



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

v.

OKLAHOMA NATURAL GAS
Respondent.

OSHRC DOCKET
NO. 90-1330

**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 March 26, 1993. The decision of the Judge will become a final order of the Commission on April 26, 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 April 15, 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
Occupational Safety and Health
Review Commission
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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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) 634-7950.

FOR THE COMMISSION

A handwritten signature in cursive script that reads "Ray H. Darling, Jr.".

Ray H. Darling, Jr.
Executive Secretary

Date: March 26, 1993

DOCKET NO. 90-1330

NOTICE IS GIVEN TO THE FOLLOWING:

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Administrative Law Judge
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SECRETARY OF LABOR,

Complainant,

v.

OKLAHOMA NATURAL GAS COMPANY,

Respondent.

OSHRC DOCKET NO. 90-1330

APPEARANCES:

Janice L. Holmes, Esquire
 Dallas, Texas
 For the Complainant.

Larry D. Henry, Esquire
 Tulsa, Oklahoma
 For the Respondent.

Before: Administrative Law Judge E. Carter Botkin

DECISION AND ORDER

This is a proceeding brought 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").

On March 15, 1990, the Occupational Safety and Health Administration ("OSHA") inspected an excavation site in Oklahoma City, Oklahoma, where Respondent, Oklahoma Natural Gas Company ("ONG"), had employees working. As a result of the inspection, ONG was issued a serious citation alleging violations of 29 C.F.R. §§ 1926.651(k)(1) and 1926.652(a)(1). ONG contested the citation, and a hearing was held on February 19, 1991. On April 17, 1991, ONG made a motion to substitute evidence. ONG's motion is addressed below, followed by the relevant evidence and a discussion of the citation items.

Motion to Substitute Exhibit

At the hearing, R-1, copies of four photos taken of the excavation site, was received into evidence, the original photos having been lost. On April 17, 1991, during a conference call in which the Secretary's request for an extension of time to file a brief was granted, ONG made a motion to substitute the copies of the photos with the originals, which had been found after the hearing. The Secretary objected, and the parties were ordered to file motions and any objections to the exhibit. ONG complied with the order on May 1, 1991; however, the Secretary has not. Her objection is therefore deemed waived, and ONG's motion to substitute evidence is GRANTED.

The Evidence

The record shows that on March 14, 1990, ONG had dug a 6 to 8-foot-long trench, running north and south, in order to install a new gas line which tied into an already-existing line. On March 15, ONG had six employees at the site, including a foreman, and three employees were in the north end of the trench placing a valve on the line. Although the north and east sides of the trench were sloped, the west side was essentially vertical other than a 20 to 24-inch horizontal bench 38 inches from the bottom of the trench. There was a 16-inch-diameter water line in the west wall parallel to the gas line, which was about a foot from the bottom of the trench, and two 6-inch-diameter petroleum lines were buried about 8 inches below the top of the wall. An OSHA lab analysis of a soil sample taken from the excavation revealed it to be Type C soil. (Tr. 11-36; 46-49; 55-61; 66; 69; 82-84; 95-102; 137-51; 179-80; 185; C-1-8).

The record further shows that although ONG had an excavation safety program and training in that regard, it had not incorporated OSHA's new regulations, which were issued in October 1989, into its program; moreover, C. C. Bowling, the jobsite foreman, was not aware of the new regulations prior to the inspection. (Tr. 14-15; 39-42; 62; 65; 77-78; 91-94; 135-37; 156-57; 161-64; 173-74).

George McCown, the OSHA compliance officer ("CO") who inspected the site, testified the trench was required to be sloped at an angle of 1.5:1, the criterion for unknown or Type C soils, and that while he had no problem with the north and east sides, the west

side was not in compliance with the 1.5:1 requirement and exposed the employees to death or serious injury due to the potential for a cave-in. McCown said the condition could have been abated by shoring, but that the standard does not recognize a utility pipe in a wall as adequate protection. He also said he told the ONG representatives at the site they could abate the condition by removing additional soil from the west wall, and that while they indicated they would do so he did not recall seeing it done. (Tr. 26-30; 36-39; 48-49; 55-58; 66; 72-74; 77).

McCown further testified that Bowling, who accompanied him during the inspection and was in charge of the site, was not a "competent person" within the meaning of the standard because of the condition of the trench and his unfamiliarity with the new regulations. He said Bowling told him he had years of experience, but that Byron Haygood and Lester LaRue, ONG's operations superintendent and safety coordinator, respectively, indicated at the closing conference that the company had not had time to train employees in the new regulations. (Tr. 13-15; 39-42; 65; 77-80).

C. C. Bowling has been performing excavation work with ONG since his initial employment with the company in 1967, and has been in progressively responsible foreman positions for 4.5 years. He testified he had received extensive training through ONG and the Oklahoma Gas Association in sloping, shoring, benching, soil classification and hazardous atmospheres since he began working for the company. He further testified that ONG incorporates OSHA standards into its policies, that the OSHA tables are used in classifying soil, and that a copy of the regulations is in every ONG truck. Bowling noted he was trained in the new regulations in the summer of 1990, but that he was not familiar with them at the time of the inspection. (Tr. 89-94; 100; 133-37; 151-53; 157).

Bowling said the trench was in an area with which he was familiar, that he had visually and manually inspected the soil pursuant to his normal practice, and that he had classified it as what would now be termed Type C. He also said that although ONG's policy at that time was to slope 1:1, he sloped the north and east sides of the trench 1.5:1 because he believed that was what was safe under the circumstances; he benched the west side because of the existing lines in it and ONG's policy of not disturbing lines unless necessary. In his opinion, the trench was safe. (Tr. 94-102; 135-38; 148-49; 152-53; 156-57).

Bowling noted the job had started on March 14, and that he knew about the petroleum lines due to Occidental Petroleum's advising him they were there; he decided to not disturb them because they were shallow and because he did not know how old they were or what they contained. Bowling noted he had explained this to McCown, who had had him stop the work at the site; he asked McCown what he could do to resume work, and was told to take off an area 2 feet wide and 8 inches deep from the top of the west side, down to where the petroleum lines were located. Bowling said this was done before McCown left and that work was resumed. (Tr. 95-100; 145-51; 193-96; R-1).

Lester LaRue has been with ONG since 1963, and has been a safety coordinator since 1976. He testified he took R-1, photos of the site, and R-2, a video of it, on March 15 after the west side had been dug out pursuant to McCown's instructions, and that no other alterations had been made to the trench. He agreed with Bowling's testimony about ONG's training and procedures in excavation safety. (Tr. 160-76).

29 C.F.R. § 1926.652(a)(1)

1926.651(k)(1) and 1926.652(a)(1) are subparts of OSHA's revised regulations in regard to excavations, which, as noted *supra*, were issued in October 1989 and went into effect in January 1990. See 54 Fed. Reg. 45,894 (1989). 1926.652(a)(1) provides, in pertinent part, 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 ... [e]xcavations 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.

ONG contends the standard does not apply because the trench in this case was less than 5 feet in depth. I disagree. The CO testified he measured the depth at the point where the work was taking place with the help of one of the employees in the trench, and that it was 38 inches from the bottom up to the bench and another 34 inches up to the top. (Tr. 15; 22-23; 28; 32; 59-61). While Respondent disputes these measurements, I note that the CO, who has over 20 years experience in occupational safety, has had training in trenching and soil analysis and has inspected numerous excavation sites. (Tr. 8-11).

Moreover, the testimony of Bowling, whose experience is noted *supra*, was that he measured the trench to be 38 inches up to the bench and 24 more inches up to the top.¹ (Tr. 138-41; 155-56). Although Bowling's measurement to the top was less than the CO's, his testimony indicates he may have been referring to the point at which the petroleum pipes were located, approximately 8 inches below the surface. (Tr. 138). The testimony of either witness establishes the trench was over 5 feet deep. Between those witnesses, I found the CO the most reliable since his testimony was free of ambiguity.

In support of its contention that the standard does not apply, ONG points to the testimony of Tommy Brown, the engineer in charge of the project.² Brown prepared R-3 and R-4, drawings indicating various measurements at the site. Brown testified he surveyed the site on February 23, 1990, and, based on a known elevation point, determined the top of the gas line to be 3.8 feet below ground level, as shown on R-3. (Tr. 178-82). Since ONG did not dig the trench until March 14, it is apparent Brown did not actually measure it on February 23. (Tr. 146; 181-82). Further, his 3.8-foot figure was to the top of the line, which was 6 inches in diameter and about a foot from the bottom of the trench. (Tr. 98; 140-41; 179-80). Finally, while Brown testified he took the measurements shown on R-4 on March 15 after the CO left, he did not indicate what the depth of the trench was or whether such information is reflected on R-4. (Tr. 185-87; 190). Based on the record, the only probative evidence regarding the depth of the trench is the testimony of the CO and Bowling; accordingly, the standard is applicable in this case.

As noted *supra*, 1926.652(a)(1) requires the use of protective systems when employees are working in excavations 5 feet or more in depth. The standard provides for the use of systems such as sloping, benching and shoring, and sets out specific requirements in that regard. The record shows that while the north and east sides of the trench complied with

¹Respondent's assertion that Bowling measured the depth of the gas line to be 38 inches is not supported by a careful reading of the record. (Tr. 140-41).

²Respondent also points to R-1 and R-2 in support of its contention. I note that R-1 and R-2, unlike C-1-6, the CO's photos, were taken after the additional earth was removed. I note also that photos and videos can be deceiving and are not as persuasive as measurements actually taken; accordingly, the testimony of the CO and Bowling, as set out *supra*, is credited over R-1 and R-2.

the standard, the benching on the west side did not meet the 1.5:1 requirement for Type C soil; the CO's opinion was that the condition exposed the employees to a potential cave-in and serious injury or death.³ Bowling testified that when he asked the CO what he could do to resume work, he was told to remove an area 2 feet wide and 8 inches deep from the top of the west side. Bowling's testimony was credible, and is supported by the CO's recollection of what he told ONG. Also credible was Bowling's statement that the additional soil was removed before the CO left, which, while not recalled by the CO, was not refuted by the Secretary.

Based on the foregoing, I find that the standard was violated, but that the violation was nonserious. Although I am well aware of the hazards of cave-ins, I am simply not persuaded that the trench in this case represented a substantial probability of death or serious physical harm in light of the abatement measure the CO himself recommended. In my view, the likelihood that an area of soil 2 feet wide and 8 inches deep falling on employees in a trench of this depth would result in a serious injury or death is remote. This citation item is therefore affirmed as an "other" violation.

The Secretary proposed a penalty of \$1,000.00 for this item. After giving due consideration to the employer's size, history and good faith, as well as to the low gravity of the violation, I conclude that a penalty of \$100.00 is appropriate for this item.

29 C.F.R. § 1926.651(k)(1)

1926.651(k)(1) provides 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

³The undersigned notes that ONG presented the testimony of soil expert Musharraf Zaman. Dr. Zaman possessed impressive credentials; however, he did not personally view the site, and while he referred to C-7 (the OSHA lab analysis) to conclude a cave-in was not possible, he used a compressive strength factor of .5 to arrive at his conclusion rather than the actual factor of .27 shown on C-7 and did not take into account other factors such as machinery adjacent to the trench. (Tr. 103-127; C-3). Finally, I sensed an overall character of exaggeration in his testimony, best illustrated by his opinion that it would have taken a severe earthquake to cause the trench wall to collapse. (Tr. 115).

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.

“Competent person” is defined at 1926.650(b) as “one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.” This definition is more fully explained in the preamble to the final rule, at 54 Fed. Reg. 45,909 (1989), as follows:

In order to be a “competent person” for the purposes of this standard one must have had specific training in, and be knowledgeable about, soils analysis, the use of protective systems, and the requirements of this standard. One who does not have such training or knowledge cannot possibly be capable of identifying existing and predictable hazards in excavation work or taking prompt corrective measures.

It is clear from the record that Bowling had had many years of experience and extensive training in excavation and trenching safety at the time of the inspection. However, he himself acknowledged he was not aware of the new regulations until the inspection, and that he was not trained in them until the summer of 1990. ONG asserts Bowling was a “competent person” within the meaning of the standard, and that the fact he was not specifically trained in the new regulations does not constitute a violation. I disagree. As the foregoing points out, an employee not specifically trained in the new regulations, which differ significantly from the old, would be unaware of their requirements and unable to properly identify hazards and take appropriate corrective measures. In fact, appropriate corrective measures had not been taken in this case. Accordingly, a violation of the standard has been established.

The Secretary characterized this item as a serious violation. However, based on the fact that Bowling adequately sloped two sides of the trench and that his benching of the west side has been found to be a nonserious violation, I conclude that it is also appropriate to classify the subject item as nonserious. This citation item is therefore affirmed as an “other” violation, and, based on the factors set out *supra*, the Secretary’s proposed penalty of \$1,000.00 is reduced to \$100.00.

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law that are inconsistent with this decision are DENIED.

Conclusions of Law

1. Respondent, Oklahoma Natural Gas Company, 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 this proceeding.

2. On March 15, 1990, Respondent was in nonserious violation of 29 C.F.R. §§ 1926.651(k)(1) and 1926.652(a)(1).

Order

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

1. Items 1 and 2 of serious citation number 1 are AFFIRMED as "other" violations, and a penalty of \$100.00 is assessed for each item.



E. Carter Botkin
Administrative Law Judge

Date: **MAR 19 1993**