United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. Degen Excavating, Inc., Respondent.	OSHRC Docket No. **08-1271**

Appearances:

Linda Hastings, Esquire, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio
For Complainant

Roger Sabo, Esquire, Schottenstein, Zox & Dunn, Columbus, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review a citation issued by the Secretary of Labor ("Secretary") to Respondent, Degen Excavating, Inc. ("Degan"or "Respondent").

On July 7, 2008, Darin VonLehmden, the Secretary's Compliance Officer (CO), was driving through Leipsic, Ohio when he observed an excavation worksite where employees were installing an underground sewer line (Tr. 15). Pursuant to an OSHA National Emphasis Program, the CO went to the site to conduct an inspection (Tr. 16). The CO identified himself to project supervisor Daniel Tuttle and working foreman Stephen Robey. As the CO approached the excavation, he saw an employee, later identified as Steve Maxwell, working in the trench (Tr. 17). The trench was dug partially in a gravel backfill (Tr. 22, 81, 154). Maxwell was in the trench to slip a 10-foot long piece of pipe over the rubber boot of the manhole and then tighten the boot (Tr. 156,160-161). This procedure was estimated to take about 3-5 minutes (Tr. 159). The trench was not shored, sloped,

or protected by a trench box (Tr. 50). The CO ordered Maxwell out of the trench. As Maxwell exited the trench, the CO observed there was no ladder, ramp or stairway to provide egress. Rather, Maxwell walked up the backfill stone around the manhole structure (Tr. 38). An opening conference was conducted and the CO interviewed the employees, took measurements and photos and documented the conditions at the site (Tr. 17). The CO also took soil samples from the trench. Both Tuttle and Robey told the CO that the soil was either Type B or C, or a combination thereof (Tr. 23, 156, 197). This was confirmed by the lab analysis of the soil samples (Exhs. C-1, C-2).

As a result of the inspection, Degen was issued a single citation alleging three serious violations of the trenching/excavation standards. The Secretary proposed a penalty of $3,500.00 for each item, for a total penalty of $10,500.00. A hearing was held in this matter in Columbus, Ohio, on February 3, 2009. For the reasons that follow, the violations are affirmed and total penalties of $6,500.00 are assessed.

DISCUSSION

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991).

Item 1 alleges a violation of 29 CFR § 1926.651(c)(2)[1] on the grounds that "an employee performed work in a trench which was approximately 8.6' deep, 25.00' long, and 7.00' wide. No ladder was observed."

The evidence establishes that the trench was 8.6 feet deep and 25 feet long (Tr. 32, 38). It is not disputed that a ladder, ramp or stairway was not provided at the time Maxwell was in the trench. (Tr. 38, 44, 199). The CO testified that, when ordered to leave the trench, Maxwell had to run or walk up the backfill stone around the manhole structure in the trench. According to the CO,

[1] The standard provides:

1926.651 Specific excavation requirements.

* * *

(c) *Access and egress*

* * *

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

Maxwell "was exerting quite a bit of energy because for every step he took, there was material that was sliding because it was backfill stone" (Tr. 37). He concluded that the requirements of the standard were not met because there was no method for the employee to exit the trench in a timely fashion without being impeded (Tr. 37).

Operating foreman, Stephen Robey, testified that Maxwell had no trouble exiting the trench by climbing up the "gravel bank" (Tr. 163-164). Similarly, Maxwell testified he had no difficulty walking out of the trench. Furthermore, he testified that his feet did not "slip or move into the granular" while exiting (Tr. 214).

Clearly, Degen failed to provide a ladder, stairway or ramp for Maxwell to use when exiting the trench. It is Respondent's position that the bank Maxwell climbed was a safe method of egress sufficient to satisfy the standard. I disagree. Exhibit C-14 shows the trench at the location Maxwell exited and the path he took to leave the trench (Tr. 35-36). The exhibit demonstrates that Maxwell had to walk up loose backfill gravel to arrive at a steep bank that he had to climb to effectuate egress. This photo shows that the path contained significant backfill and supports the CO's assertion that Maxwell had to cope with sliding on backfill stone while exiting. While Robey and Maxwell may believe that Maxwell had no trouble exiting the trench, the photo demonstrates that this was more likely due to Maxwell's dexterity than the suitability of the means of exit. Indeed, in the event of a collapse, it is very possible the bank Maxwell was required to climb could have been adversely affected. The alleged violation was committed in full view and with the full knowledge of Degen supervisors Robey and Tuttle. Accordingly, I find that the evidence demonstrates that Degen failed to provide an adequate means of egress from the trench and, therefore, that the Secretary established a prima facie violation of the cited standard.

Item 2 alleges a violation of 29 CFR §1926.651(k)(1)[2] on the grounds that "the employer did not ensure an inspection was conducted by the competent person of the trench which was

[2] The standard provides.

1926.651 Specific excavation requirements.

* * *

(k) *Inspections*. (1) 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.

approximately 8.60' deep with near vertical walls in "C' soil. Visible sloughing was observed and employee exposed to hazards."

Respondent asserts that topman Maxwell, foreman Robey, and project supervisor Tuttle all had competency training and, therefore, were "competent persons" within the meaning of the standard (Tr. 144, 183, 206). The standard, however, does not merely require that there be a "competent person" at the site. Rather, the employer is required to ensure that the trench is inspected at least daily by a competent person. It is here that Degen's conduct falls short. The CO testified that, during the inspection, both Tuttle and Robey informed him that, although they looked at the trench, they did not inspect it for hazardous conditions (Tr. 37).

The CO also testified that, as part of its safety program, Degen requires trench inspections and has a form that is supposed to be filled out that contains a daily trench report checklist (Tr. 40, Ex. C-16). The CO was provided with this form during the inspection, but it was not completed (Tr. 40). At the hearing, Robey and Tuttle testified that they regularly examined the soil to determine its type (Tr. 166, 192-193), but neither testified that they examined the trench at least daily to determine its structural safety. Maxwell entered the trench with the knowledge of Robey and Tuttle. These two supervisors had full knowledge that the trench had not been inspected by a competent person.

Accordingly, I find that the Secretary established that Degen failed to daily inspect the structural integrity of the trench and, therefore, established a prima violation of the cited standard.

Item 3 alleges a violation of 29 CFR § 1926.652(a)(1)[3] on the grounds that "the employer did not ensure an employee was adequately protected from cave-ins and/or collapse hazards while installing a 8" sewer line in a trench approximately 8.60' feet with near vertical walls in "C" soil. Visible sloughing was observed." There was some heavy equipment, including a front-end loader and some dump truck near the trench that could have effected the stability of the trench. (Tr. 22)

[3] The standard provides.

1926.652 Requirements for protective systems.

(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 paragraphs (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.

Although there was a trench box at the site, there is no dispute that the trench was not shored, sloped, or otherwise protected. The CO testified that the trench was measured to be 8.6 feet deep, with nearly vertical walls sloped at an angle of approximately 75 degrees (Exhs. C-6, C-17; Tr. 26, 56, 132). The top of the trench was 7 feet wide (Tr. 29, 33). The bottom of the trench was approximately 24 inches wide (Tr. 54). The trench was dug partially in a gravel backfill (Tr. 22, 81, 154). Otherwise, the soil was a mixture of Types B and C (Tr. 23, 156, 197). The standard requires that trenches dug in Type B soil be sloped to an angle of 45 degrees, while trenches dug in Type C soil must be sloped to an angle of 34 degrees. According to the CO, to comply with the standard, the top of the trench should have been at least 16 feet wide if dug in Type B soil, and 24 feet wide if dug in Type C soil (Exh. C-17; Tr. 56-57, 117).

In its brief, Degen argues that the soil samples tests taken by the Salt Lake City lab were inadequate because those results were conclusory, with no explanation or details explaining how those conclusions were reached (Respondent's Brief pp. 15-16). I find no merit in this argument. As noted, the evidence that the soil was a combination of Types B and C is overwhelming. This was the opinion of, not only the CO, but also of Robey and Tuttle. Therefore, even if the CO failed to send soil samples for testing, I would find that the overwhelming weight of the evidence clearly established that the trench was dug in a combination of Type B and C soil.

The evidence is undisputed that Maxwell entered the unprotected trench with the full knowledge of both supervisors. I find that the Secretary has established a prima facie violation of the cited standard.

Unpreventable Employee Misconduct

Asserting that the items should be vacated, Degen timely raised the "unpreventable employee misconduct" defense. To establish the affirmative defense of "unpreventable employee misconduct", the employer must show that it had a thorough safety program which was adequately enforced and communicated, and that the violative conduct was idiosyncratic and unforeseeable. The employer must also present evidence concerning the manner in which it enforces its safety rules. *L. E. Myers Co.,* 16 BNA OSHC 1037, 1040 (No. 90-945, 1993). When the alleged misconduct is that of a supervisor, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of

employees under his supervision. *Archer-Western Contractors Lt.,* 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), *petition for review denied* at 978 F.2d 744 (D.C. Cir. 1992). In such an instance, the employer must also establish that it took all feasible steps to prevent the incident, including adequate instruction and supervision of its supervisory employee. *Id.* Moreover, a violation is foreseeable where the employer's safety program, or the training or supervision of its employees is inadequate. *Interstate Brands Corp.*, 20 BNA OSHC 1102, 1104-05 (No. 00-1077, 2003).

According to Robey, the crew decided not to use the trench box because it was longer than the distance between the manhole and a water drain pipe which marked the ends of the trench. Making the trench long enough to accommodate the trench box would have required that the water to the town be cut-off for a longer period[4] (Tr. 155, 210). The team thought the work in the trench could be completed in 3-5 minutes[5] (Tr. 159). Project Supervisor Tuttle testified that the trench banks were standing all morning, and he assumed that the trench was safe (Tr. 187). Robey testified he talked things over with Maxwell, and based on their experience, they decided that they could get the job done safely without the use of a trench box, even though they were aware that they were violating company policy (Tr. 157-158). He further testified that they told Tuttle about their decision, and that Tuttle was in agreement (Tr. 158). Maxwell similarly testified he and Robey decided that the banks looked safe and that he could safely enter the trench and attach the pipe without using trench protection (Tr. 210-211). He stressed that he would not have entered the trench if it did not look safe[6] (Tr. 215). Clearly, the decision to allow Maxwell to enter the unprotected trench was not only made by Maxwell's immediate supervisor, Robey, but also was supported by Robey's superior, Project Supervisor Tuttle[7].

Respondent established that it has a safety program that includes trench safety (Exh. R-4; Tr. 129). Its supervisors conduct weekly toolbox meetings that involve various safety matters including trench safety (Tr. 131, Ex. R-3). The last toolbox meeting, held on June 30, 2008, was

[4] The town had earlier expressed concern that the work might leave much of the town without water (Tr. 155).

[5] Maxwell testified that he was in the trench for about 5 minutes (Tr. 214).

[6] It should be noted that the crew determined that the trench was safe without conducting an inspection of the trench as required by 29 CFR § 1926.651(k).

[7] Foreman Robey reported to Project Supervisor Tuttle. In turn, Tuttle reported to Project Supervisor and safety officer Howard Best who, in turn, reported to owner Bill Degen (Tr. 170).

attended by Maxwell, Robey, and Tuttle and addressed trench safety (Tr. 131). All three employees had competency training (Tr. 144, 183, 206) and other safety training (Tr. 126-128, 146, 183, 190, 206-207). Degen considered all three to be safety conscious employees (Tr. 230). Respondent cites the CO's testimony at page 101 of the transcript for the proposition that the CO considered the safety program at Degen to be very good (Respondent's Brief p.13). A review of that testimony reveals that the CO was not giving his opinion but, rather, was reciting the opinion given to him by Maxwell of the Degen safety program.

Therefore, Respondent asserts, supervisors Robey and Tuttle and topman Maxwell violated a well-communicated and adequately enforced safety rule when Maxwell entered the trench without using the trench box. It argues, not only were the employees adequately trained, but also that its work rules were enforced. Respondent points out that, after the violation, all three employees were given verbal reprimands which were placed in writing (Exh. R-5; Tr. 134, 168, 194, 216).

I find the problem here lies not with the quality of Degen's safety manual or in the initial implementation of its safety program, but rather in the enforcement of that safety program.

Significantly, it was not just an isolated supervisor or employee that determined that it was permissible to violate company safety rules, but the entire team which included two levels of supervisors and one experienced employee. *Gem Industrial, Inc.*, 17 BNA OSHC 1861 (No. 93-1122, 1996) involved a situation where, contrary to their employer's work rules, all three employees working on beams failed to use required fall protection. In that case, the Commission stated "[w]here all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule."17 BNA OSHC at 1865. Here, not only did all the employees determine that it was appropriate to violate company safety rules, but two of those employees were supervisors, including Tuttle, who was just two reporting levels below the company owner.

Post-inspection disciplinary measures may be considered in determining whether a work rule was effectively enforced, provided that it is viewed in conjunction with pre-inspection discipline. *Gem Industrial, Inc.*, 17 BNA OSHC at 1864, n.6. Respondent failed to produce any evidence it effectively enforced its safety rules or that previous violations of its safety rules met with any form of discipline. To the contrary, Howard Best, the project supervisor and Degan's safety officer, testified he did not issue any disciplinary notices for safety violations since he became safety officer

in 2006 (Tr. 136, 137). While the testimony established authority to issue discipline rested with owner William Degan, this authority was not exercised (Tr. 136). Degen testified that, in the 7 to 8 years since taking over the company, he never disciplined an employee for safety violations, until the current incident (Tr. 234-235).

Although Respondent's disciplinary notice sets forth a progressive disciplinary procedure for repeated safety violations (Exhs. R-4-7), neither Robey, Tuttle nor Maxwell knew the nature of subsequent disciplinary measures (Tr. 176, 199, 219). Indeed, Degen testified that his company had no procedures setting forth what would follow a first warning. Rather, he stated that in such an event, he would investigate and, based on the nature of the infraction, administer discipline accordingly (Tr. 234). Given this lack of a viable enforcement policy, it was foreseeable that employees would violate those safety rules. This was particularly true in this situation, where compliance was inconvenient and employees did not perceive that violating the rules entailed significant danger[8]. *See Diamond Installations,* 21 BNA OSHC 1688, 1691, n.5 (No. 02-2080 & 02-2081)(Commissioner Thompson notes that the Secretary establishes foreseeability when she establishes, *inter alia*, a lack of an adequate enforcement program.)[9]

Moreover, Respondent did not discipline the crew until the day after the informal conference with OSHA, 44 days after the inspection, and more than three weeks after it was cited for the instant safety violations (Tr. 132-136). Degen explained that the delay was due to personal medical issues

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[8] It is also noteworthy that the discipline was only for entering a trench without using the trench box. The discipline did not include either the failure of a competent person to inspect the trench, or the failure to place a ladder inside the trench while Maxwell was in it. (Tr. 219)

[9] Respondent cites this Judge to *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006), a case I initially decided wherein I imputed a supervisor's knowledge of a violation to the employer and rejected the unpreventable employee misconduct defense on the grounds that the supervisor's failure to wear fall protection demonstrated that the employer had not effectively communicated its work rules. The Fifth Circuit reversed my decision on the grounds that the burden was improperly placed on the employer to prove that the supervisor's misconduct was not foreseeable. In the Court's view, imputing the constructive knowledge of a supervisor's own misconduct to the employer imposed a strict liability scheme. Therefore, the Court found that I erred by placing the burden on the employer to establish that the employer's misconduct was unforeseeable. This case is, however, distinguishable. First, this case arose in the Sixth Circuit. Unlike several other circuits, the Sixth Circuit does not require the Secretary to establish that a supervisor's misconduct was foreseeable. Rather it views the "unpreventable employee misconduct" as an affirmative defense with the burden on the employer to establish all relevant elements. *Danis-Shook Joint Venture, XXV v. Secretary of Labor*, 805 F.3d 805, 811-812 (6th Cir. 2003). Second, I note that the Fifth Circuit found that a supervisor's knowledge of his own malfeasance "is *not* imputable to the employer where the employer's safety policy, training and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable. 459 F.3d at 608-609." Here, the evidence clearly establishes that Respondent's disciplinary policy was virtually non-existent, thus making it foreseeable that supervisors would feel free to violate the safety policy. In addition, this case involves the knowledge of two supervisory employees of the exposure of a non-supervisory employee to hazardous conditions.

that kept him from gathering the necessary information (Tr. 233). The delay in issuing discipline to the crew until after the OSHA conference, together with the complete failure to take any disciplinary action for other safety infractions prior to this inspection, suggests that the purpose of the discipline was to support Respondent's legal defense rather than to enhance its safety program. I also find that the inability of any other corporate official to take disciplinary action in Degen's absence underscores a fatal flaw in Respondent's safety program, since it is apparent that, in Degen's absence, all disciplinary procedures came to a grinding halt. Indeed, the evidence demonstrates that when it came to enforcement, Respondent did not have an effective safety program.

Accordingly, I find that Respondent failed to establish that the violations were a result of unpreventable employee misconduct.

Penalty

The Secretary asserts that each of the violations is serious and proposes a penalty of $3,500.00 for each item, for a total of $10,500.00. The evidence establishes that Maxwell was in an unprotected trench 8.6 feet deep, that was not properly inspected and which did not provide a safe means of egress. Under section 17(k) of the Act, 29 USC § 66(k) a violation is "serious" if there is "a substantial probability that death or serious physical harm could result." The evidence establishes that had the trench collapsed, it was likely that Maxwell would have suffered injuries ranging from broken bones to death (Tr. 47, 58, 59). Accordingly, I find all three violations were properly classified as serious.

In assessing penalties, the Commission must give due consideration to the employer's prior history and good faith, the size of the employer's business, and the gravity of the cited violations. 29 U.S.C. § 66(j); *S&G Packaging Co.*, 19 BNA OSHC 1503, 1509 (No. 98-1107, 2001).

The CO testified the gravity of the violations was high/greater (Tr. 48-49). Credits were given for Degen's size (40%) and history (10%) (Tr. 48-49, 58-59). No credit was given for good faith due to the deficiencies in the company safety program (Tr. 48).

Item 1-Failure to provide proper means of egress.

While I agree that the violation was serious, I find the Secretary overstated its gravity. Although Degen did not provide a proper means of egress which could have led to death or serious harm, the evidence shows that Maxwell was working in proximity to the manhole. Though more

attributable to his dexterity than the propriety of the means of egress, Maxwell was able to climb up the side of the trench without great difficulty. Accordingly, I find the violation to be of low gravity and find a penalty of $1000.00 to be appropriate.

Item 2-Failure to have a competent person inspect the trench.

Again, I find that the violation was serious. Had the trench collapsed with Maxwell in it due to the failure to conduct a proper inspection, the likely result would have been death or serious physical harm. The Secretary based her penalty on the assumption the gravity of the violation was high/greater. I disagree. The trench was dug earlier that day (Tr. 152-153). Therefore, this was not a situation where the trench had been subject to the stresses of being open for a sustained period. Also, there is no evidence that it had rained or that any other incident occurred that would have required additional inspection under the standard. Nonetheless, the trench was not properly inspected by a competent person who could have detected any defect in the trench's structural stability. On this basis, I find that the gravity of the violation was moderate, and find that a penalty of $2,000.00 is appropriate.

Item 3-Failure to shore, slope or otherwise protect employees working in the trench from the hazard of collapse.

Here, I agree with the Secretary that the gravity of the violation was high. The failure to provide a trench box, shoring or sloping exposed Maxwell to the hazard of death or serious physical injury from a trench collapse. Although he was in the trench for only five minutes, the failure to provide a proper means of egress or to have the trench inspected by a competent person increased the likelihood of an accident and, therefore, the gravity of working in an unprotected trench. The project supervisor, Tuttle, testified a trench can collapse "pretty quick" (Tr. 196). Accordingly, I find that $3,500.00 penalty proposed by the Secretary is appropriate.

FINDINGS OF FACTS 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

Accordingly, it is **ORDERED** that:

Citation No. 1, Item 1, alleged serious violation of 29 CFR § 1926.651(c)(2) is affirmed and a penalty of $1,000.00 is assessed;

Citation No. 1, Item 2, alleged serious violation of 29 CFR § 1926.651(k)(1) is affirmed and a penalty of $2,000.00 is assessed; and

Citation No. 1, Item 3, alleged serious violation of 29 CFR § 1926.652(a)(1) is affirmed and a penalty of $3,500.00 is assessed.

___/s/_____
Stephen J. Simko, Jr.
Administrative Law Judge

Date: July 8, 2009

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