



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3419

Phone: (202) 606-5400  
Fax: (202) 606-5050

SECRETARY OF LABOR  
Complainant,  
v.  
P. GIOIOSO & SONS, INC.  
Respondent.

OSHRC DOCKET  
NO. 95-0322

**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 April 24, 1996. The decision of the Judge will become a final order of the Commission on May 24, 1996 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 May 14, 1996 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  
1120 20th St. N.W., Suite 980  
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
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) 606-5400.

FOR THE COMMISSION

*Ray H. Darling, Jr. / RHA*

Ray H. Darling, Jr.  
Executive Secretary

Date: April 24, 1996

DOCKET NO. 95-0322

NOTICE IS GIVEN TO THE FOLLOWING:

Frank V. McDermott, Jr.  
Acting Regional Solicitor  
Office of the Solicitor, U.S. DOL  
One Congress Street, 11th Floor  
P.O. Box 8396  
Boston, MA 02114

Richard D. Wayne, Esq.  
Hinckley, Allen & Snyder  
One Financial Center  
Boston, MA 02111

Robert A. Yetman  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
McCormack Post Office and  
Courthouse, Room 420  
Boston, MA 02109 4501

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Resources Authority to install water lines in the town of Winthrop in order to feed water to Deer Island (Tr. 251, 260-61, 271-72). On October 6, 1994, as part of this project, Gioioso employees were working at an open trench site located at the intersection of two streets leading to Deer Island (Tr. 39-40, 57; Exhibit C-1). Gioioso does not dispute that the trench was dug in a gravel-type soil and was approximately four feet wide, eighteen feet long, and at least six feet deep (Tr. 42-43, 45, 51, 55-56, 58, 61, 67-68, 102, 122, 126, 137, 152, 158, 287, 310, 314-15, 321; Exhibits C-1, C-2, & C-19 at 6). The walls of the trench were "straight cut" at a 90 degree angle to the street and the trench was not shored, sheeted, or benched (Tr. 43, 55-56, 66-67, 152, 310-13; Exhibits C-2 through C-9).

A group of compliance officers conducting an inspection on Deer island were driving past the work area on their way to lunch when they noticed a large Caterpillar crawler shovel ("CAT") and a spoil pile located next to the open trench which contained two employees (Tr. 35-37, 41-43, 48-49, 100, 149-51, 155-57; Exhibits C-1, C-2, C-7, C-8 & C-9). Pursuant to OSHA's national emphasis program, the compliance officer driving the car parked nearby and approached the work area in order to conduct an inspection of the trench. One of the employees identified himself as the project's foreman (Tr. 43-45, 50-54, 61-62, 91, 102-03, 105, 208-09, 309).

**I. Serious Citation 1, Item 2:**

29 CFR § 1926.651(e): Employee was not prohibited to be underneath loads handled by lifting or digging equipment:

RT 145; Winthrop:

Employees were exposed to serious injury while working in a trench in which a section of 12" water line was being lowered.

Under this item, the Secretary alleges violation of § 1926.651(e) which prohibits an employee from being underneath a load handled by lifting or digging equipment. According to two of the compliance officers who observed the worksite, a ten-foot section of cast-metal pipe that was suspended from the bucket of the CAT excavator by a single chain sling passed over the heads of the two Gioioso employees working inside the trench (Tr. 44-45, 51, 83-84, 86, 108, 110-14, 118-19, 151, 153, 163-66; Exhibit C-2). According to Gioioso's foreman, Salvatore Sansone, the pipe was

in the process of being moved from one location to another (Tr. 327-30).<sup>1</sup> As the CAT's arm moved slowly, the pipe apparently spun around from its single connection point, swinging over the men's heads (Tr. 65, 110-11, 115, 119-20, 154, 163, 165-66). Considering the manner in which the pipe was suspended from the bucket of the CAT, as well as the photograph which depicts the pipe dangling in close proximity to the men working inside the trench, the record lends credence to the compliance officers' observations (Exhibit C-2).

Gioioso asserts that the testimony of the compliance officers is inconsistent regarding the actual position of the two employees inside the trench when the pipe passed over their heads. One compliance officer testified that he saw the employees standing close together when the suspended pipe passed over their heads, while the other compliance officer testified that the men were standing several feet apart (Tr. 43-46, 51, 65-66, 83-84, 110, 113, 118-19, 151, 153-54, 158, 163-66; Exhibit C-2). Therefore, Gioioso argues, their testimony is untrustworthy and should not be credited. Gioioso fails to acknowledge, however, that the first compliance officer made his observation after he had parked the car and was approaching the worksite in order to remove the men from the trench, while the second compliance officer made his observation from his seat in the front of the car when the group of inspectors drove past the site. As such, any significance Gioioso would accord this minor inconsistency is undermined by the fact that these observations were made at different times and from different vantage points.

As noted *supra*, two Gioioso employee were exposed to this violative condition. Since one of these employees was Sansone and he was well aware that the pipe was being moved in this manner, knowledge on the part of Gioioso is established (Tr. 326-30). *A.P. O'Horo Co.*, 14 BNA 2004, 2007, 1991 CCH OSHD ¶ 29,223 (No. 85-369, 1991) (employee who has been delegated authority over other employees is considered a supervisor whose actual or constructive knowledge of violative conditions can be imputed to employer). Thus, there is sufficient evidence to support

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<sup>1</sup> At the hearing, there was some question as to whether the men inside the trench were preparing to receive the pipe for installation (Tr. 57, 134, 154, 159, 171-73; Exhibit C-19 at 3). Gioioso's safety director, however, noted that the photographs indicate the trench was not "ready" for the pipe to be installed; for instance, the crushed stones used to protect the pipe from damage were not present at the bottom of the trench (Tr. 290-92, 327).

the conclusion that a violation of § 1926.651(e) has occurred as alleged.

## **II. Serious Citation 1, Item 3:**

29 CFR § 1926.1053(b)(1): Portable ladders were used for access to an upper landing surface and the ladder side rails did not extend at least 3 feet (.9m) above the upper landing surface to which the ladder was used to gain access:

RT 145; Winthrop:

A ladder used for access and egress to a trench did not extend three feet above the street level.

Under this item, the Secretary alleges violation of § 1926.1053(b)(1) which requires that portable ladders used for access to an upper landing surface extend at least three feet above said surface.<sup>2</sup> It is undisputed that a ladder leaning against one of the side walls near the center of the trench extended only 12 inches above the road surface (Tr. 48-49, 55, 85, 292-93, 322-23; Exhibits C-1, C-3 through C-9). Gioioso's foreman admits that he placed the ladder inside the trench in this manner (Tr. 322). Both compliance officers observed the foreman and the laborer working with him use this ladder to exit the trench (Tr. 62, 141-42, 161). Thus, there is sufficient evidence to support the conclusion that a violation of § 1926.651(e) has occurred as alleged. Gioioso, while acknowledging the violation in its post-hearing brief, urges that it should be characterized as *de minimis*. Based upon the evidence discussed *infra* (Section V), the Secretary has presented sufficient support to characterize the violation as serious.

## **III. Repeat Citation 2, Item 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(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(I) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

RT 145; Winthrop, Tafts Avenue:

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<sup>2</sup> As an alternative to extending the ladder in this manner, § 1926.1053(b)(1) provides the option of securing the ladder at its top to a rigid support and adding a grasping device such as a grabrail in order to assist employees in mounting and dismounting the ladder. This option was not utilized here.

Employees were exposed to serious injury or death while working in an unshored trench that was seven feet deep.

Under this item, the Secretary alleges violation of § 1926.652(a)(1) which requires each employee in an excavation to be protected from cave-ins by an adequate protective system. As noted *supra*, the walls of the trench were straight cut to a 90 degree angle and the trench did not contain any kind of protective system. Although Gioioso has acknowledged that the trench was at least six feet deep, it maintains that the two employees inside the trench never stood on the trench's floor, but stood on an exposed, six-inch diameter natural gas pipe that traversed the trench (Tr. 48-49, 71-72, 139-41 152, 310, 314, 318; Exhibits C-3, C-4, C-5, C-6, & C-19). Since this pipe was located approximately three and a half feet from the top of the trench, Gioioso claims that its employees were never exposed to the cave-in hazard presented by a trench measuring more than five feet (Tr. 313, 316-18).

Based on the testimony of the two compliance officers who observed the worksite, as well as the only photograph taken of the men while they were inside the trench, it is unlikely that the men were standing on the floor of the trench at the time that the compliance officers observed them. Both compliance officers testified that from outside the trench, the tops of the hard hats worn by the men were visible (Tr. 50-51, 61, 102-03, 151). In fact, in the photograph of the two employees, the foreman is pictured almost from the waist up and the full face of the laborer is visible (Tr. 158, 315-16; Exhibit C-2). Given that the heights of the two employees were estimated to be no more than six feet and the depth of the trench was placed at over six feet, Gioioso's contention that the men were standing on the pipe at the time that the photograph was taken is not an unreasonable one (Tr. 63, 122-24, 167).

But no matter where they were standing, the employees were still inside a trench that was not protected in accordance with § 1926.652(a)(1). In *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2011, 1992 CCH OSHD ¶ 29,900 (No. 90-1505, 1992), *aff'd*, 16 F.3d 1219 (6th Cir. 1994), Ford made the same argument Gioioso makes here, claiming that its employees were only exposed to a trench that was 3 ½ feet deep because they were supposed to stand on a pipe located at that depth. The Commission rejected this argument as "unpersuasive", stating that "[§ 1926.652(a)(1)] speaks of the depth of the trench, not of the position of employees in the trench." Since the depth of this trench

was well over the five-foot depth exception level, Gioioso was required to comply with the protection requirements of the cited standard, irrespective of where the men were told to stand while inside the trench.

At the hearing, the foreman acknowledged that cave-in protection was required in the trench. Indeed, he claims that the reason he and the laborer were inside the trench was to measure it in order to determine whether a steel trench box would fit inside (Tr. 310, 312-14, 324). The compliance officer confirmed that he observed a trench box about 100 yards away from the work area (Tr. 53, 86, 133, 324). According to the foreman, his primary concern was ensuring that the exposed gas line was not ruptured. Moreover, if the trench box did not fit, he claims he was prepared to use some other type of shoring system (Tr. 134-36, 313; Exhibit R-1). But as the Secretary has validly noted, the men did not need to enter the trench in order to measure it for these purposes. Just as the compliance officer did during his inspection, the dimensions of the trench could have easily been determined from outside of the trench. Having entered the trench, for whatever purpose, the men should have been protected from a potential cave-in. Thus, there is sufficient evidence to support the conclusion that a violation of § 1926.652(a)(1) has occurred as alleged.

#### **IV. Unpreventable Employee Misconduct Defense**

Gioioso contends that all three of these violations are the result of unpreventable employee misconduct, primarily on the part of its foreman. In order to establish this affirmative defense, Gioioso must prove that it has work rules designed to prevent the violative conditions, that these rules are effectively communicated to its employees, and that it has effectively enforced these rules when they are violated. *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130, 1994 CCH OSHD ¶ 30,621 (No. 92-0851, 1994). When the misconduct of a supervisory employee is alleged, “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.” *L.E. Myers Co.*, 16 BNA OSHC 1037, 1041, 1993 CCH OSHD ¶ 30,016 (No. 90-945, 1993). Despite an effort to develop a safety program that includes frequent training sessions, I find that Gioioso’s program falls short in terms of its implementation and enforcement.

Gioioso’s employee safety manual, distributed to all new hires, contains general sections on

the lifting of loads, the proper placement of ladders in trenches, and the protection requirements for trenches (Tr. 253-55, 285-86, 292-93, 295, 302-03; Exhibit R-2). While not extensive in detail, these materials can be considered rules which govern the work practices of Gioioso's employees. Although Gioioso's foreman indicated that he was aware of these specific rules, Gioioso has not definitively established that these rules have been effectively communicated to all employees (Tr. 53, 313, 321-22). According to Gioioso's safety director, "toolbox talks" are held weekly at each worksite, safety meetings are held monthly for supervisory personnel, and safety seminars are held biannually for all employees (Tr. 255-59, 264-65, 268-69, 296). Despite this training schedule, Gioioso has provided little information regarding the exact nature of these sessions, submitting into evidence only a sampling of toolbox talk topic sheets excerpted from a newsletter published by the National Utility Contractors Association (Tr. 258-59, 261-62; Exhibits R-3 to R-12). According to these sheets, Gioioso scheduled several toolbox talks throughout 1993 and 1994, but there is nothing to verify that these talks actually took place. In fact, the record as a whole lacks critical information regarding the content of these various training sessions, who conducted each session, and most important, which employees actually attended (Tr. 257, 264, 268-69). Without such documentation to prove that its training program has been fully implemented, Gioioso cannot persuasively argue that these particular work rules have been effectively communicated to its employees. *See Hamilton Fixture*, 16 BNA OSHC 1073, 1090, 1993 CCH OSHD ¶ 30,034 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (employer must establish that it has effectively communicated and enforced the specific rule or rules at issue).

Most significant is the fact that there is also nothing in the record indicating that Gioioso has effectively enforced its safety program. Gioioso has provided no evidence to indicate that it actively monitors its employees' compliance with the safety program. Without some type of check on employee work practices, such as unscheduled safety audits or mandatory safety checklists, violations of Gioioso's safety program will remain undiscovered. Indeed, one can only wonder where the two Gioioso project superintendents assigned to this relatively small worksite were when the foreman was violating the company's safety rules (Tr. 53, 265-66). Even when safety violations are discovered, Gioioso has provided no documentation to indicate that its four-tier disciplinary policy is actually executed (Tr. 296-98, 300; Exhibit R-14). *See Precast Services Inc.*, 17 BNA

OSHC 1454, 1455, 1995 CCH OSHD ¶ 30,910 (No. 93-2971, 1995), *petition for review filed*, No. 96-3031 (6th Cir. Jan. 9, 1996) (“To prove that its disciplinary program is more than a ‘paper program’, an employer must present evidence of having actually administered the discipline outlined in its policy and procedures.”). In fact, it is not even evident that employees are aware that the threat of disciplinary action exists. Gioioso notes that on the day of the inspection, the foreman was reprimanded by one of the project superintendents and sent home without pay. This action alone, however, does not prove adequate enforcement of the specific work rules at issue here (Tr. 297, 300). *Id.* at 1456.

Based on his testimony, the foreman’s actions were in direct contravention of what he knew Gioioso’s safety policy to be. As the Commission has stated, misconduct on the part of a supervisory employee is a strong indication that his employer’s safety program is lax. *L.E. Myers, supra*, 16 BNA at 1041. Because that has proven to be the case here, Gioioso has failed to sustain its allegation of unpreventable employee misconduct. Moreover, based upon the history of safety violations compiled by Gioioso, it is likely that violations will continue so long as Gioioso fails to communicate to its employees its strong interest in complying with safety and health regulations and vigorously enforcing its safety program by severely disciplining employees who fail to comply with safety regulations.

## **V. Characterization of the Violations & Penalties**

### **Serious Citation 1, Item 2**

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is “serious” if there is “a substantial probability that death or serious physical harm could result” from the violation. In order to establish that a violation should be characterized as serious, the Secretary need not establish that an accident is likely to occur, but must show that in the event of an accident, it is probable that death or serious physical harm could occur. *Flintco Inc.*, 16 BNA OSHC 1404, 1405, 1993 CCH OSHD ¶ 30,227 (No. 92-1396, 1993). Here, the evidence establishes that a ten-foot section of cast-metal pipe was suspended just above a trench and capable of swinging around from its single connection point. Should that pipe break free of its sling as it passes over the heads of the employees working inside the trench, these employees could suffer serious physical injury (Tr. 83-84).

Accordingly, this violation was properly characterized as serious.

Pursuant to § 17(j) of the Act, the Commission is authorized to assess each violation an appropriate penalty, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1006-07, 1995 CCH OSHD ¶ 30,635 (No. 92-424, 1994). The most significant of these factors is the gravity of the violation, which includes the number of exposed employees, the duration of exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Id.*

For this violation, the OSHA assistant area director testified that the probability of an injury occurring was judged to be greater and the severity of the injury was judged to be high (Tr. 197-98, 200-01). The gravity-based penalty was reduced by 20% for Gioioso's size, but no reduction was given for good faith or prior history of violations (Tr. 199-200). Thus, a total penalty of \$4,000 is proposed. Given Gioioso's extensive citation history, reviewed by the assistant area director at the hearing, and the fact that Gioioso's foreman knowingly disregarded his duty to protect the employees under his supervision, I agree that it is inappropriate to give Gioioso credit for previous history or good faith (Tr. 175- 79, 182-94; Exhibits C-11 through C-17).<sup>3</sup> However, based upon my own analysis of the factors set forth in § 17(j), I find the gravity of the violation to be less than that indicated by the proposed penalty. Only two employees were exposed to the hazard created by the suspended pipe and, according to the testimony of the compliance officers, the pipe was over the employees' heads for a short amount of time. Therefore, I find a penalty of \$1,000 to be more reasonable and appropriate under the circumstances.

### **Serious Citation 1, Item 3**

It is undisputed that the ladder placed inside the trench extended only 12 inches above street level. The two employees who used this ladder to enter and exit the trench may have grabbed the ladder's side rails for support and fallen back into the trench, suffering serious physical injury (Tr.

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<sup>3</sup> Initially, the reduction given for size was to be 40%, but this amount was halved because of what the assistant area director characterized as Gioioso's "lack of concern for safety and health on the worksite" (Tr. 200). Based upon my own assessment of Gioioso's conduct, the size reduction will remain at 20%.

85, 128, 130, 132). Thus, based upon the analysis set forth *supra* with regard to serious violations, I find that this violation was properly characterized as serious.

With regard to penalty, the assistant area director testified that the probability of an injury occurring was judged to be lesser and the severity of the injury was judged to be low (Tr. 201). After allowing for the 20% size reduction, a total penalty of \$1,200 is proposed. However, based upon my own analysis of the penalty factors set forth in § 17(j), I find the gravity of the violation to be less than that indicated by the proposed penalty. As noted with regard to Item 2, only two employees were exposed to this violative condition. Also, the compliance officer acknowledged that the ladder was positioned at a safe angle and seemed stable (Tr. 128, 293-94). As such, the likelihood of a fall occurring was small. Accordingly, I find a penalty of \$600 to be more reasonable and appropriate under the circumstances.

### **Repeat Citation, Item 1**

There is no question that an unprotected trench which is more than five feet deep poses a cave-in hazard. Had a cave-in occurred here at the time that the employees were working inside the trench, they could have suffered serious physical harm or even death (Tr. 68, 143-44). Thus, based upon the analysis set forth *supra* with regard to serious violations, I find that this violation was properly characterized as serious. On the basis of a citation issued to Gioioso in 1992, the Secretary has also alleged that this violation should be characterized as repeat (Tr. 177-79, 195, 203-04; Exhibit C-11). A violation is properly classified as repeated under § 17(a) of the Act if at the time of the alleged repeat violation, there was a Commission final order against the same employer for a substantially similar violation. *Edward Joy Co.*, 15 BNA OSHC 2091, 2092, 1991-93 CCH OSHD ¶ 29,938 (No. 91-1710, 1993); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979). It is undisputed that the 1992 citation, which contains a serious violation of § 1926.652(a)(1), became a final order of the Commission on August 13, 1993 (Tr. 203-05; Exhibit C-11). Therefore, the violation is affirmed as repeat.

With regard to penalty, the assistant area director testified that the probability of an injury occurring was judged to be greater and the severity of the injury was judged to be high (Tr. 201-02). After allowing for the 20% size reduction, a total penalty of \$8,000 is proposed. Based upon my

own analysis of the penalty factors set forth in § 17(j), I find that this penalty accurately reflects the gravity of the violation. Having been previously cited under this standard, Gioioso was well aware of the hazard posed by an unprotected trench. This hazard was exacerbated by the fact that the trench was located on a residential street with a considerable amount of vehicular traffic travelling to and from Deer Island (Tr. 69-70). Although only two men were exposed to this hazard, the record indicates that they were inside the trench for a considerable amount of time. In addition, Gioioso's foreman testified that an additional instance of exposure occurred earlier in the day when the laborer entered the unprotected trench in order to dig out the gas pipe with a hand shovel (Tr. 324-25). Therefore, I find a penalty of \$8,000 to be reasonable and appropriate under the circumstances.

**VI. Findings of Fact and Conclusions of Law**

All findings of fact relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

**ORDER**

Serious citation 1, item 1, alleging a violation of 29 C.F.R. § 1926.651(b)(4), is WITHDRAWN.

Serious citation 1, item 2, alleging a violation of 29 C.F.R. § 1926.651(e), is AFFIRMED and a penalty of \$1,000 is assessed.

Serious citation 1, item 3, alleging a violation of 29 C.F.R. § 1926.1053(b)(1), is AFFIRMED and a penalty of \$600 is assessed.

Repeat citation 1, item 1, alleging a violation of 29 C.F.R. § 1926.651(a)(1), is AFFIRMED and a penalty of \$8,000 is assessed.

  
ROBERT A. YETMAN  
Judge, OSHRC

Dated: \_\_\_\_\_  
Boston, Massachusetts