

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant,

v.

CRANBERRY REALTY/PARSIPPANY
OFFICE PLAZA,
Respondent.

Docket No. 99-2255

Appearances: Margaret A. Temple, Esq.
Office of the Solicitor of Labor
U. S. Department of Labor
For Complainant

Maurice Soussa, *pro se*
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) (the Act). The only issue before the Commission is the amount of civil penalties to be assessed.

Respondent is a realty company with three employees. Its owner undertook to be his own general contractor, hiring two laborers and a backhoe owner/operator to dig a trench on property he owned. His purpose was to connect a building he owned on the property to the city sewer lines. He directed and supervised the work directly. The trench was dug on the morning of October 26, 1999. By that afternoon a Compliance Officer (CO) from the Occupational Safety and Health Administration (OSHA) appeared at the site. OSHA had been called by a supervisor from the local sewer authority. The CO found conditions he believed to be violations of the Construction Safety

Standards. It is alleged that Respondent failed to have a competent person inspect the trench (29 C.F.R. § 1926.651(k)(1)) and that there was no adequate protection against cave-ins (29 C.F.R. § 1926.652(a)(1)). The Secretary seeks penalties of \$1,400.00 and \$7,000.00, respectively, for the two violations.

Complainant's witnesses at the May 16, 2000, hearing in Newark, New Jersey, provided reliable and un rebutted evidence that Respondent was engaging in construction, that the trench was more than 5 feet deep, that it was in soil which required protection against cave-ins, that such protection was lacking, that employees were exposed to the conditions and that Respondent knew of the conditions. Thus, Complainant has made a *prime facie* case for both violations.

Respondent seeks not to refute the existence or classifications of the violations but asks for a reduction in the penalties sought by the Secretary.

The four factors to be considered in determining appropriate penalties are the size of the employer's business, the gravity of the violation, the good faith of the employer and the employer's prior history with OSHA. Each element is considered below.

Respondent is not in the construction business but has undertaken at least one other building project. Respondent's size is exceedingly small. It employs only three people and those doing the construction work were hired solely for that job. The gravity of the violation of a trench left unprotected and subject to possible to collapse cannot be taken lightly since trench collapse represents a very significant danger to those in the trench. As Complainant's summary pointed out, "it only takes one minute to have a cave-in." (Tr. 66) Yet, only one, or perhaps two, employees were in the trench for a short period of time. The trench was open for considerably less than one day. As to good faith, Respondent's displeasure with the activities of OSHA and the inspection of his work site were improperly taken by the CO as a demonstration of a "lack of responsibility or poor attitude." (Tr. 42-51) An employer's annoyance with an OSHA inspection is irrelevant to its dedication to employee safety. Moreover, there is no evidence that Respondent sought to delay, sidetrack or prevent the inspection by the CO. Respondent's good faith towards employee safety is, however, called into question by the evidence that he was warned of the need for cave-in protection by the utility supervisor and apparently did nothing. Lastly, Complainant's failure to give Respondent any reduction or credit based on its history is unacceptable. There is some indication that on a prior

occasion during which Respondent undertook construction activities, its work site was inspected and citations of some kind were issued. It appears, however, that those matters were “dropped.” The CO improperly considered these facts as showing a history of prior “violations.” (Tr. 47) They were not violations, they were merely allegations of violations.

While not delving into the philosophy or purpose of penalties under the Act, suffice it to say that a harsh monetary penalty would be of little learning value for this Respondent who has merely dabbled in construction on occasion. Moreover, there would be little or no deterrent effect generated by imposing harsh penalties on a realty broker, inasmuch as he is not a fugleman in the local construction industry . Imposing a significant penalty, however, would seem likely to persuade Respondent to hire a professional contractor in the future.

Based on the above considerations, I find that a penalty of \$500.00 is appropriate for the failure to have a competent person inspect the trench (Citation 1, Item1) and that a penalty of \$1,500.00 is appropriate for the failure to have adequate protection in the trench (Citation 1, Item 2).

Accordingly, IT IS ORDERED that:

1. Citation 1, Item 1, is AFFIRMED. A civil penalty of \$ 500.00 is assessed therefor.
2. Citation 1, Item 2, is AFFIRMED. A civil penalty of \$ 1,500.00 is assessed therefor.

Dated: 6/19/00
Washington, D.C.

/s/
Michael H. Schoenfeld
Judge, OSHRC