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SECRETARY OF LABOR,  
Complainant,

v.

KENKO, INC.,

Respondent.

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OSHRC DOCKET  
NO. 97-0925

APPEARANCES:

Steven E. Walanka, Esq., Office of the Solicitor, U.S. Department of Labor,  
Chicago, Illinois

Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, California

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor to affirm three items of a serious citation issued by the Occupational Safety and Health Administration to Kenko, Inc. for the alleged violations of safety regulations adopted under the Occupational Safety and Health Act of 1970. The matter arose after compliance officers for the Administration inspected a worksite of the Respondent, concluded that it was in violation of the regulations and recommended that a citation be issued. The Respondent disagreed with this determination and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Milwaukee, Wisconsin.

Item 1a of the citation charged that:

A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

a) Employees laying and connecting pipe in a trench 15' deep or greater with a slope of less than 1/2 to 1.

in violation of the regulation found at 29 C.F.R. §1926.651(c)(2) which reads as follows:

(2) *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 (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees.

At the hearing the lead compliance officer testified that a ladder was placed in the trench when the inspectors approached the area. He believed there was no adequate means of egress prior to the time the ladder was placed in the trench because the pile of dirt, loose soil, clumps, and obstructions impeded progress out of the trench. The Respondent asserts that without reliable evidence that the backfill material would not have safely supported the weight of an individual using it as a means of egress there was no basis for a conclusion that the material did not constitute a safe means of egress.

It appears that the individuals in the trench did not consider egress through the backfill unsafe because they worked there when no ladder was present. While the backfill may not be an ideal ramp, there was no showing that it was unsafe. Indeed, the people in the trench were apparently able to exit without a ladder. Further, no measurements were taken to establish that the “pile of dirt” was too vertical to be utilized as an egress instrument. Apparently the compliance officer did not use the dirt pile himself. There was no testimony to the effect anything prevented workers from walking up the backfill and out of the trench. Finally, the compliance officer admitted that he would have used the backfill as means of egress if necessary. The backfill may therefore be considered as a safe means of egress, and the Respondent has thus satisfied the regulation. Item 1a of the citation is therefore VACATED.

Item 1b of the citation alleged that:

Adequate protection was not provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face:

a) While employees were working in trench at least 15 feet deep with a slope of less than 1½ to 1.

in violation of the regulation at 29 C.F.R. §1926.651(j)(1) reading:

(j) *Protection of employees from loose rock or soil.* (1)  
Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove

loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

On this issue the compliance officer in command observed loose material, soil and rock on the face of the excavation. Photographs taken at the scene confirm that rocks and material appeared on the side of the trench. The officer's views and photographs are confirmed by the Respondent's superintendent who stated that he saw the same thing; that the backhoe operator had twenty years of experience; and that he should have known better. Indeed, the Respondent was directed to correct the situation and did so by arranging for a trench box to be delivered to the site.

The Respondent contends that there was no hazard because the movement of rocks and soil did not expose an employee to a significant injury. I do not agree that falling rocks and debris from a distance of fifteen feet or more would merely result in soil on one's work boots, as suggested by its counsel.

With respect to this item of the citation, the Secretary has established that there were loose rocks and soil on the side of the excavation. If an accident occurred, the

resultant injury could be serious, especially since the excavation was only four feet wide at the bottom. Accordingly, this item of the citation is **AFFIRMED**.

Citation 1, item 2 reads as follows:

29 C.F.R. §1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 C.F.R. §1926.652(c). The employer had not complied with the provisions of 29 C.F.R.

§1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

- a) Employees laying and connecting pipe in a trench 15' deep or greater with a slope of less than 1½ to 1.

in violation of the regulations at 29 C.F.R. §1926.652(c) and 29 C.F.R. § 1926.652(b)(1)(i) which provides:

- (c) *Design of support systems, shield system, and other protective systems.*

Designs of support systems shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (c)(1); or, in the alternative, paragraph (c)(2) ; or, in the alternative, paragraph (c)(3); or, in the alternative, paragraph (c)(4) as follows:

(b) *Design of sloping and benching systems.* The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3), or, in the alternative, paragraph (b)(4), as follows:

(1) *Option (1)--Allowable configurations and slopes.* (i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.

The compliance officers measured the cavity and found it to be 4 feet across at the bottom and 22 feet wide at the top. Its walls were approximately 15.33 and 11.4 feet deep. Respondent's cut sheets of the trench show the walls to be 13.3 and 11.78 feet deep. A government laboratory concluded that the soil was basically Class B. These findings require a trench width of approximately 29 feet. There is no question that the cavity was over 5 feet deep with confirmation in photographs depicting a worker whose head was well below the top of the trench and a tall ladder extending into its bottom.

Since the officers found the trench was only 22 feet wide at the top; and since the Respondent furnished no evidence to the contrary, the trench dimensions failed to meet the requirements of the regulation. I find, therefore, that the Respondent was in violation of the regulations. Although the Respondent has little faith in the calculations of the youthful Agency intern, there is nothing in the record to contradict his findings with respect to the width of the trench.

I also find that the Respondent knew or should have known of the violations in this portion of the citation, and that serious injury could result if an accident occurred.

In passing, I note that Respondent's brief charges that the Complainant has not established that the individuals in the trench were its employees. However, at no time prior to Respondent's brief was this defense advanced. Even Respondent's counsel repeatedly used the term "employee" when

referring to workers in the trench. (See page 113 of the transcript).

In sum, I conclude that the workers in the trench were in the employment of the Respondent; and that the Respondent was in violation of the regulations addressed in Citation 1, item 1b and item 2.

There appears to be no quarrel with regard to the penalties. Therefore a penalty of \$2,125.00 is assessed for the violation of Citation 1, item 1b and a penalty of \$4,250.00 for the violation of Citation 1, item 2.

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Sidney J. Goldstein  
Judge, OSHRC

Dated: