UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Pospiech Contracting, Inc., Respondent.	OSHRC Docket No. **07-1619**

Appearances:

Kristina T. Harrell, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Kevin K. Dixon, Esquire, Law Office of Kevin K. Dixon, P.A., Inerness, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Pospiech Contracting, Inc., (PCI) installs underground utilities. In August 2007, PCI was installing underground utilities for a new Wal-Mart under construction in Hudson, Florida. As Occupational Safety and Health Administration (OSHA) compliance officer Christos Nicou was driving past the site on August 27, 2007, he observed workers on scaffolding and on the structure's roof without fall protection. Nicou stopped and conducted an inspection of the site. During his investigation, Nicou saw a trench in the area of the parking lot that PCI had excavated. Nicou took photographs and measurements of the trench. Based on his inspection, the OSHA issued a citation to PCI on September 25, 2007, charging the company with a repeat violation of 29 C. F. R. § 1926.652(a)(1) for failing to provide an adequate protective system for employees working in an excavation. The citation proposed a penalty of $8,000.00. PCI timely contested the citation.

The court held a hearing in the matter on February 26, 2008, in Tampa, Florida. The parties stipulated jurisdiction and coverage (Tr. 4-5). After the hearing, the court issued an order on February 29, 2008, allowing the evidentiary record to remain open for the limited purpose of receiving PCI's written safety program in effect at the time of the inspection. PCI submitted its program on March 6, 2008. In an order dated March 14, 2008, the court admitted the written safety program into evidence as PCI's Exhibit R-5a.

The parties have filed a post-hearing brief. PCI asserts the excavation was not more than 5 feet deep, and thus required no protective system. If the excavation is found to have exceeded 5 feet in depth, PCI claims it had no knowledge of the condition. It asserts the affirmative defense of unpreventable employee misconduct.

As discussed below, the court affirms the citation and assesses a penalty of $5,000.00.

Background

PCI's corporate office is in Inverness, Florida. Case Contracting was the general contractor for a new Wal-Mart under construction in Hudson, Florida. Case Contracting hired PCI to install the underground utilities for the project (Tr. 183, 281).

On August 27, 2007, compliance officer Nicou was driving past the Wal-Mart site when he observed workers on the roof area, as well as workers on a scaffolding system. The workers were not using any form of fall protection. (These workers were not PCI employees.) Nicou parked his car and went to Case Contracting's jobsite trailer, where he met with James Farmer, Case's jobsite superintendent and Timothy Walker, Case's project manager (Tr. 20, 228). Farmer accompanied Nicou as he conducted a walkaround inspection of the site (Tr. 21-22).

As Nicou and Farmer exited the Wal-Mart building and walked towards the south side, they saw a trench in the parking lot area which had been dug by PCI earlier that day (Tr. 22). PCI employee Esteban Padre was sitting in a backhoe next to the trench's south side (Tr. 34) . The rest of PCI's crew had gone to lunch (Exh. C-1; Tr. 24-25, 47).

PCI pipe foreman Christopher Larratt supervised the crew that included Padre, Ishmial Zumaro, Marcello, Lazarus, and Phillipi (Tr. 239). At 11:00 a.m., day of the inspection, Larratt's crew had dug the excavation with a backhoe to repair a damaged 2-inch irrigation pipe that PCI had installed several months earlier. Larratt was the designated competent person on the project. He did

not take a soil sample to determine its classification, but he worked under the assumption that all Florida soil is Type C soil. After Larratt dug out the excavation with the backhoe, Esteban and Ishmial used hand shovels to clear the soil around the pipe. At no time did Larratt or any of the other employees measure the depth of the excavation. After lunch (and after Nicou's inspection) Zumaro put a coupling on the pipe to finish the repair. The entire repair project lasted approximately two hours, including the half-hour lunch break that was underway when Nicou and Farmer arrived at the site. (Exh. C-4; Tr. 184, 238-239, 249, 251-252, 254).

Although no one was in the excavation when Nicou and Farmer arrived, they both observed footprints in the bottom of the trench (Exhs. C-2 & C-6; Tr. 48). With Farmer present, Nicou took depth measurements of the excavation, using a steel measuring tape (Tr. 27). Nicou measured the north and the south sides of the excavation at 6 feet deep, and the east side at 6½ feet deep. The west side measured 4½ feet deep (Tr. 27-28). Nicou paced out the length and width of the excavation and estimated it to be 6 feet long and 5 feet wide (Tr. 50-52). Based on the feel and the appearance of the soil, Nicou concluded it was Type C soil. Nicou also took a soil sample and later sent it to the OSHA Technical Center in Salt Lake City, Utah, for analysis. The lab results confirmed Larratt's assumption and Nicou's conclusion: the excavation was dug in Type C soil (Exh. C-5; Tr. 30-31).

After Nicou finished inspecting the excavation, Farmer held a closing conference in Case's jobsite trailer with the four subcontractors Nicou believed to be in violation of OSHA's standards. Representing PCI was pipe foreman Larratt, as well as its general superintendent Kenny Rose and superintendent Frank Newborn (Tr. 55, 172, 230-231). During PCI's closing conference, Larratt disputed Nicou's contention that employees had entered the excavation (Tr. 59-60). Nicou, Farmer, and the three PCI representatives went back to the excavation, which was still open. More footprints were evident in the excavation. In the presence of the three PCI supervisory personnel, Nicou measured the depth of the north side of the trench, again finding it to be 6 feet (Tr. 62-64). Neither Larratt, Rose, or Newborn disputed the measurement, nor did any of them measure the depth for himself (Tr. 175, 254-255).

In reviewing PCI's history, Nicou discovered that PCI had previously been cited for a violation of § 1926.652(a)(1) on February 8, 2005. Based on this previous violation, OSHA issued the citation in this case to PCI for a repeat violation on September 25, 2007. Upon receipt of the

citation, PCI hired two companies, Central Testing Laboratory and Thomas LaSenna Surveying, Inc., to determine the depth of the excavation at the time of the inspection (Tr. 193, 206). By the time the companies conducted their tests, the parking lot had been paved. Each company took one sample from a location of the excavation specified by PCI (Tr. 199-200).

The Citation

The Secretary has the burden of proving the violation by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.,* the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Repeat Violation of § 1926.652(a)(1)

The citation alleges:

> At the site, employees were in progress of water piping installation in a trench measured and found to be 5 feet wide by 6 feet long and 6.5 feet deep at the north, south and east side. The west side was 4.5 feet deep. The trench walls were vertical and no protection was provided against possible cave-ins.

Section 1926.652(a)(1) provides:

> 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) Excavation 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.

PCI's primary argument is that § 1926.652(a)(1) does not apply in this case because the excavation falls under the exception in § 1926.652(a)(1)(ii), *i.e,* the excavation was less than 5 feet in depth.

Applicability

Nicou measured the excavation on two separate occasions, both times finding it to be over 5 feet deep except for the west side (Tr. 27-28, 62-64). PCI took no measurements of the excavation,

either before or after Nicou's initial inspection (Tr. 175, 254-255). The Secretary submitted a signed statement from Farmer dated October 16, 2007, in which he states he observed Nicou measure the depth of the excavation on the two separate occasions. Farmer corroborated Nicou's testimony that the excavation was over 5 feet deep and the trench walls "were not sloped. There [they] were cut vertical" (Exh. C-6, p. 3).

PCI countered with an undated affidavit in which Farmer avers he "observed the OSHA representative make no more than two (2) measurements of the excavation from the side of the work site" and that the excavation "did not appear to be greater than five (5) feet in depth" (Exh. R-3)[1]. PCI made much of the "two measurements" issue at the hearing and in its post-hearing brief, even though the Secretary cleared up any confusion in her examination of Nicou (Tr. 151):

> Q.: It came up a couple of times, Mr. Dixon brought up that in your inspection file, it refers to two measurements?
>
> Nicou: Correct.
>
> Q.: And, that the statement provided by Mr. Farmer and other employees of Pospiech Contracting say that they witnessed you taking the two measurements. What is your understanding of what two measurements means?
>
> Nicou: Two instances of making measurements.
>
> Q.: And, when you say, "two instances," what is two instances?
>
> Nicou: One when we first approached the trench, myself and Mr. Farmer; and the second time when the entire company was present; management from Pospiech, the general contractor and myself were present at a second measurement.
>
> Q.: So, you wouldn't, then, say that the two instances refer to your only dropping your tape twice?
>
> Nicou: No, I did a lot more than two.

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Farmer's handwritten statement is factually detailed. Farmer's undated affidavit contains five short statements written very much in the manner of a lawyer. The only statement at odds with Nicous' testimony is that the excavation "did not appear" to be deeper than 5 feet. Because we have Nicou's actual measurements, Farmer's assertion of his perception of the excavation is irrelevant.

Even assuming PCI's claim that Nicou made only two measurements were true, it is still two more measurements than PCI made and it is sufficient to establish the excavation was deeper than 5 feet. Farmer was present during both instances of measurement and he wrote in his statement that "the east side was measured by the compliance officer and it was about six and a half feet" (Exh. C-6, p. 3). In his undated affidavit, Farmer states the excavation "did not appear" to be greater than 5 feet in depth, but he also took no measurements. The only measurements taken of the excavation the day of the inspection were those taken by Nicou. As such, this evidence is unrefuted and establishes the Secretary's *prima facie* case for this element.

PCI's insistence that the excavation was less than 5 feet in depth raises several questions. Nicou took the first set of measurements in front of Farmer, who agrees in his signed statement that the excavation was deeper than 5 feet. Farmer raised no objection and noted no disagreement with the measurements in his statement. Then Nicou again measured the excavation in front of Farmer, as well as Larratt, Rose, and Newborn,[2] respectively the pipe foreman, the general superintendent, and the superintendent for PCI. Why, if Nicou's measurement was inaccurate, did not one of the three men representing PCI in supervisory capacities raise an objection? Why did no one from PCI take a measurement himself? If Nicou's measurement showed the depth to be less than 5 feet, or if any of the men perceived Nicou's measurement to be inaccurate, the logical response would be to raise an objection at that time. The record shows no one did so.

Instead, several months after Nicou's inspection[3], PCI hired Central Testing Laboratory to take an augur boring and Thomas LaSenna Surveying, Inc. to take a core boring of the an area of the now blacktopped parking lot that PCI had again excavated. Both borings hit "natural soil" at less

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In his testimony, Newborn stated he did not remember Nicou taking a depth measurement of the excavation (Tr. 174-175). This is contrary to the testimony of Nicou and the written statement of Farmer, and is given no credibility.

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PCI complained throughout the hearing and in its post-hearing brief that, "Due to the delay in the employer receiving notification they were unable to measure the trench, photograph the trench, or test for soil impaction" (PCI's brief, p. 4). Nicou inspected the excavation on August 27, 2007. The Secretary issued the citation on September 25, 2007, just shy of a month later. Section 9(c) of the Occupational Safety and Health Act of 1970 (Act) provides: "No citation may be issued under this section after the expiration of six months following the occurrence of any violation." The Secretary was well within the statutory six months for issuing the citation. The best time to have measured the trench, photographed the trench, and tested for soil impaction was on August 27, before PCI itself backfilled the trench. There was no delay in issuing the citation.

than 5 feet (Tr. Exhs. R-1 & R-2; Tr. 193-217). PCI chose a spot approximately 25 feet from the southwest corner of the Wal-Mart and excavated there. Each company took one boring (Tr. 203, 211).

Representatives of the Secretary were not present at either of these borings. PCI presented no photographs to show the conditions of the later excavation. Nicou testified the walls of the original excavation were uneven. The west wall of the excavation measured 4½ feet. It is possible the borings came from this section of the original excavation, and uncertain whether they came from an area where Nicou measured the excavation to be deeper than 5 feet. Furthermore, the area was paved for a parking lot between the day of the inspection and the time when the companies took the boring samples. The ground had been scraped and leveled before paving. Workers were in the process of scraping the parking lot the day of the inspection (Tr. 28). The depth of the natural soil likely changed once the scraping was completed. The evidence of the borings is too speculative to be of probative value. They were taken months after the original excavation and in markedly changed conditions. They are given no weight in determining the depth of the excavation.

The Secretary has established § 1926.652(a)(1) applies to the excavation at issue.

Noncompliance

For excavations greater than 5 feet in depth, the standard requires employers to protect employees from cave-ins by "an adequate protective system designed in accordance with paragraph (b) or (c) of this section." Paragraph (b) of § 1926.652(a) addresses the design of sloping and benching systems. Paragraph (c) addresses the design of support systems, shield systems, and other protective systems. It is undisputed that PCI did not use a trench box, sloping, or any other protective system in the trench (Tr. 67-68).[4]

The Secretary has established PCI failed to comply with the terms of the standard.

[4] The excavation was not purposefully sloped but, as Nicou stated, "On the side where the excavator was, because of the excavated material dropping on the side, there was material there where there was a slope, but it wasn't an effort to slope the trench" (Tr. 33-34). For an excavation that is 6 feet deep in Type C soil, the standard requires a slope of 32 degrees. A slope of 32 degrees would result in the top of the trench wall being 9 feet away from the toe of the trench (Tr. 69). The width of the excavation at issue was 5 feet at the top and 2½ to 3 feet at the toe (Tr. 52).

Employee Exposure

Nicou did not observe any employees in the excavation the day of his inspection, but both he and Farmer observed footprints at the bottom of the excavation the first time they viewed it, and more footprints the second time (Exhs. C-2 & C-6; Tr. 48). Padre told Nicou that both he and Zumaro had been in the excavation (Tr. 26-27). Larratt denied any PCI employees were ever in the excavation, claiming they repaired the pipe from outside of it (Tr. 59-60). Aside from the implausibility of such a repair, Larratt contradicted himself at the hearing when asked how the excavation differed from the conditions shown in Exhibit C-2 (Tr. 251-252, emphasis added):

> Larratt: Well, when they *went in there again and they were actually in the hole work[ing] again*, this was cleaned up in the back area a little bit more, and the back edge was knocked down a little bit more.
>
> Q.: And, you said when they got back down in the trench–what kind of work were they doing? Was that after lunch?
>
> Larratt: Yes, that was after lunch.
>
> Q.: What kind of work were they doing after lunch?
>
> Larratt: They put a coupling on the pipe there that was cut.

Padre and Zumaro were in the excavation both before and after lunch. PCI argues that they did not stand at the bottom of the excavation, but stood on the water pipe. Assuming such an implausible scenario occurred, the Secretary has still established PCI's employees were exposed to the hazard of a cave-in.

> The safety standard is implicated by the depth of a particular trench, without regard to an individual worker's precise location in it. The notion that having workers stand on a laid pipe within the trench is a satisfactory method of protecting them from the risk of cave-ins is nonsense.

P. Gioioso & Sons, Inc. v. OSHRC, 115 F. 3d 100, 109 (1st Cir. 1997).

Knowledge

Larratt was PCI's pipe foreman. He personally operated the backhoe to excavate the trench (Tr. 246-247). He directed his crew to repair the water pipe. Larratt testified his crew members only work under his direct supervision (Tr. 239). "When a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and

the Secretary satisfies [her] burden of proving knowledge without having to demonstrate any inadequacy in the employer's safety program." *Superior Electric Co,* 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996).

PCI repeatedly argues that Nicou somehow compromised his inspection by failing to notify PCI' corporate shareholders at the time of the inspection. PCI states, "The inspector did not notify upper management, even though he said it was normal practice to do so" (PCI's brief, p. 9). This is a distortion of Nicou's testimony. Nicou stated that a foreman is considered a representative of management, "and he becomes the eyes and ears of the company. Decisions that the foreman makes are decisions of the company" (Tr. 143). Nicou said it was OSHA's policy to get in touch with a higher management official than a foreman. In this case, Nicou met with PCI's general superintendent Rose and its superintendent Newborn. Both men represented upper management of PCI (Tr. 144). It was not Nicou's responsibility to notify anyone else from PCI.[5]

The Secretary has established that PCI had actual knowledge of the violative conditions of the excavation. She has proven her *prima facie* case.

Unpreventable Employee Misconduct Defense

PCI contends that if the court finds a violation, it was the result of employee misconduct on the part of Larratt. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.,* 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F. 3d 401 (6th Cir. 1997).

The safety program PCI submitted at the hearing contains an extensive section outlining PCI's work rules for excavation and trenching. It was dated two months after Nicou's inspection (Exh. R-5).

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Indeed, PCI vice-president and chief operating officer Michael Hartman testified it was Rose's responsibility to notify the corporate office of the inspection. PCI verbally reprimanded Rose and Newborn for failing to do so (Tr. 287).

The court left the record open for 10 days after the hearing to allow PCI time to submit its safety program in effect at the time of the inspection. PCI did so, with a document designated as Exhibit R-5a.

Exhibit R-5a does not contain a single reference to excavations or trenches. There are no work rules relating to excavations. From a reading of this safety program, no one would know that PCI ever works with excavations, much less that it is the company's specialty.

PCI offered no other evidence that it had established work rules relating to adequate protective systems in excavations, or that any such rules were effectively communicated to its employees. Not only did PCI not take steps to discover violations, after upper management was directly confronted with a tape-measured depth of 6 feet in the excavation, they still refused to acknowledge the excavation was in noncompliance with § 1926.652(a)(1). No employees were disciplined for the violative conditions of the excavation at issue.

PCI has failed to establish its employee misconduct defense.

Repeat Classification

The Secretary alleges the violation is a repeat, based upon a citation issued by the Secretary to PCI on February 8, 2005. A violation is considered a repeat violation "if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation." *Potlatch Corp.,* 7 BNA OSHC 1061, 1063 (No. 16183, 1979).

Item 6 of citation no. 1 of the February 2005 citation charged a violation of § 1926.652(a)(1), the same standard at issue in this case (Exh. C-7). The citation arose from an inspection conducted on November 9, 2004, of an excavation that was 48 feet long by 25 feet wide by 10 feet, 6 inches, deep. The soil was Type C soil (Exhs. C-7 & C-8). The parties entered into an Informal Settlement Agreement on February 25, 2005. No modifications were made to the citation, but the parties agreed to a slight reduction in penalty (Exh. C-10; Tr. 98-99).

"A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Company,* 17 BNA OSHC at 1638. Both violations were of the same standard and created the same hazard: death or serious injury by cave-in. In each case, PCI failed to provide an adequate protective system for its employees in the excavation (Tr. 88-89).

The Secretary has established the violation was properly classified as repeat.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

At the time of the inspection, PCI employed approximately 180 employees. Approximately 25 employees worked on the Wal-Mart site (Tr. 102). The Secretary had cited PCI previously for violating the same standard at issue here. The Secretary adduced no evidence of bad faith on PCI's part.

The gravity was high. Nicou testified, "A square foot of dirt can weigh as much as 100 to 120 pounds. If that hit you on the side of your leg, it can cause you fractures" (Tr. 95). An employee buried up to his chest could suffocate and die.

It is determined the appropriate penalty for this violation is $5,000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of the citation, alleging a repeat violation of § 1923.652(a)(1), is hereby affirmed, and a penalty in the amount of $5,000.00 is assessed.

\s\ Ken S. Welsch
KEN S. WELSCH
Judge

Date: June 30, 2008