



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

POOLER ENTERPRISES,

Respondent.

OSHRC DOCKET NO. 24-1274

APPEARANCES:

Marc G. Sheris, Senior Trial Attorney
U.S. Department of Labor, Office of the Solicitor, New York, NY
for Complainant (the Secretary)

Timothy Crumb,
Safety Consulting Services, Pittsford, NY
Representative for Respondent

BEFORE: Christine Le
Administrative Law Judge

DECISION AND ORDER

Pooler Enterprises (Pooler) is a construction company that performs utilities and site work in preparation for building construction. Tr. 19. The Occupational Safety and Health Administration (OSHA) conducted an inspection of Pooler's worksite in Penfield, New York on April 22, 2024. Tr. 13. OSHA issued Pooler a Citation and Notification of Penalty (Citation) on August 13, 2024, alleging a serious violation of 29 C.F.R. § 1926.651(j)(1) for failure to provide adequate protection to protect employees from loose rock or soil that could pose a hazard by

falling or rolling from an excavation face. Ex. R-2 at 4. The Secretary proposed a penalty of \$4,662. Ex. R-2 at 4.

Pooler timely contested the Citation and the proposed penalty, which brought the matter before the independent Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 659(c). Jt. Preh'rg Stmt. ¶ c at 5; Sec'y Br. at 2. I granted the Secretary's Motion to Amend the Citation on November 21, 2024, to instead allege a violation of 29 C.F.R. § 1926.652(a)(1) based on the same facts as the originally issued citation. I held a hearing in Rochester, New York, on April 29, 2025, under the Commission's Simplified Proceedings. 29 C.F.R. § 2200.200, *et seq.* The Secretary timely filed a post hearing brief. Pooler did not file a post hearing brief.

For the reasons discussed below, Citation 1, Item 1, as amended, alleging a failure to use adequate cave-in protection for employees working in an excavation, is **VACATED**.

JURISDICTION

The parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to section 10(c) of the Act, and at all times relevant to this action, Pooler was an employer engaged in a business affecting interstate commerce as defined in section 3 of the Act, 29 U.S.C. §§ 652(3) & (5). Jt. Preh'rg Stmt. ¶ c at 5; Sec'y Br. at 2. Based on the parties' stipulations and the facts presented, Pooler is an employer covered under the Act, and the Commission has jurisdiction over this proceeding.

FINDINGS OF FACT

OSHA assigned Compliance Safety and Health Officer (CO) Wilson Soto to inspect a construction worksite at 1657 Fairport Nine Mile Point, The Arbor at Penfield, Penfield, New York, on April 22, 2024. Tr. 13-14; Ex, R-1 at 1. The worksite was selected from a randomized

list of construction sites within OSHA's jurisdictional area that were active and available for inspection. Tr. 13-14. At the worksite, CO Soto met with the site's general contractor, Spoleta Construction (Spoleta). Tr. 15. Vincent Candello, Spoleta's Assistant Superintendent, accompanied CO Soto throughout the inspection. Tr. 16.

During the inspection, CO Soto came across an excavation.¹ Tr. 16. CO Soto determined it was a utilities excavation where a water main had been installed. Tr. 17-19. The excavation measured six feet, four inches deep and was approximately nine feet wide and thirteen to fourteen feet long. Tr. 16-17, 29, 31, 93-94; Ex. C-4. CO Soto learned that Pooler dug the excavation and installed the utility pipe. Tr. 18-19.

CO Soto proceeded with his investigation and held an opening conference with Todd Jackson, Pooler's Site Foreman and general supervisor. Tr. 20, 86-87, 89-90. CO Soto also met with Charlie Kinsman, Pooler's Pipe Foreman for twenty-five years. Tr. 78, 83. Mr. Kinsman's duties included directing Pooler employees to install pipe components in the excavation, running the excavator to dig the excavation, preparing the work schedule for the day, ordering necessary parts, and backfilling the excavation. Tr. 79, 84, 95.

On the day of OSHA's inspection, Pooler was conducting tests to locate and isolate a water main leak. Tr. 80-82, 90-92. To conduct the tests, Pooler pumped water from a barrel into the water main while a subcontractor monitored the area with a listening device to determine the exact location of the leaks. Tr. 81, 84-85, 93.

CO Soto concluded that Pooler's employee had entered the excavation to open the valve to test the water flow. Tr. 28, 60-61. CO Soto did not observe any employees in the excavation

¹ Throughout the record—including the Citation, hearing transcript, and the Secretary's brief—the witnesses and parties used the terms "excavation" and "trench" interchangeably. For the purposes of this decision, I use the term "excavation" to maintain clarity and consistency.

at the time of the inspection but observed there was no cave-in protection and took various photographs. Tr. 26, 33, 35-38; Exs. C-1, C-2, C-3, C-4.

DISCUSSION

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and, (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980); *Atl. Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

Amended Citation 1, Item 1

As amended, Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1962.652(a)(1) as follows:

- a) On or about 04/22/2024, at the Arbor at Penfield Townhouse project, located in Penfield, New York, the employer did not enforce the use of cave-in protection for employees working in a trench 6 feet 4 inches below grade. Employees were allowed to access water mains inside a trench with no protective systems in place.

Ex. R-2 at 4.

The cited standard provides, in relevant part, that “[e]ach 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” 29 C.F.R. § 1926.652(a)(1).

Applicability

Section 1926.652(a)(1) requires that employees in an excavation be protected from

cave-ins by an adequate protective system.² “The test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations where applicability is questioned.” *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993); *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1406 (No. 99-0707, 2001). The cited standard is within Subpart P, which “applies to all open excavations made in the earth’s surface,” including “trenches.” 29 C.F.R. § 1926.650(a). “Excavation” is further defined as “any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.” 29 C.F.R. § 1926.650(b). A “trench” or “trench excavation” is defined as “a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet (4.6 m).” 29 C.F.R. § 1926.650(b).

The Secretary contends, by its plain terms, section 1926.652(a)(1) is applicable to the excavation created by Pooler as “it was a man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.” Sec’y Br. at 5-6; 29 C.F.R. § 1926.650(b). Pooler does not dispute that the conditions fall within the definition of “excavation” set forth in section 1926.650(b). Therefore, Subpart P applies to the excavation, including the provisions of 29 C.F.R. 1926.652(a)(1).

Compliance

The cited standard requires each employee in an excavation to “be protected from cave-ins by an adequate protective system.” 29 C.F.R. § 1926.652(a)(1). Section 1926.652(a)(1)

² The cited standard provides exceptions when “[e]xcavations are made entirely in stable rock” or for excavations less than five feet deep when a competent person has examined the ground and found no indication of a potential cave-in. 29 C.F.R. § 1926.652(a)(1)(i)-(ii). Neither party argues that any exception applies here.

requires adequate protective systems in accordance with subsections (b) or (c). Paragraph (b) provides options for using sloping and benching systems, and paragraph (c) provides options for using “support systems, shield systems, and other protective systems.” 29 C.F.R. § 1926.652(b)-(c).

The Secretary argues Pooler failed to comply with the standard’s requirements because no trench boxes or other forms of cave-in protection were used. Sec’y Br. at 6. Pooler does not assert that it had an adequate protective system in place at the time of the inspection but instead contends that no employees were exposed to the cave-in hazard. Tr. 76.

At the time of the inspection, there was no cave-in protection in the excavation. Tr. 34-35; Ex. C-2. CO Soto testified that there was no shoring for the sides of the excavation, the dirt had not been benched back away from the excavation, and no trench box was installed to protect against a cave-in. Tr. 34-35. Photographs show no cave-in protection in the excavation. Exs. C-1, C-2, C-4. Accordingly, the Secretary has demonstrated that the excavation was not in compliance with the requirements of 29 C.F.R. § 1926.652(a)(1).

Exposure

“The Secretary always bears the burden of proving employee exposure to the violative conditions.” *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). To establish exposure, the Secretary “must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). The zone of danger is the “area surrounding the violative condition that presents the danger to employees.” *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995). The zone of danger is determined by the hazard presented by the violative condition and is

normally the area surrounding the condition which presents the danger to employees that the standard was intended to prevent. *Id.*; *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

The Secretary contends Mr. Kinsman was exposed to the hazardous condition when he entered the excavation without cave-in protection on the morning of April 22, 2024. Sec’y Br. at 7. Pooler asserts the Secretary has failed to prove exposure because none of its employees were in the excavation or “had reason to be in the trench, and if they were in the trench at any time prior to [the inspection], they used appropriate cave-in protection.” Tr. 76.

The Secretary did not offer any direct evidence to prove that employees were in the excavation and thereby exposed to the violative conditions. The sole evidence offered by the Secretary to establish employee exposure was CO Soto’s testimony about statements allegedly made by Mr. Jackson and Mr. Kinsman to CO Soto at the worksite. These hearsay statements, allegedly made by Pooler employees to CO Soto, were admitted and considered pursuant to the Commission’s Simplified Proceedings rules, under which the Federal Rules of Evidence do not apply. Commission Rule 209(c), 29 C.F.R. § 2200.209(c). Because the record lacks direct evidence—such as eyewitness observations, photographs, recordings, or written admissions from an exposed employee—this case turns entirely on the credibility of CO Soto’s testimony and the reliability of these alleged out-of-court statements used to establish exposure.

CO Soto testified that Mr. Jackson and Mr. Kinsman told him Mr. Kinsman had been in the excavation on the morning of the inspection and that the admissions were “in the field notes.” Tr. 20-22, 39-40, 65. However, on further cross-examination, CO Soto backtracked: “Yeah, I stand corrected. It’s [the admissions are] not in the field notes.” Tr. 66.

Although the Safety Narrative alleges that CO Soto “learned ... Kinsman, was in the trench earlier that morning (8:30am) opening the flow valve to test the water pressure,” CO Soto admitted he did not ask Mr. Jackson why Mr. Kinsman needed to enter the excavation for a water pressure test. Tr. 63, 65, 71; Ex. R-2 at 1. CO Soto later conceded he took no written statements from the declarants and that he “thought of it but didn’t,” despite having no time constraints. Tr. 68, 74; *see* Ex. R-3. CO Soto’s recollection and testimony regarding the out-of-court statements made by Mr. Jackson and Mr. Kinsman lack credibility due to internal inconsistencies and are not reliable.³

In contrast, both Mr. Jackson and Mr. Kinsman, the declarants of the alleged out-of-court statements, testified at the hearing. Mr. Jackson denied having knowledge or ever being asked by or telling CO Soto that Mr. Kinsman was in the excavation. Tr. 91, 93. Mr. Jackson testified that Mr. Kinsman had no need to enter the excavation because that was the job of a “pipe layer,” while Mr. Kinsman was responsible for operating the excavator. Tr. 91, 94-95. Mr. Jackson confirmed that a trench box had been used when employees installed the valve, and no employees needed to enter the excavation to actuate the valve at that point [on the day of the inspection].⁴ Tr. 91. Mr. Jackson explained the valve would not have been open at that point because “[y]ou’d get hundreds of gallons of water in there and you would stop your test. You’re trying to test the water. If you open that, it’s going to fill the trench with water.”⁵ Tr. 91. I found

³ CO Soto also testified that he “noticed footprints near the valve.” Tr. 30, 49-50. When asked if any footprints could be identified in the photograph, he insisted that he “could see footprints to the right side of that red valve.” Tr. 50; Ex. C-2. However, there are no footprints visible in the photographs. Exs. C-1, C-2, C-4. CO Soto’s testimony in this regard, claiming that footprints were visible in the photographs when they are not, further reduced the credibility of his overall testimony.

⁴ Mr. Jackson testified that a pressure test would not be performed in the excavation, but with an above-ground “hot box assembly” located about 120 to 150 feet east of the excavation. Tr. 91-93, 96-97.

⁵ CO Soto admitted there was no apparatus or device in the excavation to measure pressure. Tr. 60-62.

Mr. Jackson to be forthright. His demeanor was candid and non-reactive, consistent with CO Soto's observations during their opening and closing conferences. Tr. 24-25, 99.

Mr. Kinsman corroborated Mr. Jackson's testimony and denied ever entering the excavation depicted in the photo, disputed ever having told CO Soto that he had been in the excavation, and denied seeing any employees enter the excavation on the day of the investigation. Tr. 79-80, 88. He further testified there was no need for any employee to be in the excavation because a hired subcontractor used listening devices outside of the excavation to determine if there were any leaks. Tr. 84-86. Moreover, Mr. Kinsman testified that the pressure test for the Monroe County Water Authority would not have been conducted until after the leaks were found and repaired. Tr. 85-87. Mr. Kinsman's testimony was credible and consistent with Mr. Jackson's account.

The Commission has stated “[a] declaration that is introduced through another's testimony inherently has less probative value than the declarant's own testimony.” *Morrison-Knudsen Inc.*, 13 BNA OSHC 1121, 1123 (No. 80-345, 1987); *Continental Electric Co.*, 13 BNA OSHC 2153, 2155 n. 6 (No. 83-921, 1989) (“As an out of court declaration, the employee's statement inherently has less probative value than would the employee's own testimony and is not necessarily entitled to dispositive weight.”). This is because “neither the other party nor the judge has an opportunity to cross-examine the person who made the statement” or assess the credibility of the declarant. *Morrison-Knudsen Inc.*, 13 BNA OSHC 1121, 1124 (No. 80-345, 1987). Given this, I credit the consistent testimony of Mr. Jackson and Mr. Kinsman over CO Soto's inconsistent testimony.

The Secretary has failed to establish employee exposure. The case relies on uncorroborated, out-of-court admissions that lack internal consistency and have been

contradicted by the sworn testimony of Mr. Jackson and Mr. Kinsman, who both provided credible alternative explanations for why no employee needed to enter the excavation. Tr. 79-80, 84-85, 88, 91-93. Furthermore, the Secretary has failed to meet the burden of showing that it was reasonably predictable, by operational necessity or inadvertence, that Pooler employees were or would have been in the excavation and therefore exposed to the cave-in hazard. *See Fabricated Metal Prods.*, 18 BNA OSHC at 1074. ⁶

Accordingly, Citation 1, Item 1, is **VACATED**.

ORDER

Based on the foregoing findings of fact and conclusions of law in accordance with Commission Rule 90(a)(1), 29 C.F.R. § 2200.90(a)(1), it is ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of C.F.R. § 1926.652(a)(1), is **VACATED**.

SO ORDERED.

Dated: February 12, 2026

/s/ Christine Le
Christine Le
Administrative Law Judge

⁶ Because there is no exposure, I do not reach the issue of knowledge.