



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.	:	OSHRC DOCKET NO. 97-0241
	:	
TRINE CONSTRUCTION CORP.,	:	
	:	
Respondent.	:	

APPEARANCES:

Helen Schuitmaker, Esquire
 Chicago, Illinois
 For the Complainant.

Melissa Giannini, Esquire
 Oak Brook, Illinois
 For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 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 work site in Wheeling, Illinois, on January 23, 1997, where Respondent Trine Construction (“Trine”) was engaged in excavation; the site was part of a 3-mile water main project of the City of Wheeling, and Trine was the contractor on the project. As a result of the inspection, Trine was issued a repeat citation alleging that an excavation was not shored or properly sloped, in violation of 29 C.F.R. 1926.652(a)(1). Trine contested the citation, the case was designated an E-Z Trial case pursuant to Commission Rule 203(a), and the hearing in this matter was held on September 3, 1997.

The Relevant Testimony

Ron Payne, the OSHA compliance officer (“CO”) who inspected the site, testified that he saw the subject excavation from the road as he was on his way to another work site; the excavation was about 13 feet long and 11 feet wide, and, based on his later measurements, 8 to 9 feet deep except

for the south end, which was 6 to 7 feet deep. Payne further testified that the excavation walls were essentially vertical and that while no one was in it when he arrived he spoke to several people at the site, including Alan Miller, an engineer who was overseeing on the project, Octavio Celese, Trine's foreman, and Raul Buenrostro and Frank Pallimetti, two other Trine employees; Miller told him that Buenrostro had been in the excavation earlier that morning removing the soil from around the piping at the bottom, Celese told him they were going to be laying pipe in the excavation and that he had no plans to use protection as he believed it was safe, and Buenrostro and Pallimetti made statements consistent with that of Miller. Payne noted that the area where Buenrostro had been working was 8 to 9 feet deep, that the soil had been previously disturbed due to the piping that was already in it, and that his concern was that a cave-in could occur; he also noted that after discussing the matter further, Celese agreed to get a trench box from another site and use it in the excavation. (Tr. 4-32).

Alan Miller testified that he was the City of Wheeling's consultant inspector on the project, that Buenrostro had been in the excavation for five to ten minutes shortly before Payne's arrival, and that the excavation was 8 to 9 feet deep in the area where Buenrostro removed the soil around the pipe; he further testified that Buenrostro had also been in another area of the trench that was about 6 feet deep when he was probing for an additional pipe. Miller said the excavation walls were vertical, and that the soil had been previously disturbed due to prior excavations in the same area; he also said that no protection was used during Buenrostro's work, and that although Trine got a trench box to the site and used it later that day he had previously seen employees at other sites on the same project work in excavations over 5 feet deep without protection. (Tr. 32-39).

Discussion

29 C.F.R. 1926.652(a)(1), the standard cited in this case, 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 (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The record establishes, and Trine does not dispute, that the excavation was 8 to 9 feet deep except for the south end, that the sides were essentially vertical, and that no protection was used when Buenrostro was in the excavation. Trine contends, rather, that Buenrostro worked only in the

south end to probe for the additional pipe and that that end was only 3 to 4 feet deep. (Tr. 60-63). In support of this contention, Trine presented the testimony of Michael Rendina, Trine's project superintendent, and Frank Pallimetti. Rendina testified that the excavation had just been completed that morning, that no one had been in the 8 to 9-foot area before OSHA arrived, and that the company's intent had been to use shoring or trench boxes before proceeding. (Tr. 40-47). Pallimetti testified that Buenrostro had been only in the south end in order to probe for the pipe, that that area was 3 to 4 feet deep, and that there had been no need to be in the 8 to 9-foot area. (Tr. 49-59). However, Rendina conceded that he had not been at the site and had not seen the excavation. (Tr. 42; 48). Moreover, Pallimetti's testimony was not persuasive in light of that of Miller and the CO, which was consistent and convincing, and I find as fact that Buenrostro had been working in the unprotected excavation at a depth of 8 to 9 feet. I also find, based on the evidence that the soil had been previously disturbed, that Trine was required to use protection such as sloping, shoring or trench boxes. (Tr. 12-13; 36; 42-43; 52-59). *See* Appendices A through F to the standard.

The citation in this case has been characterized as a repeat violation. A violation is properly classified as repeated if at the time of the alleged violation there was a Commission final order against the same employer for a substantially similar violation. *See Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The CO testified that a citation issued to Trine in 1994 alleging a violation of 29 C.F.R. 1926.652(a)(1) had become a final order of the Commission and that C-1 was a copy of that citation. (Tr. 14-15). Michael Rendina testified that in settling the 1994 citation and paying a reduced penalty, Trine had not known the citation would stay on its record for three years. (Tr. 45-47). Regardless, on the basis of the record, Trine was in repeated violation of the standard.

The Secretary has proposed a penalty of \$2,800.00 for this citation. The CO testified that although the violation was serious, the gravity was not high due to the excavation's width and his opinion that a cave-in would likely have resulted in injuries such as broken bones and not a fatality; he also testified that the penalty was reduced in light of the company's size but that no further reductions were given because the violation was serious as well as repeated. (Tr. 16-17). In my view, the proposed penalty is appropriate, and it is accordingly assessed.

Conclusions of Law

1. Respondent Trine Construction Corporation is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in repeated violation of 29 C.F.R. 1926.652(a)(1).

Order

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

1. Item 1 of citation 1 is affirmed, and a penalty of \$2,800.00 is assessed.

Irving Sommer
Chief Judge

Date: