on it, and then pull it out of the
10 trench for rework and to continue the work on the
11 ground level.

12 The uncontroverted testimony at the hearing was
13 that when this is done, the sides are benched back or
14 sloped back. This only takes about a minute to do.
15 It's a small trench, so it can easily be moved back
16 before the employee gets into the trench.

17 At the time of the inspection, there was no ladder
18 found at the site. There were also no employees that
19 were getting into the trench, or getting out of the
20 trench.

21 There was testimony that when the work is going on,
22 there is a ladder available; that the ladder is often
23 used to mark a point on the trench where backfill is to
24 be done, within this 50- to 100-foot area.

25 Given the facts of this case -- and this is a fact

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1 specific case -- with facts produced at the hearing
2 that have convinced me of this decision, I believe that
3 the Government had information in its possession when
4 the citation was issued to generally support the
5 citation as issued.

6 However, facts elicited at the hearing indicate to
7 me that the Government's position must fail with regard
8 to employee access or exposure on both alleged
9 violations. I find that there was a failure to prove
10 at the hearing employee exposure to Citation 1, Item 1,
11 and to Citation 2, Item 1, for the reasons I have
12 stated previously.

13 Both items are vacated, and no penalties are
14 assessed.

15 That will conclude the hearing at this time. Thank
16 you.

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18 (Whereupon, the proceedings were
19 concluded at 12:00 p.m.)

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