



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

GARDNER FIRE PROTECTION
Respondent.

OSHRC DOCKET
NO. 93-1462

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 11, 1994. The decision of the Judge will become a final order of the Commission on September 12, 1994 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before August 31, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: August 11, 1994

DOCKET NO. 93-1462

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

GARDNER FIRE PROTECTION,

Respondent.

OSHRC Docket No. 93-1462

APPEARANCES:

Leslie John Rodriguez, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. Thomas Gardner, President
Gardner Fire Protection
St. Petersburg, Florida
For Respondent *Pro Se*

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

On December 23, 1992, Gardner Fire Protection (Gardner) was engaged in the installation of sewer and fire hydrant lines at the KOA Campground in Seminole, Florida. On April 8, 1993, the Secretary of Labor (Secretary) issued a citation to Gardner alleging four serious violations of the Occupational Safety and Health Act (Act). The citations resulted from an inspection conducted by Compliance Officer Robert Chadwick. Gardner, represented *pro se* by President Thomas Gardner, contested the alleged violations and proposed penalties.

There is no dispute regarding jurisdiction or the basic facts in this case, and Exhibits C-1 through C-14 were received into evidence by stipulation. Gardner was installing sewer and fire hydrant pipe 18½ feet long by 8 inches in diameter at the time of the inspection. The pipe was placed in an excavation 36 to 38 inches in depth with 30 inches of cover. Cable was also placed in the excavation. At least three or four employees were on the worksite.

Mr. Gardner testified that on December 22, the day before the inspection, a water line was accidentally broken causing the excavation to become flooded. A pump was placed in the excavation which remained overnight. On the morning of December 23, it was necessary to redig most of the excavation, and an additional pump was used to remove water (Tr. 9-11, 55-56).

Alleged Violation of 29 C.F.R. § 1926.651(c)(2)

The standard, which pertains to the means of egress from trench excavations, provides as follows:

A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

The citation alleges that:

The excavation measured approximately 11 feet long by 12 feet wide and the depth of the excavation ranged from 4 feet deep to 6 feet deep and a ladder was not provided for safe access and egress, on or about 12/23/92.

Mr. Gardner admits there was no ladder in the excavation at the time of the inspection (Tr. 22). He contends, however, that the sides of the excavation were terraced while the work was being performed (Tr. 28).

Mr. Chadwick testified that he observed employee Robert Britt climbing out of the excavation, which measured approximately 4 feet deep (Tr. 38). Gardner agrees that at the time of the inspection the sides were not terraced, and no other safe means of egress was provided Mr. Britt at the 4-foot depth (Tr. 17, 29).

The violation occurred as alleged.

Alleged Violation of 29 C.F.R. § 1926.651(j)(2)

The standard, which pertains to protection of employees from loose rock or soil, requires that:

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.

Chadwick testified that the excavated soil was not placed at least 2 feet from the edge of the excavation. He stated the condition was more hazardous where Britt was working because the water had undermined the east wall (Exhs. C-3, C-4, C-5; Tr. 39-40).

In defense, Thomas Gardner explained that the soil placed on the bank was mostly excavated mud spread out to dry (Tr. 55-56). He further asserted that all of the excavating work had been completed, and Britt was simply in the shallow part of the excavation to briefly check a wire (Tr. 57-58).

The evidence clearly establishes the violation as alleged.

Alleged Violation of 29 C.F.R. § 1926.651(k)(1)

The standard, which pertains to inspections of excavations, states as follows:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

The citation alleges that:

Daily inspections prior to the start of work, and as needed throughout the shift, were not made of the excavation(s) for evidence of hazardous conditions:

a) Buena Vista Street, at the Seminole K.O.A. Campground, an inspection was not conducted to determine the extent of the hazards associated with working in the excavation after the broken P.V.C. water line caused severe erosion to the east side of the excavation wall, on or about 12/23/93 [sic].

Chadwick testified the standard was violated because the employee was in the excavation with the soil to the edge, and the wall was undermined (Tr. 43-44). He did not discuss the matter of daily inspections with Gardner (Tr. 44-45).

Thomas Gardner, with thirty years' experience, must be deemed a competent person within the meaning of the standard (Tr. 8). He testified that he inspected the worksite prior to beginning work on December 23 prior to Chadwick's arrival (Tr. 23-25, 30).

The evidence adequately establishes that a competent person conducted inspections in compliance with the standard. Since the standard does not place a duty on the employer after the inspections, it is not indicated in this case how Gardner failed to comply. Here, the evidence supports the contention that the work had been completed, and employees were not required to be in the excavation. In fact, it is shown Tom Gardner asked Britt what he was doing in the excavation (Tr. 58). For the purpose of the standard, the facts do not indicate employee exposure could be "reasonably anticipated."

The evidence fails to establish the violation as alleged.

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

The standard sets forth requirements for protection of employees in excavations and 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 (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The alleged violation is described in the citation as follows:

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 CFR 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) Buena Vista Street, at the Seminole K.O.A. Campground, the employee working in the north end of the excavation was working in depths ranging from 4 feet to 6 feet. The west wall of the excavation was cut to approximately 60 degrees from the horizontal and the east wall was approximately 80 degrees from the horizontal due to the water erosion, and no type of protective system was provided or utilized, on or about 12/23/92.

Mr. Chadwick testified that he took the measurements of the excavation. He determined the sides were not sloped to an angle of 36° as required by the standard (Tr. 46-47). Chadwick acknowledged that the area of the trench in which he observed Britt was approximately 4 feet in depth and contained water. No protection was provided (Tr. 29, 49).

The evidence establishes that the violation occurred as alleged.

Chadwick's testimony that employee Britt was in the trench without protection, and that sloping was not in accordance with the standard, is not denied. Although Britt was in an area less than 5 feet in depth, the exceptions to the standard do not apply. Tom Gardner, a competent employee, testified that there was sloughing or "breaking up" of the soil due to the broken water line (Tr. 27). This obviously created a condition for a potential cave-in.

The violations in this case are classified as serious. In this regard, section 17(k) of the Act provides as follows:

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The evidence shows that a collapse of the excavation walls could result in death or serious harm to exposed employees. In the determination of penalties, the Commission held that:

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, good faith, and prior history of violations. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, P. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J. A. Jones*, 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

Hern Iron Works, Inc., 16 BNA OSHC 1247, 1994 CCH OSHD ¶ 30,155 (No. 88-1962, 1994).

The record discloses Gardner had approximately five employees at the worksite, and one was exposed to the violative conditions. The area in which the exposed employee stood was not in excess of 4 feet in depth.

Gardner's good faith was shown by its compliance with the standards during the process of excavation and pipe-laying. The presence of the employee in the excavation at the time of the inspection was due to the emergency created when a pipe was accidentally broken. No history of prior violations was shown.

Upon due consideration of the foregoing factors, it is determined that the following penalties are appropriate for the violations.

<u>Standard</u>	<u>Penalty</u>
§ 1926.651(c)(2)	\$200.00
§ 1926.651(j)(2)	500.00
§ 1926.652(a)(1)	500.00

FINDINGS OF FACT 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 hereby ORDERED that the items contained in the citation be disposed of as follows:

<u>Standard</u>	<u>Disposition</u>	<u>Penalty</u>
§ 1926.651(c)(2)	Affirmed	\$200.00
§ 1926.651(j)(2)	Affirmed	500.00
§ 1926.651(k)(1)	Vacated	- 0 -
§ 1926.652(a)(1)	Affirmed	500.00

/s/ Paul L. Brady
PAUL L. BRADY
Judge

Date: August 4, 1994