



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 One Lafayette Centre
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 Washington, DC 20036-3419

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SECRETARY OF LABOR, :
 :
 Complainant, :
 :
 v. : OSHRC Docket No. 92-0264
 :
 CONIE CONSTRUCTION, INC., :
 :
 Respondent. :
 :

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.
 BY THE COMMISSION:

At issue in this case is whether an excavation at the worksite of Respondent, Conie Construction, Inc. ("Conie"), was sloped in compliance with the excavation standard at 29 C.F.R. § 1926.652(a)(1).¹ The Secretary cited Conie for a willful violation of the standard,

¹That section 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 paragraph (b) or (c) of this section

It is undisputed that paragraph (b)(2) applies in this case. That paragraph provides:

(2) *Option (2)--Determination of slopes and configurations using Appendices A and B.* Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.

(continued...)

claiming that the excavation was not properly sloped, and proposed a penalty of \$21,000. The administrative law judge, Paul L. Brady, found that the Secretary failed to show noncompliance with the standard and vacated the citation. We find, however, that the excavation was not sloped in accordance with the standard and that the Secretary met the remainder of his burden of proving a violation. We affirm the citation as willful and assess a penalty of \$21,000.

Analysis

In order to establish a violation, the Secretary must demonstrate that (1) the standard applies, (2) the employer failed to comply with the terms of the standard, (3) employees had access to the cited condition, and (4) the employer knew, or, with the exercise of reasonable diligence, could have known of the violative condition. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶ 30,303, p. 41,757 (No. 90-2866, 1993). The cited standard requires that employees in excavations be protected by an adequate protective system designed in accordance with paragraph (b) or (c) of section 1926.652. The top 15 to 16 feet of the cited excavation, which was approximately 20 to 21 feet deep, was dug in “hard clay” classified as Type A soil. The remainder was solid rock. The standard requires that the walls of excavations in Type A soil be sloped $\frac{3}{4}$ to 1. See Subpart P, App. B, Table B-1. The Secretary demonstrated that in order to comply with the standard, the top of the excavation would have to have been 28 feet wide, instead of the 20 to 22 feet it actually was, to have been sloped $\frac{3}{4}$ to 1. Even trimming all measurements in the employer’s favor (that is, assuming a total depth of only 19 feet, leaving only 14 feet of Type A soil above the 5 feet of rock, and a bottom only 3 feet wide), the top of the excavation would still have had to be at least 24 feet wide to have been sloped $\frac{3}{4}$ to 1. The company’s own foreman testified that the excavation was only 22 feet wide at the top. Based on these facts, we find that the

¹(...continued)

Appendix A covers classification of soil and distinguishes “stable rock” from “Type A” soil which means cohesive soils such as clay. Appendix B covers sloping and benching and paragraph (c)(2) provides that “[t]he maximum allowable slope for a soil or rock deposit shall be determined from Table B-1 of this appendix.” Table B-1 provides that the maximum allowable slope for excavations less than 20 feet deep in stable rock shall be “vertical,” and for those in Type A soil shall be “ $\frac{3}{4}$:1.”

excavation was not properly sloped and that Conie failed to comply with the applicable standard.²

The Secretary characterized this violation as willful and proposed a penalty of \$21,000. The judge, who vacated the citation, did not reach either issue. We could remand for the judge to determine the proper characterization and penalty in the first instance, but the evidence of record is sufficiently detailed for us to make the appropriate findings *de novo*. See *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1977-78 CCH OSHD ¶ 22,481 (No. 14249, 1978). Cf. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993).

Willfulness

The Commission has described a willful violation as one “committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993 CCH OSHD ¶ 30,059, p. 41,329 (No. 89-2883, 1993) (consolidated) (citing *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2012, 1991 CCH OSHD ¶ 29,223, p. 39,133 (No. 85-0369, 1991)). By the time of the inspection in this case, in November 1991, Conie was well aware of the requirements of the excavation standard, yet continued to flout them. The company had been cited at least twice before for violations of similar standards.³ In 1989, Conie reached a settlement agreement with the Secretary in which a willful violation of a trenching standard carrying an

²There is no question but that the cited standard applies to the facts of this case and, as Conie admits in its answer and answers to interrogatories, approximately three employees worked in the excavation. Finally, as discussed below, the knowledge of Conie’s foreman and owner that the excavation was not sloped in accordance with the standard is imputable to the employer. See *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1993 CCH OSHD ¶ 30,303 (No. 90-2866, 1993).

³Until early 1990, “Subpart P -- Excavations, Trenching, and Shoring” was divided into sections covering “Specific excavation requirements” and “Specific trenching requirements.” 29 C.F.R. Part 1926, Subpart P, was revised, effective March 5, 1990, to govern “protective systems” for all excavations, including trenches. 54 Fed. Reg. 45,894, 45,959 (1989); 54 Fed. Reg. 53,055 (1989).

\$8000 proposed penalty was reduced to a serious violation with an \$800 penalty. In 1990, the company paid \$800 each for four violations, one of which was a violation of a trenching standard.

The compliance officer testified that the foreman told him that he was familiar with the excavation standard and knew that the excavation had to be sloped according to OSHA requirements, but felt that it would not cave in. The foreman himself testified that he had received specific training about the most recent OSHA regulations on excavations. The owner of the company spoke highly of the foreman, describing him as “conscientious” and “on the ball.” The owner further testified that upon arriving at the site, he explained to a state inspector that “I didn’t have any problem with [the excavation]. My foreman didn’t have a problem with it.” The foreman’s knowledge, as well as the owner’s, of the violative conditions is therefore imputable to the company. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537, 1991-93 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-360, 1992) (consolidated) (citing *A.P. O’Horo*, 14 BNA OSHC at 2007, 1991 CCH OSHD at p. 39,128). The foreman in this case was also the Conie foreman in the 1990 case who then rejected the standard’s requirements in favor of his judgment that the trench was safe. When asked whether he thought the trench that was the subject of the 1990 citation was unsafe, Conie’s foreman denied there was any danger in tunneling under a tree, based on his “experience.” “I know the ground is good. If I thought I was in any unsafe conditions, I definitely wouldn’t have [gone] in there.” In this case, when asked why he selected a slope of only ½ to 1 for an excavation in Type A soil over 20 feet deep, the foreman testified that “I thought it would be safe . . . [b]ased on my experience and everything.” His belief, regardless of his 25 years of experience, is immaterial in determining the willfulness of the violation. Also irrelevant in this context is the opinion of Conie’s expert witness, a geotechnical engineer, that a ½ to 1 slope was sufficient to protect against collapse. The engineer characterized the soil above the solid rock as “A plus” or “better than A,” based on tests he performed in the vicinity seven months after the excavation was back-filled. While his testimony may be relevant to the probability of an accident occurring, it has no bearing on whether Conie willfully violated a standard requiring a ¾ to 1 slope for Type A soil.

Finally, that the foreman entered both excavations himself, while perhaps demonstrating confidence in his own professional assessments of potentially dangerous situations, does not change the willfulness of this violation. As the United States Court of Appeals for the Sixth Circuit has observed:

His decision to continue with the trenching operations was intentional, deliberate, and voluntary; therefore, it was "willful." *Accord Empire-Detroit Steel Div. v. OSHRC*, 579 F.2d 378 (6th Cir. 1978). This conclusion appears to be warranted, irrespective of [the foreman's] good faith belief that the workers could continue with the trenching without hazard.

Donovan v. Capital City Excavating Co., 712 F.2d 1008, 1010 (6th Cir. 1983). *See also Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶ 29,080 (No. 85-0319, 1990) (although foreman may not have committed the violations intentionally to endanger the employees, he did intentionally ignore OSHA's requirements after the inspector correctly explained them to him), and cases cited. In this case, the foreman knew what the standard required and knew that the sloping ratio he chose did not comply with the standard, yet he purposefully substituted his own judgment for the unambiguous requirements of the standard. For all the foregoing reasons, we find that the violation was willful.

Penalty

In determining an appropriate penalty, we note that the penalty was proposed under section 17(a) of the Act, 29 U.S.C. § 666(a), as amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 § 3101 (1990), which provides that an employer who willfully violates the Act or any standard promulgated pursuant thereto "may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$5,000." The Act provides:

The commission shall have authority to assess all civil penalties . . . giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

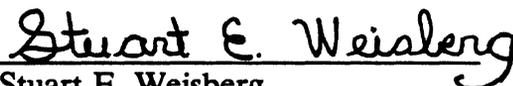
Section 17(j) of the Act, 29 U.S.C. § 666(j). *See Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1994 CCH OSHD ¶ 30,363 (No. 88-1962, 1994). The gravity of the offense is generally the principal factor to be considered. *See Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73

CCH OSHD ¶ 15,032 (No. 4, 1972). The excavation here was cut into hard clay, it was sloped ½ to 1, and, according to an experienced geotechnical engineer and a seasoned foreman, it was not likely to collapse. At the same time, the excavation was very deep, over 20 feet deep, and quite narrow at the bottom, only a few feet wide. If a wall were to collapse around an employee, serious injuries or death would most surely result. *See Calang Corp.*, 14 BNA OSHC at 1794, 1987-90 CCH OSHD at p. 38,873. We therefore conclude that the gravity of this violation was moderate to high.

Although Conie is a moderate-sized company, the moderate-to-high gravity of this violation, Conie's lack of good faith, and its history of previous violations, all support a penalty of \$21,000 for this willful violation, as proposed by the Secretary.

ORDER

Accordingly, we reverse the judge's decision, affirm a willful violation of 29 C.F.R. § 1926.652(a)(1), and assess a penalty of \$21,000.


Stuart E. Weisberg
Chairman


Edwin G. Foulke, Jr.
Commissioner


Velma Montoya
Commissioner

Dated: June 29, 1994



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SECRETARY OF LABOR,

Complainant,

v.

CONIE CONSTRUCTION, INC.,

Respondent.

Docket No. 92-0264

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on June 29, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

June 29, 1994
 Date

Ray H. Darling, Jr.
 Ray H. Darling, Jr.
 Executive Secretary

Docket No. 92-0264

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
JACK CONIE AND SONS CORP.
Respondent.

OSHRC DOCKET
NO. 92-0264

**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 September 23, 1993. The decision of the Judge will become a final order of the Commission on October 25, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before October 13, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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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. / RHW
Ray H. Darling, Jr.
Executive Secretary

Date: September 23, 1993

DOCKET NO. 92-0264

NOTICE IS GIVEN TO THE FOLLOWING:

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The Secretary alleges Conie failed to provide protection for employees in an excavation, in violation of 29 C.F.R. § 1926.652(a)(1). The standard provides in pertinent part as follows:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section

Mr. Bruce Bingham, who conducted the inspection, testified that when he arrived at the worksite, Conie was in the process of setting a manhole in the excavation. He observed that the walls of the excavation “were basically straight up and down, more vertical than a slope of any kind.” He did agree, however, they were sloped “outward somewhat near the top” (Exh. C-2, 3, Tr. 13-14, 19). The inspector stated he conferred with Conie’s foreman on the site, who indicated he was familiar with Occupational Safety and Health Administration’s (OSHA) sloping requirements for various types of soil.

Bingham testified he used a tape to measure the excavation, which was 21 feet in depth and 20 feet by 24 feet in width at the top. The bottom was estimated to be 4 feet wide based on the size of the manhole. The foreman revealed that his employees had worked for about one-half hour in the trench that day and although no soil tests were conducted, he believed the soil was stable (Tr. 20-24). He stated the foreman informed him he knew the excavation was not sloped to OSHA requirements (Tr. 54). There was no trench box present (Tr. 39).

Mr. Bingham did not take samples or conduct any soil testing, but recognized a different color of soil near the bottom of the excavation. While he agreed there was some sloping, he contended the sides of the excavation, whether A, B or C type soil, did not comply with the regulations. While conducting the inspection, he observed some benching, but made no measurements (Tr. 36, 50, 63). In his view, the foreman was a competent person within the context of the standard (Tr. 44). Also, he noted Conie maintained a written safety program (Tr. 37). Bingham stated he recommended issuance of the citation because the standard “requires the employer, in the absence of taking soil samples or using tabulated data or using a registered professional engineer, to slope the sides of an excavation at a slope of one and a half to one” (Tr. 25).

Mr. Russell Kildarger, pipe crew foreman, testified that he has about 40 years' experience in pipe work. In addition, he has received training on trenching regulations conducted by OSHA personnel at Conie's safety meetings (Tr. 66-68). Kildarger related that in digging the excavation, hard clay was first encountered and then rock beginning about 5 feet from the bottom (Tr. 73). He tested the soil above the rock with a penetrometer that revealed the soil was type A. The rock was dug with vertical sides, but he sloped the soil one-half to one, which he believed was safe based on his experience (Tr. 76-77). Benching was performed on the north side of the excavation (Tr. 79).

On the date of the inspection, Kildarger recalled that two safety officials from the state also visited the site. He explained that if unsafe conditions are found at a worksite, they will close down the operation. No such action was discussed in this case (Tr. 71-72). During the course of Bingham's inspection, Kildarger did not recall assisting in the taking of measurements, but he knew a trench box was present at the site (Tr. 80, 83-84).

Mr. Daniel Longo, a geo-technical engineer, testified on behalf of Conie. He explained that his work is concerned with the earth sciences and primarily to determine the ability of soil to either support itself or structures (Tr. 95-96). He is familiar with the soil conditions in the area of this worksite, having been involved with construction of apartment buildings, shopping centers and sewer lines (Tr. 102-103). Longo, who has testified as an expert on soil mechanics, stated that typically the soil in the area is hard with some rock (Tr. 103, 104). He explained that in this case, he drilled a test boring where the excavation was dug, but not in the backfill. The hole was located approximately 15 feet from the area that was excavated and 18 feet from the sewer line (Tr. 108-109).

The boring results showed the first 3 feet was stiff fill followed by a strata of stiff to hard silty clay for the next 15 feet; then shale, a horizontally planed bed rock, was encountered. The materials were identified in Exhibit C-2. He would classify the soil as "better than type A." This composition was consistent with Longo's knowledge of the soil in the area. He believed "the stability is excellent" and saw no problem with putting in 15 - 20 foot vertical walls (Tr. 112-113, 115, 119, 120, 134).

Longo explained that benching affects the stability of the excavation by moving the load of the soil on the upper level out farther from the bottom (Tr. 134). In designing a

trench under the circumstances and consistent with the standard, he would slope the soil one-half to one and allow the shale to remain vertical (Tr. 118, 138).

Mr. Joseph Conie, safety director, testified that a trench box was on the site, but there was no need to use it because of the solid rock and hard soil in the excavation (Tr. 159). He was familiar with the excavation and recalled the vertical walls in the rock and benching of the walls of silt on the north and west sides (Tr. 161).

Conie explained that he has worked 37 years in many capacities for the family-owned company. Most of his experience has been in the same general area of Columbus, Ohio. Generally, the soil he has encountered is hard clay or blue shale, which is rock (Tr. 148-151). His policy is to have trench boxes on every job for use, depending upon the condition of the soil. He believed there was no need to use a trench box on this job (Tr. 158-159).

Specific training in trenching and shoring is provided under Conie's safety program. In addition to a safety official from OSHA, an industry representative has participated in employee training. Conie also maintains current information on OSHA's policies and regulations which are used in weekly safety meetings (Tr. 148-150). Mr. Conie related his conversation with the state inspector on the day of the inspection in this case. He stated the inspector inquired about the 5 foot vertical portion of the excavation. After he explained it was cut in "solid rock," there was no further discussion of the matter. He was aware the inspector had the authority, but "he didn't have any reason to shut me down" (Tr. 155, 166, 169).

Paragraph (b) of the regulations at 29 C.F.R. § 1926.652 provides for four options in the design of sloping and benching protective systems. They are:

- (1) slope no less than 1 1/2 horizontal: 1 vertical;
- (2) determine sloping and/or benching requirements in accordance with appendices A and B of Subpart P;
- (3) design sloping or benching requirements using tabulated data;
- or (4) design sloping or benching requirements using a professional engineer.

Option (2), which governs in this case, requires sloping in accordance with soil classifications and the measurements of the excavation are not in dispute. The evidence clearly establishes that the soil on the sides of the excavation was hard clay, type A by definition, to a depth of approximately 15 feet. The remaining 5 feet or so of the approximately 20-foot depth consisted of hard shale rock. The primary question therefore

is whether the excavation was sloped in accordance with the regulations. Table B-1 of Appendix B allows for vertical sides in excavations dug in rock and 3/4 to 1 slope in type A soil. Since no sloping is required for the rock, it is incumbent upon the Secretary to show that the hard clay was not sloped in accordance with the regulation.

The record fails to disclose by a preponderance of the evidence that the type A soil did not meet the sloping requirements as alleged. The citation is therefore vacated.

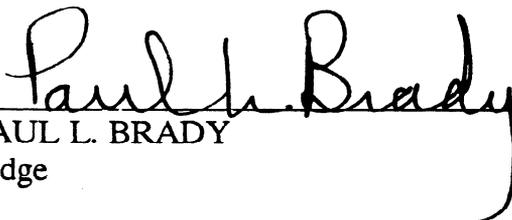
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

That the citation alleging violation of 29 C.F.R. § 1926.652(a)(1) is hereby vacated.



PAUL L. BRADY
Judge

Date: September 13, 1993