

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

SECRETARY OF LABOR, :
 :
Complainant, :
 :
v. :
 :
SENTRALE CONTRACTING CORP., :
 :
Respondent. :

OSHRC DOCKET NO. 96-1573

APPEARANCES:

Susan B. Jacobs, Esquire
New York, New York
For the Complainant.

Michael J. Barnaby, Esquire
White Plains, New York
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a construction site in Armonk, New York, on September 20, 1996, where Respondent Sentrale Contracting (“Sentrale”) was engaged in excavation; as a result, Sentrale was issued a repeat citation alleging two violations of OSHA’s excavations standard. Sentrale contested the citation, and a hearing was held on August 19 and 20, 1997. Both parties have submitted post-hearing briefs.

The OSHA Inspection

Sentrale’s work at the site included performing the excavation needed for the installation of the utilities for the conference center being constructed, and, at the time of the inspection, Sentrale employees were working on a trench that had been dug so that the HVAC contractor could put in the cooling system lines. Steven Biasi, the OSHA compliance officer (“CO”) who inspected the site, observed the excavation at about 12:30 p.m. on September 20, 1996. In one area of the trench, which

was about 4 feet deep, he saw some HVAC employees laying pipe; however, he saw an additional employee in another area which appeared to be about 6 feet deep. The CO noted that there was a soil pile on the edge of the trench near the area where this employee was working and that the pile was approximately 5 feet high and 20 feet long; he further noted that the sides of the trench were not properly sloped, and, concluding that the excavation was a hazard, asked the employee to get out. The CO spoke with the employee, Edward Souza, and with Sentrale's job site superintendent, Robert Sweeting, and learned that Sweeting had instructed Souza to work in the trench. He also learned, upon measuring the trench, that it was 4 feet deep where the HVAC employees were and that it got progressively deeper; it was 6.5 feet deep where Souza had been working and 7.5 feet deep beyond that point, and the walls were sloped at about 65 degrees at the 5.5-foot depth and about 90 degrees at the 7.5-foot depth. CO Biasi videoed the trench, and took soil samples from the trench walls at the 6.5 and 7.5-foot-depth areas; he sent the samples to the OSHA lab in Salt Lake City for analysis, which showed the soil in both samples to be Type B. Based on the CO's inspection and the analysis results, OSHA cited Sentrale pursuant to 29 C.F.R. 1926.651(j)(2) and 29 C.F.R. 1926.652(a)(1).

The Alleged Violations

Item 1 of the citation alleges a violation of 29 C.F.R. 1926.651(j)(2), which states as follows:

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

Item 2 of the citation alleges a violation of 29 C.F.R. 1926.652(a)(1), which states 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) or this section except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

In regard to item 1, Sentrale contends that the Secretary failed to prove the alleged violation because the CO did not measure the distance between the soil pile and the edge of the trench and because the CO did not establish that Souza was working adjacent to the pile. Although CO Biasi's determination was by visual observation, he consistently described the soil pile as being on the edge

of the trench. He also pointed the soil pile out in C-5, his video, and noted Souza's location in the trench on C-4, his diagram of the trench with his measurements; in particular, he circled Souza's location on C-4 at the 6.5-foot depth, which is clearly adjacent to the soil pile also depicted on C-4. (Tr. 11-12; 20-25; 39-47; 52). Moreover, Sweeting essentially conceded that the soil pile was not 2 feet from the edge and that Souza had been working in the area the CO described. (Tr. 157-59; 176-78). CO Biasi noted that in addition to the hazard of soil falling into the trench, the soil pile's weight on the edge of trench increased the likelihood of a cave-in. (Tr. 13).

With respect to item 2, Sentrale contends the Secretary failed to prove that Souza had been working in an area of the trench that was over 5 feet deep. This contention is rejected in light of the evidence set out in the preceding paragraph, and, in particular, Sweeting's concession noted therein. Sweeting also conceded that the soil in the trench was Type B, which is established in any case by the Secretary's evidence in regard to the CO's taking samples of the soil, the analysis of the soil, and the results of the analysis. (Tr. 16-21; 25-26; 64-72; 190-91; C-6). Finally, Table B-1 in Appendix B to the excavations standard sets out a maximum allowable slope of 45 degrees for Type B soil, Sweeting conceded that the walls of the trench that were in areas deeper than 5 feet were not sloped as required, and the CO's measurements, which Sentrale did not rebut, revealed that the walls in the 5.5 and 7.5-foot-deep areas were sloped at 65 and 90 degrees, respectively. (Tr. 20-23; 191-92; C-4).

Based on the foregoing, Sentrale was in violation of the cited standards unless it can show an affirmative defense recognized by the Commission. Sentrale contends that Souza's presence in the 6.5-foot-depth area of the excavation was unpreventable employee misconduct. To prove this affirmative defense, an employer must demonstrate that it had work rules designed to prevent the violation, that it had adequately communicated the rules, and that it had taken steps to detect violations and had effectively enforced the rules upon discovering violations. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). Sentrale's evidence in this regard follows.

Sweeting testified that the HVAC employees were only able to lay pipe up to the point where they were at the time of the inspection due to some design changes in the site plans, that Sentrale could not proceed with its excavation of the trench until the design changes were received, and that the authority to proceed was received the following week. Sweeting said that while one Sentrale equipment operator was further digging out a wall in the area of the pipe installation on the morning

of September 20, the rest of Sentrale's employees, including Souza, were doing backfilling and grading work in other parts of the site; however, just before lunch, the HVAC contractor asked if Sentrale could provide some bedding sand to secure the piping he was installing, after which Sweeting told one of his equipment operators to dump some sand in that area and Souza to spread it. Sweeting noted that none of his workers had been in the trench that morning, that Sentrale had no reason to be in the area where the CO saw Souza, and that he himself had been unaware of Souza being there and had told him not to go there. (Tr. 136-44; 149-65; 181-86; 191-93; 198-200).

Sweeting further testified about Sentrale's safety practices, and his testimony was supported by that of Joseph Cerniglia and Frank Fusco, Sentrale's vice-president and project superintendent, respectively. Taken together, their testimony was that Sentrale job superintendents inspect their sites daily, that superintendents also discuss with their crews the work to be done each day, and that sloping, shoring or trench boxes are used when employees work in excavations over 5 feet deep; they also testified that site safety meetings are held weekly, that one of the topics is trenching safety, which includes reviewing an excavation manual and an open discussion about trenching, and that supervisors attend meetings twice a month in Sentrale's office that include safety information and handouts that are passed along to employees at site safety meetings. Employees are trained in Sentrale's safety program, and workers who do not follow safety rules are subject to reprimand and/or dismissal. (Tr. 136; 139; 153-54; 157; 166-70; 194-96; 201-21; 225-32; C-8; R-8; R-12).

Despite the foregoing, it is my conclusion that Sentrale has not shown that Souza's presence in the 6.5-foot-deep area of the excavation was the result of unpreventable employee misconduct. First, while the testimony of Sweeting and Souza indicates that they were familiar with the requirements of the subject standards, it is apparent that Souza was working in a location that exposed him to the cited hazards.¹ (Tr. 95; 106-07; 112; 121; 139; 158-59; 177-80). Second, although Souza first testified that he would not go in a trench unless his supervisor told him to, he then said that he would go in a trench that was "safe" and indicated his belief that the area where he had been working was safe. (Tr. 106; 116-18; 133). Third, notwithstanding Cerniglia's testimony that

¹Souza said that he had not been in the deeper area of the trench and that Sweeting had told him not to go there; however, his testimony while viewing C-5 makes it clear that he was in fact in the deeper part of the trench. (Tr. 103-04; 112-17).

Souza was reprimanded for being in the deeper part of the trench, Souza's testimony indicates that no such disciplinary action occurred. (Tr. 131-33; 231-32). Finally, CO Biasi testified that when he talked to them, Souza and Sweeting told him the same thing, that is, that the equipment operator had been dumping fill material into the trench, where Souza had been working to bring the grade of the trench up so that more piping could be installed, and that this work had been going on all morning; it is also clear from CO Biasi's testimony that he himself saw this work. (Tr. 12; 16; 42-47; 58-62). I observed the demeanor of CO Biasi and found his testimony to be consistent, credible and convincing. The testimony of Sweeting and Souza, on the other hand, was simply not persuasive in view of the record as a whole, particularly in light of Souza's overall testimony. (Tr. 94-134). On the basis of the record, the CO's testimony is credited as being the reliable evidence in regard to the circumstances at the site on September 20, 1996. I find, therefore, that Souza's presence in the 6.5-foot-deep area of the trench was pursuant to Sweeting's instructions, and Sentrale's unpreventable employee misconduct defense is accordingly rejected.

The Characterization of the Violations

Items 1 and 2 have been classified as repeat violations with proposed penalties of \$10,000.00 and \$4,000.00, respectively. A violation is properly classified as repeated if at the time of the alleged violation there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary presented evidence to demonstrate that a repeat citation alleging a violation of 29 C.F.R. 1926.651(j)(2) and a serious citation alleging a violation of 29 C.F.R. 1926.652(a)(1), both of which were issued to Sentrale in 1993, had become final orders of the Commission on October 25, 1993; the Secretary also presented evidence to demonstrate that items 1 and 2 of the citation in this case were issued as "second repeat" and "first repeat" violations, respectively, due to the 1993 final orders of the Commission, and that the proposed penalties for items 1 and 2 were derived by considering the maximum amounts that could be assessed for these characterizations together with a 60 percent discount because of the size of the company. (Tr. 31-34; 76-84; C-1; C-9-11). Based on this evidence and the record as a whole, I conclude that the characterization of the violations and the proposed penalties are appropriate; consequently, the penalties as proposed are assessed.

Conclusions of Law

1. Respondent Centrale Contracting Corporation is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in repeat violation of 29 C.F.R. 1926.651(j)(2) and 29 C.F.R. 1926.652(a)(1).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1 and 2 of citation 1 are affirmed, and penalties of \$10,000.00 and \$4,000.00, respectively, are assessed.

Irving Sommer
Chief Judge

Date: