

)  
Secretary of Labor,  
Complainant,

v.

Stone-Circle Underground, Inc.,  
Respondent.

\*  
\*  
\*  
\*  
\*  
\*  
\*

OSHRC Docket No. 97-1732 (E-Z)

)  
Appearances:

Dana Ferguson, Esquire  
Office of the Solicitor  
U. S. Department of Labor  
Atlanta, Georgia  
For Complainant

Herbert B. Dell, Esquire  
Ft. Lauderdale, Florida  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

### **DECISION AND ORDER**

Stone-Circle Underground, Inc. (Stone-Circle), constructs underground drainage fields in the Fort Lauderdale, Florida, area. After an inspection by the Occupational Safety and Health Administration (OSHA) of an excavation in the Barnett Bank's parking lot, Stone-Circle received two citations. Citation No. 1 alleges serious violations of § 1926.651(e) for employees working underneath the bucket of a trackhoe (item 1) and § 1926.651(j)(2) for the spoil pile immediately adjacent to the edge of the excavation (item 2). OSHA proposes a \$2,000.00 penalty for each serious violation. Citation No. 2 alleges a repeat violation of §1926.652(a)(1) for employees working in an excavation not protected from cave-ins by shoring, sloping or other protective means. A penalty of \$4,000.00 is proposed for the repeat violation. Stone-Circle timely contested the citations.

The case was designated for E-Z trial proceedings. The parties stipulate jurisdiction and coverage (Tr. 5). The hearing was held on January 26, 1998, in Miami, Florida. Stone-Circle's argument that there was no opening conference is rejected. Item 1 of Citation No. 1, alleging that employees were working underneath the bucket of the trackhoe, is affirmed. The record, however, is insufficient to establish the other two alleged violations, that employees were exposed

to the spoil pile or the unprotected walls of the excavation.

Background

On August 22, 1997, Stone-Circle, a small employer with 20 to 25 employees, was constructing a new drainage field, referred to as a French drain, in the Barnett Bank's parking lot in Plantation, Florida (Tr. 104-105, 135). Stone-Circle had been working on the French drain for a day and a half when OSHA conducted an inspection (Tr. 127). The length of the excavation site was 150 feet (Tr. 122, 129, 138).

To construct a French drain, Stone-Circle digs an excavation by trackhoe to a depth of approximately 7-feet. Paper/fabric is placed along the sides of the excavation. An approximate 2-foot bed of gravel is then placed in the bottom of the excavation and leveled by the trackhoe. The drainage pipe is placed on top of the gravel and bolted. At the Barnett Bank, the drainage pipe was placed at a depth of less than 5 feet (4.58 feet from the top of the gravel to the rim or grate). Each section of pipe is 20 feet (Tr. 137). More gravel is placed on top of the drainage pipe to within one foot of the finished grade. The paper/fabric is folded over the top of the gravel. More gravel and dirt are added. A drainage grate and asphalt finish the drainage field (Exh. R-1, R-2; Tr. 136-138). The drainage field is installed in sections of 23 to 30 feet of open excavation (Tr. 139).

On August 22, 1997, the Stone-Circle's superintendent William Debaugh, at approximately 11:30 a.m., visited the bank site (Tr. 134, 142). He saw no problems with the operation of the trackhoe, the placement of the spoil pile, or the lack of shoring or slopping. Employees were standing on the graveled portion of the excavation, less than 5 feet deep (Tr. 139, 141, 143). They were not in the deep portion of the excavation where the trackhoe was digging.

Around noon, Sonja Lederer, secretary to the OSHA Area Director, went to the bank (Tr. 14). While using the ATM machine in front of the bank, she saw the excavation and trackhoe. The trackhoe was digging at the south end of the excavation. Lederer testified that she saw the bucket of the trackhoe when dumping dirt on the spoil pile cross over the heads of employees working in the excavation (Tr. 15, 27-28). She made her observations from three separate locations at the bank; the ATM machine, the north end of the excavation, and the south end when

leaving the bank. Lederer estimated that the distance from her points of observation to the location of the trackhoe was 20 to 300 feet (Tr. 30). She reported her observations when she returned to the OSHA office (Tr. 15).

A safety compliance officer arrived at the bank site at approximately 2:30 p.m. (Tr. 71, 103). She recorded her inspection by video camera (Exh. C-1). As the compliance officer approached the south end of the excavation, she testified that she saw the bucket of the trackhoe crossing over the heads of two employees, Sam Carranza and Juan Cordona (Tr. 43). The employees were working in the excavation. The trackhoe was digging the excavation and placing the dirt on the spoil pile in the southwest corner.

When the compliance officer arrived at the trackhoe, she met Joe Martin, Stone-Circle's foreman. She showed Martin her OSHA credentials, gave him a business card, and discussed her observations about the trackhoe's bucket operating over the heads of employees (Exh. C-1; Tr. 39). Her discussion is heard on the video (Exh. C-1). While talking to Martin, Sam Carranza, pipelayer, exited the excavation through the deep portion of the excavation in front of the trackhoe (Exh. C-1; Tr. 40).

The compliance officer asked Martin to help measure the width of the excavation. Martin agreed and went to the other side. The excavation measured 9 feet, 6 inches wide (Tr. 50). The compliance officer then asked about the depth of the excavation and Martin immediately jumped into the excavation (Exh. C-1). The excavation measured 7 feet deep in the 10-foot portion of the excavation without gravel. The compliance officer estimated the bottom of the excavation was 3 feet wide (Tr. 51). The compliance officer's inspection of the excavation site took approximately 10 to 15 minutes (Tr. 103).

Based on the compliance officer's inspection, serious and repeat citations were issued. Stone-Circle maintains that the video taken by the compliance officer fails to show violations or support the observations of Lederer and the compliance officer. Also, Stone-Circle argues that the compliance officer did not conduct an opening conference and she placed its employees in unsafe situations.

#### Discussion

To prove a violation of a safety standard, the Secretary of Labor must show by a

preponderance of the evidence that (1) the cited standard applies, (2) there was a noncompliance with the terms of the standard, (3) there was employee exposure or access to the hazard created by the noncompliance, and (4) the employer knew or with the exercise of reasonable diligence could have known of the condition. *Kasper Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1994 CCH OSHD ¶ 30,303, p. 41,757 (No. 90-2866, 1993). No affirmative defense as to the alleged violations are asserted by Stone-Circle.

As to each alleged violation, Stone-Circle does not dispute the application of the excavation standards at § 1926.650 *et seq.* to its excavation site at the Barnett Bank. Also, there is no dispute that Stone-Circle knew or should have known of the conditions of the excavation. Joe Martin, foreman, was present and supervised the work on the drainage field (Tr. 43, 121). William Debaugh, superintendent, inspected the site daily; he was on-site approximately three hours prior to the OSHA inspection (Tr. 135, 142). A supervisor's knowledge of conditions at the worksite is imputed to the employer. *See Dover Elevator Co.* 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,479 (No. 91-862, 1993).

The Secretary does not allege a shoring violation in the graveled portion of the excavation. Employees on the graveled portion of the excavation were less than 5 feet deep (Tr. 204). The issue remaining as to each violation is whether employees were exposed to the trackhoe's bucket or an unsafe condition in the 7-foot deep portion of the excavation.

#### Opening Conference

Section 8(a) of the Occupational Safety and Health Act (Act) requires that "upon presenting appropriate credentials to the owner, operator, or agent in charge," OSHA is authorized to conduct an inspection in a reasonable manner, at reasonable times, and within reasonable limits. *See Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1079, 1986-87 CCH OSHD ¶ 27,815, p. 36,403 (No. 77-3804, 1987). Stone-Circle argues that compliance officer failed to have an opening conference.

The burden is on Stone-Circle to show unreasonable conduct by the OSHA compliance officer during the inspection. There must be a substantial failure to comply with the provisions of § 8(a), and such noncompliance prejudiced Stone-Circle. *Gem Industrial, Inc.*, 17 BNA OSHC 1185, 1995 CCH OSHD ¶ 30,762 (No. 93-1122, 1995).

The compliance officer testified that she presented her OSHA credentials and a business card to Joe Martin, Stone-Circle's foreman (Tr. 39). The video of the inspection recorded her conversation with Martin but does not show her presenting her credentials. The compliance officer is heard discussing the movement of the trackhoe's bucket over employees' heads and the location of the spoil pile (Exh. C-1). Martin did not testify and Stone-Circle offered no evidence disputing the compliance officer's account. Although not extensive, an opening conference was held sufficient to satisfy the requirements of § 8(a). The compliance officer identified herself and discussed the conditions she observed. The record does not show that Stone-Circle was prejudiced.

### Alleged Violations

#### Item 1- Working Underneath Loads

The citation alleges that Stone-Circle's employees were working underneath the bucket of a Caterpillar trackhoe used to excavate soil from the excavation. Section 1926.651(e) states that "no employee shall be permitted underneath loads handled by lifting or digging equipment."

Sonja Lederer, secretary with OSHA, and the compliance officer, testified to observing the trackhoe's bucket cross over the heads of employees in the excavation. The trackhoe was placing dirt on the spoil pile in the south west corner (Tr. 15-16, 27, 43). The compliance officer's video of the inspection does not show employees working underneath the bucket (Exh. C-1; Tr. 204). Sam Carranza, a pipelayer who was working in the excavation, denied that the bucket moved over his head (Tr. 117).

Despite the lack of video evidence, the observations of the secretary and compliance officer are credible and provide sufficient corroboration. Neither Lederer nor the compliance officer was shown to have a reason to fabricate or incorrectly represent their observations. The failure of the video to show the movement of the bucket does not rebut their observations. The camera's field of view is limited. The video does not show the complete operation of the trackhoe. Further, the compliance officer's observations are confirmed by her verbal warning to the foreman, Joe Martin, heard on the video as she approached the trackhoe (Exh. C-1).

Sam Carranza, who was in the excavation, denied that he was working underneath the bucket of the trackhoe. Carranza is still employed by Stone-Circle. His job in the excavation was

to assure that the bottom of excavation was level (Exh. C-5, Tr. 118-119). His attention was not on the location of the bucket overhead. Carranza's testimony is given little weight. A violation of § 1926.651(e) is affirmed.

### Serious Classification

The violation of § 1926.651(e) is classified as "serious." In order to establish a "serious" violation under § 17(k) of the Act, the Secretary must show that there is a substantial probability that death or serious physical harm could result from the hazardous condition. In determining substantial probability, the issue is not whether an accident is likely to occur. Rather, it is whether the result of an accident would likely be death or serious physical injury. *Spancrete Northeast Inc.*, 15 BNA OSHC 1020, 1024, 1991 CCH OSHD ¶ 29,313, p. 39,358 (No. 86-521, 1991).

Stone-Circle offered no evidence challenging the serious classification. There is no dispute that death or serious injury was likely from a load of dirt falling from the bucket. The bucket held one cubic yard of dirt (Tr. 45). The possible injuries included head injuries and broken bones.

### Penalty Consideration

A penalty of \$2,000.00 for serious violation of § 1926.651(e) is reasonable. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Stone-Circle is a small company with less than 25 employees (Tr. 135). Stone-Circle received a serious citation for violations of the excavation standards on December 10, 1996. (Exh. C-2). Stone-Circle was also inspected in 1994, although no citation was apparently issued (Tr. 45). The movement of the bucket exposed two employees working in the excavation to serious injury.

### Item 2 - Spoil Pile

The citation alleges that the spoil bank was stored at the immediate edge of the southwest<sup>1</sup>

---

<sup>1</sup>At the hearing, the compliance officer corrected the location from the southeast corner as identified in the citation.

corner of the excavation. Section 1926.651(j)(2) requires:

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 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.

The safety compliance officer testified that the spoil pile, located at the southwest corner of the excavation, was at the immediate edge (Tr. 50). Stone-Circle does not deny that dirt was at the edge of the excavation where the trackhoe was working. According to William Debaugh, superintendent, the dirt was spillage from the bucket. Employees, however, were not working in the portion of the excavation where the trackhoe was digging. Employees were working on the graveled portion of the excavation at least 10 feet from the trackhoe.

The record fails to establish a violation and that employees were exposed to the spoil pile in the southwest corner of the excavation. The video of the inspection is inconclusive as to the location of the spoil pile. The position of the camera does not show the distance of the spoil pile from the edge of the excavation. The compliance officer did not measure the location of the spoil pile (Tr. 99). From where Joe Martin, foreman, is seen holding the measuring tape at the edge of the excavation, the spoil pile appears behind him (Exh. C-1). When Debaugh was at the excavation at 11:30 a.m., he stated the spoil pile where the employees were working was at least two feet back from the edge (Tr. 142-143). When asked to identify the area of the spoil pile near the edge, the compliance officer identified the deep portion near the area where the trackhoe was working (Exh. C-8). As discussed for the repeat violation, the record does not establish that employees were working in the deep portion of the excavation. A violation of § 1926.651(j)(2) is vacated.

#### Repeat Item 1 - Shoring or Sloping

The citation alleges that employees working in the excavation were not protected from cave-ins by sloping, shoring, or other means of protection. Section 1926.652(a)(1) requires:

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 except when:

- (1) Excavations are made entirely in stable rock; or
- (ii) Excavations are less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

There is no dispute that the excavation measured approximately 7 feet deep, 9 ½ feet wide at the top and 3 feet wide at the bottom in the deepest portion of the excavation. The deepest portion of the excavation had no gravel and paper/fabric (Exh. C-1; Tr. 50-51). Stone-Circle does not dispute that at the ungraveled portion of the excavation, the walls were not properly sloped, shored or otherwise protected. The Secretary also does not allege a sloping or shoring violation in the graveled portion of the excavation. The graveled portion of the excavation was less than 5 feet deep (Tr. 207).

Michael Illes, Stone-Circle's safety expert, described the soil as Type C soil because it was previously disturbed. There were previously installed pipes and utility lines (Tr. 171). The compliance officer testified that the deep portion of the excavation should have been sloped at a 1½ feet horizontal to 1 foot vertical to satisfy the 34-degree angle requirement. The width of the excavation across the top should have been 21 feet (Tr. 51, 53).

The issue in dispute is employee exposure in the deep or ungraveled portion of the excavation. Stone-Circle argues that employees were not working in the deep portion of the excavation. Carranza testified that the employees worked only on the graveled portion of the excavation (Tr. 123). There was no reason for employees to work in the area being dug by the trackhoe. The employees' job involved leveling the graveled portion of the excavation to satisfy the depth requirements for laying the pipe and bolting the pipe (Tr. 117, 121). Their work was in the graveled portion of the excavation less than 5 feet deep.

The safety compliance officer testified that while walking toward the trackhoe, she observed the two employees (Sam Carranza and Juan Cordona) working in the deep portion of the excavation (Tr. 44, 75, 106). Her video, however, fails to show the employees in the 7-foot portion of the excavation. Juan Cordona is described as approximately 5 feet, 6 inches tall (Tr. 80). Carranza is 5 feet, 7 inches tall (Tr. 118). In the video, their heads appear above the height



of the excavation. This is particularly shown in exhibits C-5 and C-6 which the compliance officer had identified as the deep portion of the excavation (Tr. 106). There is no corroboration of the compliance officer's observations. While walking to the excavation, the compliance officer may have mistaken where she observed employees working. The ungraveled portion of the excavation was only 9 - 10 feet in length (Tr. 110). When the compliance officer reached the trackhoe, the employees were working on the graveled portion of the excavation. The video only shows Sam Carranza and Joe Martin actually in the deep portion of the excavation. Their exposure, however, cannot be used to establish a violation.

Sam Carranza was seen exiting through the deep portion of the excavation in the area of the trackhoe (Exh. C-1, C-9; Tr. 75). Carranza testified that he normally exited the excavation from the gravel portion approximately 20 feet behind where he was working (Tr. 116, 130). He stated that he exited through the deep portion of the excavation because he was instructed to do so by the compliance officer. He stated that the compliance officer motioned him to leave the excavation through the deep portion (Tr. 116, 124). The compliance officer denied giving him any instruction to leave (Tr. 199).

The record shows that the compliance officer was busy showing her OSHA credentials and business card to the foreman. She also was attempting to keep the video camera operating (Tr. 39, 92). Although unintentional, it is reasonable to assume that Carranza believed he was motioned to leave through the deep portion of the excavation. The compliance officer conceded that her hands were free to gesture (Tr. 93). Carranza appeared credible. It is not grounds for issuance of a citation if an employee's exposure to a hazard occurs when the employee complies with the request of an OSHA compliance officer. *Inland Steel Co.*, 12 BNA OSHC 1968, 1983, 1986-87 CCH OSHD ¶ 27,647, p. 36,010 (No. 79-3286, 1986). This would also apply if an employee reasonably believed he was complying with a compliance officer's request.

The other employee clearly shown in the deep portion of the excavation was the job foreman, Joe Martin (Exh. C-1). He was assisting the compliance officer with measuring the depth of the excavation. The compliance officer is heard on the video asking the foreman about the depth. The foreman is seen jumping into the excavation. Martin reasonably believed that he was instructed to enter the excavation. Also, the video shows that the compliance officer did not

immediately instruct him to leave the deep portion of the excavation. Martin is seen holding the tape measure and identifying the depth of the excavation. Martin is also seen being struck by falling debris from the compliance officer's shoes while she is standing on the edge of the excavation. The compliance officer did not instruct him to leave the excavation until the measurements were completed. Martin's exposure in the deep portion of the excavation was caused by the safety compliance officer and cannot be used to establish a violation. See *Inland Steel Co.*, id. A violation of § 1926.652(a)(1) is vacated.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

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

ORDER

SERIOUS CITATION NO. 1

1. Item 1, serious violation of § 1926.651(e) is affirmed. A penalty of \$2,000.00 is assessed.
2. Item 2, serious violation of § 1926.651(j)(2) is vacated.

REPEAT CITATION NO. 2

1. Item 1, repeat violation of § 1926.652(a)(1) is vacated.

---

KEN S. WELSCH  
Judge

Date: