SECRETARY OF LABOR, Complainant, v. RAWSON CONTRACTORS, INC., and its successors. Respondent.	OSHRC DOCKET NO. 02-1921

APPEARANCES:

For the Complainant:
Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:
Charles B. Palmer, Esq., Michael Best & Freidrich, LLP, Waukesha, Wisconsin

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678.; hereafter called the "Act").

Respondent, Rawson Contractors, Inc. (Rawson), at all times relevant to this action maintained a work place at the intersection of East Capitol and North Palmer in Milwaukee, Wisconsin, where it was engaged in sewer and water pipe installation. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 1, 2002 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Rawson's Milwaukee work site. As a result of that inspection, Rawson was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Rawson brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On March 12, 2002, an E-Z hearing was held in Milwaukee, Wisconsin. The parties have submitted briefs on the issues specified by this judge, and this matter is ready for disposition.

Facts

On October 1, 2002 Compliance Officers (CO), Larry Campion and Craig Zdoini conducted an inspection of the cited work place (Tr. 21-23). CO Campion testified that he observed an excavation running east to west, and measuring 14 feet wide, and 13-1/2 feet deep (Tr. 27, 64). A trench box had been placed in the deepest part of the excavation (Tr. 28; Exh. C-1). To the south of the trench box, the excavation was 7 feet 3 inches deep (Tr. 27; Exh. C-4). The south side of the trench was vertical (Tr. 33; Exh. C-4). The soil in the trench consisted of free-flowing Type C granular material (Tr. 25, 33). The soil had been previously excavated, and was subject to vibration from heavy traffic (Tr. 33, 67, 116).

Outside the trench box, a 12 foot long, 12 inch diameter PVC storm sewer had been replaced (Tr. 26, 37, 55, Exh. C-5). Thomas Birch testified that on the day preceding the inspection, Rawson began excavation of a water main at the work site. The excavator opened a14 foot wide trench, between 48 and 54 inches deep, and was beginning to excavate down one side of the main, when the bucket damaged a second pipe, a green 12" PVC pipe, which ran parallel and adjacent to the water main (Tr. 169-70, 178). Birch stated that the operator removed the damaged section of the PVC pipe and opened a trench 7 feet, 3 inches deep and the width of the bucket, *i.e.* 24 inches, so that a new section of PVC could be inserted (Tr. 171, 173).

CO Campion did not observe the placement of the new pipe, but testified that Rawson's foreman, Thomas Birch, told him that Rawson employees had replaced the pipe the preceding day, prior to the installation of the trench box (Tr. 26). According to CO Campion, no benching or sloping was in place at that time (Tr. 54). Campion testified that, in his experience, a worker must enter the trench to prep each end of the pipe, cleaning and re-sawing jagged edges, prior to installing replacement pipe (Tr. 57). An employee's presence is also required to guide the new segment into place, and push the boot, or coupling on the replacement section over the existing pipe (Tr. 58). CO Campion testified that in the more than 300 pipe installations he had been involved in, it was always necessary for a worker to enter the trench to make the final coupling (Tr. 60).

Birch testified that the PVC pipe was replaced without any employee going into the trench. Birch stated that he pulled the rubber gasket out of the pipe himself, and "stuffed" the new section of PVC pipe onto the old. He then pounded the Fernco coupling on with a shovel while standing on the benched soil over the still buried water main (Tr. 171, 173). Birch stated that the pipe was only a foot to a foot and a half below the level of the benched soil (Tr. 175). According to him, Rawson replaces pipe from the top "every day" (Tr. 172).

On the east end of the trench, the roadway had been undermined (Tr. 28). Campion observed employees, including Mr. Birch, walking on top of the undermined pavement (Tr. 28, 38, 86; Exh. C-3). When Campion first saw them, the employees were standing in front of the southern-most tread of a Link-Belt Excavator, which rested partially on the undermined pavement (Tr. 28, 48). The CO attempted to measure the undermining, and determined that a minimum of five feet of pavement was unsupported in the area where the employees and excavator were seen (Tr. 29, 45). He testified that undermining created the potential for failure of the concrete pavement (Tr. 41). Workers on the concrete would fall, with the concrete, into the excavation (Tr. 41-42). In addition, Campion estimated that the front two feet of the excavator tread rested on unsupported pavement (Tr. 32, 81-82, 93). When the OSHA COs arrived on the site, two Rawson employees were working in the trench (Tr. 23, 48). Campion stated that employees in the trench could be injured should the excavator move too far out on the undermined pavement and tip into the excavation (Tr. 42).

Steven Elver of STS Consultants, Ltd. testified that because counter weights were installed at the rear of its cab, the Link-Belt Excavator's center of gravity was located behind the cab's pivot point (Tr. 156, 158, Exh. R-7). In its position at the time of the inspection, Elver opined, there was no danger of the excavator falling into the excavation (Tr. 156). Elver admitted that undermined pavement would not support as much weight as it did prior to its being undermined (Tr. 162). According to Elver, however, even if the undermined pavement should fail, the excavator would remain stable even, and would not tip into the excavation (Tr. 157-158). Elver testified that he analyzed the stability of the excavator as it was parked at the time of the inspection; he conceded that picking up a load, such as the trench box, would move the excavator's center of gravity toward the front of the frame, and increase the likelihood of the excavator tipping (Tr. 159). If the loaded excavator had been moved forward, and the center of gravity shifted toward the edge of the excavation, the excavator could tip into the hole (Tr. 160, 163).

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.651(i)(3): Sidewalks, pavements, or appurtenant structures had been undermined and a support system or another method was not provided to protect employees from the possible collapse of such structures:

> (a) On or about October 1, 2002, at the trench located in the meridian and the inside lane of the highway located at E. Capitol and N. Palmer, Milwaukee, WI, the employer did not provide the employees working in the 13 foot deep trench with a support system to protect employees from the possible collapse of the undermined concrete pavement, which was supporting the Link-Belt track hoe excavator. When employees were in the trench and preparing to repair a lead joint in the

54-inch cast-iron water main, they were exposed to a pavement collapse and a crushed-by-the-track hoe hazard.

The cited standard provides:

(i) *Stability of adjacent structures* (3) Sidewalks, pavements, and appurtenant structure shall not be undermined unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The evidence clearly establishes that the cited standard was violated, in that the soil beneath the pavement on the east end of the cited excavation had flowed into the excavation, undermining the pavement by at least five feet. Respondent argues, nonetheless, that undermining of pavement is not a "per se" violation, and that the standard is pre-empted by §1926.651(j)(2). This judge disagrees.

Most occupational safety and health standards include requirements or prohibitions that by their terms must be observed whenever specified conditions, practices or procedures are encountered. These standards are predicated on the existence of a hazard when their terms are not met. Therefore, the Secretary is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation. *Austin Bridge Company*, 7 BNA OSHC 1761, 1979 CCH OSHD ¶23,935 (76-93, 1979). It is well settled that when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335, 1978 CCH OSHD ¶22,525 (No. 15983, 1978).

Section 1926.651(i)(3) presumes that undermined pavement is no longer capable of supporting the loads such pavement could sustain before being undermined, and so presents a hazard to employees working within the zone of danger. In any event, CO Campion testified that undermining created the potential for failure of the concrete pavement; Rawson's expert conceded the hazard. Employees were in the zone of danger. Employees standing on the roadway could fall with failing pavement. Employees in the trench could be injured should the excavator move too far out on the undermined pavement and tip into the excavation. A violation has been established.

The standard specifically addresses the undermining of pavement, and is clearly applicable. The subparagraph referred to by Respondent, §1926.651(j)(2), provides that "employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations" and would also be applicable in the cited circumstances, and could have been cited in lieu of §1926.651(i)(3). Rawson argues that because subparagraph (j)(2) is more specific, the Secretary should be prohibited from citing it under the "more general" subparagraph (i)(e). Rawson's position is not supported by the case law. Subparagraph (i)(e) addresses rolling equipment *and* an additional hazard, *i.e.*, pavement collapsing under employees standing on the roadway. The Commission has held that general standards remain applicable where they "provide meaningful protection to employees beyond the protection afforded" by specific standards. *See Quinlan t/a Quinlan Enterps.*, 15 BNA OSHC 1780, 1991-93 CCH OSHC ¶29,765 (No. 91-2131, 1992). The Secretary chose to cite Rawson under subparagraph (j)(2), and to treat the presence of the excavator on the undermined pavement as a exacerbating factor; that decision is well within her prosecutorial discretion. Accordingly, item 1 is affirmed.

Penalty

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). The gravity based penalty is based on: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

CO Campion testified that there was a high probability of an accident occurring as a result of the cited condition (Tr. 49-53). Employee exposure was sporadic throughout the period the trench was open. On October 1, two employees were observed standing on the undermined pavement, two employees were in the trench. In the scenario most likely to lead to an accident, the operator of the excavator would also be exposed to the cited hazard. No precautions were taken to minimize the hazard posed by the undermined pavement. Should an accident have occurred, it would most likely have resulted in the serious injury or death of any employees involved. CO Campion suggested a gravity based penalty of $5,000.00. The proposed penalty of $2,500.00 reflects a 40% reduction based on Rawson's size, and an additional 10% reduction reflecting the absence of any OSHA citations within the prior three years (Tr. 51).

It is clear from both the testimony and the photographs of the undermined area, submitted by both parties, that Rawson knew both of the undermining and the proximity of the backhoe. To allow employees

to work in the trench under these conditions seems an act of plain indifference to employee safety meriting a higher penalty than the Secretary's proposed penalty of $2,500.00. Nonetheless, this judge defers to the Secretary's proposed penalty in this case;$2,500.00 will be assessed.

Serious citation 1, item 2 alleges:

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 paragraph (b) or (c) of this section:

> (a) On or about September 30, 2002, at the trench located in the meridian and the north inside of lane an active highway (sic) located at E. Capitol and N. Palmer, Milwaukee, WI, the employer did not ensure that employees repairing a 12-foot section of the 12-inch VC storm sewer, at a depth of 7 feet to the bottom of the sewer pipe in previously disturbed soil, were protected from cave-ins by an adequate protection system.
>
> The cited standard provides:
>
> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section. . . .

Discussion

CO Campion had no first hand knowledge of the events of September 30, when the 12" PVC pipe was replaced. He reasonably presumed that employees were exposed to an engulfment hazard based on his interview with Rawson's foreman, Birch, who told him that the pipe was installed prior to the installation of the trench box, and on his prior experience with pipe installation, which generally requires entry into the trench. However, Birch, the only witness with direct knowledge of the methods used to install the pipe, described the subject trench on September 30 as consisting mainly of a 41 to 54 inch deep, 14 foot wide excavation, in which he stood to install the replacement pipe, located in a 24" wide trench 2-1/2 feet deeper than the main excavation.

Weighing the testimony of the CO against a witness with first hand knowledge, this judge is compelled to find that the Secretary failed to carry her burden with respect to this item. Citation 1, item 2 is vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1926.651(i)(3) is AFFIRMED and a penalty of $2,500.00 is ASSESSED.

2. Citation 1, item 2, alleging violation of §1926.652(a) is VACATED.

/s/
James H. Barkley
Judge, OSHRC

Date: April 28, 2003