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

ABBOTT CONTRACTORS, INC.,
Respondent,

I.U.O.E., LOCAL 150,
Authorized Employee
Representative.

OSHRC DOCKET
NO. 91-3177

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 February 4, 1993. The decision of the Judge will become a final order of the Commission on March 8, 1993 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 February 24, 1993 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
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Review Commission
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Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr. (SKW)

Date: February 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-3177

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SECRETARY OF LABOR,

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v.

ABBOTT CONTRACTORS, INC.,

Respondent.

- - - - - - -

I.U.O.E., LOCAL 150,

Authorized Employee Representative.

OSHRC DOCKET NO. 91-3177

APPEARANCES:

For the Complainant:
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For the Respondent:
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George Maurides, Esq., Bischoff Maurides & Swabowski, Ltd.,
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For the Employees:
Scott C. Buck, Safety Coordinator, I.U.O.E. Local 150,
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DECISION AND ORDER

Barkley, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act).

Respondent, Abbott Contractors, Inc. (Abbott) at all times relevant to this action, was engaged in the installation of water mains in Aurora, Illinois (Answer ¶IIb). Abbott admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Answer ¶III).

On July 26 and August 6, 1991 the Occupational Safety and Health Administration (OSHA), conducted inspections of two of Abbott's Aurora worksites (Tr. 69, 244). As a result of those inspections, Abbott was issued citations and proposed penalties pursuant to the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to a hearing, the parties settled all items of the citations other than "willful" citation 2, items 1(a) and (b), alleging two separate violations of 29 C.F.R. §1926.652(a)(1) (Tr. 19-21). On July 7-9, 1992, a hearing was held in Chicago, Illinois on the items remaining at issue. The parties have submitted briefs on those issues and this matter is ready for disposition.

Alleged Violations

Willful citation 2, item 1 alleges:

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

> (a) Near 607 Pierce Street - On or about 7/26/91 employees worked in a trench excavation which measured approximately 10 feet in depth in Type A and B soil. Employees were exposed to the hazard of cave-in in that the walls of the excavation were near vertical and no shoring or other cave-in protection was utilized.

(b) Pierce Street near Lincoln - Employees worked in a trench excavation which measured approximately 9 feet in depth in Type B and C soil. The north wall of the excavation was near vertical and was not shored or otherwise protected to eliminate the hazard of cave-in.

In her complaint the Secretary amended citation 2, item 1(b) to include the language "On or about August 6, 1991."

Willful Citation 1, item 1(a)

Facts

At about midday on July 26, 1991, OSHA Compliance Officer (CO), Hasani Abdu Ball happened upon an Abbott excavation where a water pipeline was being installed near 607 Pierce Street, Aurora, Illinois (Tr. 69-70, 177). Ball was not on duty at the time, and so did not take measurements of the trench (Tr. 129). He did, however, take pictures of Abbott employees working in the trench without benefit of shoring or other cave-in protection (Tr. 71, 74-75, 568; Exh. C-1 through C-5). At the hearing Ball estimated the trench to be eight and one half feet deep, ten to twelve feet wide (Tr. 73, 75). Upon his return to the Aurora OSHA office, Ball filled out a referral to institute a formal inspection of the Abbott site (Tr. 108-110).

As a result of Ball's referral, CO Jeff Brooks arrived on the Abbott site later in the afternoon of the 26th (Tr. 177). Approximately 50 feet of excavation was open, some 40 to 80 feet beyond the point where Ball had viewed the excavation (Tr. 183, 396-399). Pipe had been partially installed; there was a trench box in the top five feet of the excavation approximately five to ten feet from the end of the pipe (Tr. 183, 193; Exh. C-9 through C-12). The excavation, in the area between the installed pipe and the trench box, was eight and one half feet across the top and ten feet deep (Tr. 193; Exh. C-10, C-12). The bottom of the trench was at least four and one half feet wide, the width of the excavator's bucket (Tr. 568). The distance from the top of the pipe to ground level measured six feet (Tr. 220). A six inch sanitary sewer line and two smaller gas and water lines ran over the top of the installed pipe (Tr. 188; Exh. C-19, C-11). Brooks concluded on the basis of manual and penetrometer tests that the soil in the excavation was Type A except where the soil had

been previously disturbed to install the sanitary sewer line, where the soil was classified as Type B (Tr. 199-204; *See also*, testimony of P. Lafata (sic), Tr. 610).

Brooks observed footprints leading from the end of the pipe to the trench box, and photographed a bucket of concrete sealer and two shovels which sat on top of the installed pipe (Tr. 186; Exh. C-9, C-11). Brooks testified that two Abbott employees, Angel Esparza and Ambrosia Chavez, told him that a trench box was not used in the areas where the pipeline crossed utilities (Tr. 213-215, 218, 383-384). Brooks also testified that Abbott's superintendent, Mark Atkins, admitted to him that no cave-in protection was provided where the excavation crossed utilities because they couldn't "cut it into people's yards." (Tr. 220). At the hearing, Paul Lafata, the Abbott superintendent on the worksite on July 26, 1991, testified that a box was not being used because the backhoe operator, Frank Ferrio (sic), refused to reset the box between utilities. (Tr. 569-571, 629).

Discussion

In both the citation and complaint, Citation 2, item 1(a) refers to a "trench excavation which measured approximately 10 feet in depth." Because the portion of Abbott's excavation which formed the basis for CO Ball's referral was only eight and one half feet deep (by Ball's estimate), Abbott did not have fair notice that the conditions recorded by Ball were at issue. Only the conditions recorded during Brooks' inspection, and identified in the citation and complaint, will be considered for purposes of establishing a violation.

The cited standard, §1926.652(a)(1) provides:

> (a) *Protection of employees in excavations.* (1) 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 Secretary has amply demonstrated the cited violation. It is clear from the record that on July 26, 1991 Abbott's Pierce Street excavation did not comply with the minimum

requirements for sloping Type A soils[1], and that shoring was not provided for employees working in the unprotected excavation.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.,* 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991), *citing Astra Pharmaceutical Products, Inc.,* 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶25,578, pp. 31,899-31,900 (No. 78-6247, 1981).

The parties agree that the sloping requirements of Subpart P, Appendix B, Table B-1, n. 2 are applicable and govern those portions of Abbott's July 26, 1991 excavation which were dug in previously undisturbed soil (Tr. 239, 572).

Note 2 states that "[a] short-term maximum allowable slope of 1/2H:1V (63°) is allowed in excavations in Type A soil that are 12 feet (3.67 m) or less in depth." The walls of a ten foot deep trench in Type A soil, therefore, must be cut back horizontally at least 1/2 the span of the vertical rise, or five feet. A ten foot trench with a four and one half foot bottom width must, at minimum, be opened to fourteen and one half feet at the top to conform to the standard. Abbott's Pierce Street trench, which was eight and one half feet wide at the top, clearly did not meet the requirements of the standard. Not only was the excavation not in compliance by the standard, but Abbott's deviation from the requirements of the standard was significant.

It is also clear that no cave-in protection was provided during those times when work was required in the area of the existing utilities. The photographic evidence shows that the

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[1] Complainant maintains that those portions of the trench crossed by utility lines contain previously disturbed soil, and under Subpart P, Appendix A(b) *Definitions* must be classified as Type B. Lafata stated that he knew the soil in the Pierce Street trench had been previously disturbed, when it was trenched for the installation of gas lines (Tr. 611). Fiordirosa, Abbott's vice-president, testified inconsistently that the lines crossing the Pierce Street trench were all "obviously whole hogged or bored" (Tr. 676). However, because the Secretary has established a violation based on the undisturbed soil in the trench, it is unnecessary to resolve the conflicting testimony.

trench surrounding the utilities has not been cut back sufficiently to accommodate the trench box (Exh. C-9, C-11). Both Abbott's superintendents, Paul Lafata and Mark Atkins, admitted that they were not using the trench box but were relying on sloping for cave-in protection in the area of utilities. The trench box observed by OSHA on the afternoon of July 26 was placed in the trench only after CO Ball's morning visit. It was not properly used, being only partially inserted in the trench 5 to 10 feet from the end of the pipe, and employees were exposed to unsloped soil in that area. Finally alternative protection, i.e., trench jacks, was not available on the worksite (Tr. 225).

Employee access to a hazard is established by showing that employees, while in the course of their assigned working duties, will be, are, or have been in the zone of danger. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 1975-76 CCH OSHD ¶20,448, p. 24,425 (No. 504, 1975). Though no employees were observed in the trench, it is clear from the evidence and the nature of Abbott's operation that employees were required to perform work in the trench. In order to lower the new pipeline into the trench, existing utility lines must be moved or removed (Tr. 577; Exh. C-4). Footprints were observed in the bottom of the trench going towards the trench box from the pipe end. Moreover, concrete sealer and shovels were clearly being used in the trench.[2]

Supervisors Lafata and Atkins were on site on July 26, 1991 and could not have been unaware of the dimensions of the Pierce Street excavation. Moreover Atkins' admissions to CO Brooks[3] that they could not cut the excavation back into private yards suggests that the dimensions of the trench were deliberate.

The undersigned finds that Abbott was in violation of §1926.652(a)(1) on July 26, 1991.

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[2] Even if those items were used from the top of the pipe, a violation would exist. The trench was six feet from the top of the pipe to the surface, requiring a three foot set back in Type A soil. Assuming the trench was still only four and one half feet wide above the pipe top, a top width measurement of ten and one half feet would be required to meet the requirements of §1926.652(a).

[3] Atkins did not testify at the hearing, nor did Abbott make any other attempt to respond to Brooks' unrefuted testimony. 54 FR 45959 (Oct. 31, 1989).

Employee Misconduct/Willfulness

Abbott maintains that the cited violations were the result of the unpredictable misconduct of supervisor Lafata and backhoe operator Ferrio.

The Commission has stated that "[i]n order to establish an unpreventable employee misconduct defense, the employer must establish that the violative conduct on the part of an employee was a departure from a uniformly and effectively communicated and enforced work rule." *Mosser Construction Co.* 15 BNA OSHC 1408, 1991 CCH OSHD ¶29,546 (No. 89-1027, 1991).

Facts of Affirmative Defense and Characterization

Abbott has an Accident Prevention Program dated May 1, 1985[4] (Tr. 700), which includes three pages of "General Safety Rules for Construction Supervisors."

Rule #35 requires that: "[d]aily inspections of excavations shall be made for evidence of possible cave-ins or slides. Where this danger exists, work in excavation shall cease until necessary precautions have been taken" (Tr. 648, 706; Exh. C-37, p.8).

Rule #38 states that "[s]ides of trenches in unstable or soft material, four (4) feet or more in depth shall be shored" (Tr. 648, 706; Exh. C-37, p.8). The rule does not define "unstable or soft material" (Tr. 712), or provide for the type of shoring required. Nor does the rule provide for sloping as an alternative protective measure or discuss soil types and sloping angles (Tr. 714-716). The rule, moreover, effectively leaves the decision whether to shore to the discretion of the foreman or supervisor (Tr. 717).

Paul Lafata was the foreman in charge and "competent person" on the Pierce Street site on July 26, 1991 (Tr. 234). Abbott stipulates that Lafata was aware of the requirements of §1926.652(a)(1) (Tr. 234, 598), and that he had, along with Atkins and Jerry Fiordirosa, Abbott's vice-president, taken a ten hour course on the OSHA construction standards as well as an evening course on the new excavation standard. Abbott further stipulates that Lafata had on site a highlighted copy of the new excavation standard. (Tr. 427-428, 469, 477, 484-485, 686).

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[4] The excavation standards underwent major revision in 1989. 54 FR 45959 (Oct. 31, 1989).

Frank Ferrio, the backhoe operator, did not receive the same instruction as supervisory personnel; he did not attend the OSHA course (Tr. 699), and did not receive a copy of the general safety rules (Tr. 704). Fiordirosa testified that employees do not receive a copy of the safety rules when they are hired, but stated that the rules are passed on to employees verbally by management (Tr. 704). Tool box talks dealing with trenching hazards are given by the job foreman twice weekly (Tr. 724-725).

Lafata testified that Ferrio was fired a week after the OSHA inspection for refusing to use the trench box (Tr. 658, *See also*; testimony of J. Fiordirosa, Tr. 690-691). However, Lafata also testified that Ferrio had objected to using the trench box for the entire three years they had been working together, and that although he had reported Ferrio in the past, he did not tell either Atkins or Fiordirosa of Ferrio's conduct on July 26 (Tr. 629-630). Nor had Lafata instituted any disciplinary action against Ferrio for his insubordination in the past. The sole action Lafata took was "[g]enerally, if he would try to get along a little more, I would give him a little more overtime. When he became very, very stubborn, the overtime stopped. . ." (Tr. 630). Fiordirosa also testified that he knew Ferrio had a "constant problem with pulling the box," and had spoken to Ferrio a number of times before about it (Tr. 691-692).

Finally, Brooks testified that superintendent Atkins told him that "[w]e can't remain competitive if we comply 100% with the OSHA standards because not all of the other employers are being required to comply as fully as we are." (Tr. 221).

Discussion of Affirmative Defense and Characterization

Abbott fails to establish that the conduct of Ferrio or Lafata was contrary to a specific work rule which was uniformly and effectively communicated and enforced. Abbott's only work rules concerning shoring, Rule #35 and #38, are both outdated and so vague as to provide no guidance to supervisory personnel. Moreover, Abbott's work rules were inapplicable here. Abbott's rules deal only with shoring. Sloping, including soil classification and proper angles of sloping were not discussed. Where, as in this case, excavating is the principle activity of the employer's business, it is not unreasonable to expect employees to be versed in the OSHA excavation standard, to know the three soil classifications set out in the standard and the sloping requirements for each type of soil.

An employer's work rule is clearly inadequate where the rule provides a lesser degree of protection than parallel OSHA standards. In this case, for example, Lafata's failure to shore or slope an excavation in Type A soil is not clearly in violation of Abbott's work rule, though clearly in violation of OSHA regulations.

Even were Abbott's work rules coextensive with OSHA regulations, Abbott's failure to enforce those rules prevent it from making out its affirmative defense. General safety rules were not provided to laborers other than supervisory personnel, and while Abbott relied on management to disseminate and enforce the rules during tool box meetings and on the job, it is clear that supervisory personnel did not take those rules seriously.

Frank Ferrio, though refusing repeatedly over a three year period to use the trench box, was retained on the job and not disciplined except by denying him additional overtime until after the July 26, 1991 OSHA inspection. Two levels of supervisory personnel were represented on July 26th; both were aware that no trench box was present, yet allowed employees to work without cave-in protection in the violative trench.

Far from supporting Abbott's employee misconduct defense, the record establishes that the cited violation was "willful". Respondent's supervisors, Lafata and Atkins, knew the standards requirements. Both men were on site on July 26, 1991 and knew that the standard was not being complied with either by proper sloping or by the proper use of a trench box.

The violation is affirmed as a "willful" violation.

Willful Citation 1, item 1(b)

On August 6, 1991 Brooks returned to the Abbott work site now located at an excavation running east to west at Lincoln and Pierce Street in Aurora (Tr. 244). Brooks observed Abbott employees standing in an open trench at the end of the installed pipe. At least one of those employees, superintendent Lafata, entered the pipe to check a joint and retrieve some wood blocks (Tr. 246, 259, 262, 594-595, 642). At the pipe's end, the trench was nine feet deep (Tr. 263; Exh. C-21), ten and one half feet wide at the top (Tr. 265; Exh. C-22, C-23), and five feet wide at the bottom (Tr. 268). The north wall was cut back approximately one foot horizontally, and the south wall four and a half feet (Tr. 267).

Brooks testified that the south wall consisted of Type A soil (Tr. 274). Brooks classified the north wall, however, as Type C, based on his attempt to "ribbon" the soil, and

on its highly granular and chalky white appearance (Tr. 269-274, 437). Brooks took no penetrometer readings of the north wall (Tr. 437). A drain tile was visible in the wall above the new pipe line (Tr. 261; Exh. C-22, C-24, C-25).

Abbott concedes that the cited trench was in violation of §1926.652(a)(2) on August 6, 1992 and that employees were exposed to the violation when they entered the trench to check the pipe joints and retrieve wooden blocks (Tr. 87, 603, 641).

Employee Misconduct/Willfulness

The cited violation is admitted, and the only issues to be decided are whether Abbott has made out the affirmative defense of employee misconduct, and if not, whether the cited violation was "willful."

As discussed above, Abbott's safety rules were neither adequately designed to avert the cited violation, nor were those rules enforced. Respondent has failed to make out the defense of employee misconduct with respect to the August 6 excavation.

Like the July 26 excavation, the August 6 excavation was a willful violation of the standard. Abbott had supervisors on site who knew the dimensions of the excavation and knew these dimensions did not meet the requirements of the standard.

CO Brooks testified that during the August 6, 1991 inspection, Atkins admitted that he was aware of compliance problems on the excavation sites, and stated he was "always having to stay on these guys. In fact just yesterday I had to come out here and tell them to get the box in the trench" (Tr. 283).

Following the August 6, 1991 inspection, Lafata was demoted from his position as superintendent to foreman (Tr. 606, 643, 692; Exh. C-10). Lafata continued to receive the same pay, however, as before his demotion (Tr. 644). Fiordirosa, Lafata's uncle (Tr. 612), testified that due to his reduced status Lafata merely missed out on various "perks," including various parties and a trip to Las Vegas (Tr. 692).

As discussed above, the evidence supports that the cited violation was "willful," and it will be affirmed as such.

Penalty

The Secretary has proposed a combined penalty of $70,000.00 for the cited violations.

The gravity of the violations are serious. Death and serious physical harm can, and have, resulted from excavations the depth of Abbott's excavations. Abbott has a history of prior violations, having been issued citations for excavation violations on November 13, 1986 (Exh. C-28); July 25, 1988 (Exh. C-30); July 26, 1988 (Exh. C-32); October 19, 1988 (Exh. C-33); and on August 7, 1990 (Exh. C-38). Abbott is a large employer of this type, employing 12 to 18 crews simultaneously (Tr. 664).

Abbott has not exhibited good faith. Its responses to its safety obligations have been less than satisfactory. Its excavation rules are outdated, incomplete and not enforced. While supervisors are trained in the new OSHA excavation regulation, that training is stopped short of those employees in greatest need, and those employees most likely to resist working in hazardous conditions, the hourly employees exposed to inadequate sloping and shoring hazards. Abbott's supervisors have tolerated long time non-compliance with sloping and shoring requirements and appear to place a premium on production over safety.

Only after the appearance of an OSHA compliance officer taking pictures of the July 26 excavation did Abbott partially and incompletely insert a trench box into the trench. A former employee, now accused by Abbott of resisting the use of a trench box for over three years, was terminated only after the July 26 inspection. Abbott's "discipline" of this employee during the prior three years he resisted using trench box were minimal at best. The supervisor in charge of the two worksites during the July 26 and August 6 willful violations was "disciplined" afterwards by a demotion that was on paper only and by exclusion from a trip to Las Vegas. Abbott's actions, particularly the long overdue discipline of the backhoe operator only after the OSHA inspection and the "demotion" of the supervisor after the inspections appear to this Judge to be calculated more towards creating an appearance of concern, rather that any meaningful attempt to assure compliance with OSHA regulations.

Abbott's justification, which appears to concede the violations and their willful nature, is that it cannot comply with OSHA regulations and compete. *All* excavators are required

to comply with OSHA safety regulations. If Abbott cannot comply it does not deserve to compete.

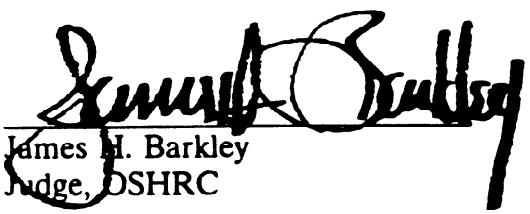
Given the gravity of the violations, Abbott's size, its lack of good faith, and prior history, a substantial penalty is justified. However, the Secretary has proposed the statutory maximum penalty for this item. The maximum penalty must be reserved for the most flagrant and most serious of violations. In this case, there was no death or injury; the employer provided some training, and the excavations were, for the most part, in type A and B soil. A penalty of $40,000.00 is appropriate.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

Order

Willful citation 2, item 1(a) and (b), alleging a violation of §1926.652(a)(1) is AFFIRMED and a penalty of $40,000.00 is ASSESSED.



James H. Barkley
Judge, OSHRC

Dated: January 29, 1993