



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
ICG ELECTRIC, INC.
Respondent.

OSHRC DOCKET
NO. 95-0166

**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 March 29, 1996. The decision of the Judge will become a final order of the Commission on April 29, 1996 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 April 18, 1996 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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.
Executive Secretary

Date: March 29, 1996

DOCKET NO. 95-0166

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,
v.
ICG ELECTRIC, INC.,
Respondent.

OSHRC DOCKET NO. 95-0166

APPEARANCES:

For the Complainant:

Kayden B. Howard, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

Lindsay E. Fischer, Esq., Colorado Springs, Colorado

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

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

Respondent, ICG Electric, Inc. (ICG), at all times relevant to this action maintained a place of business at the corner of Mississippi and Chambers, Aurora, Colorado where it was engaged in underground line installation. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 17, 1994 the Occupational Safety and Health Administration (OSHA) conducted an inspection of ICG's Aurora work site. As a result of that inspection, ICG was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest ICG brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 25, 1995 a hearing was held in Denver, Colorado. At the hearing, the Secretary withdrew item 1(a) of the Complaint and reclassified item 1(b) as a *de minimis* violation (Tr. 5). ICG withdrew its notice of contest to item 1(b) (Tr. 17). "Serious" citation 1, item 2, and "repeat" citation 2,

item 1, remain at issue. The parties have submitted briefs on the issues and this matter is ready for disposition.

FACTS

The relevant facts in this matter are undisputed. On August 17, 1994, pursuant to a complaint by the Aurora Fire Department, Compliance Officer (CO) Mike Kelly inspected two ICG excavations at the corner of Mississippi and Chambers in Aurora (Tr. 22-23). CO Kelly arrived at the job site a few minutes after 8:00 a.m. (Tr. 24).

Kelly observed two ICG employees working in the excavation on the east side of Chambers, the receiving pit (Tr. 26-27; *see also*, Stipulation of Facts #11). The receiving pit was five feet seven inches deep on its south end, and six feet deep on the north, including a four inch layer of concrete sidewalk (Tr. 31-33; Exh. C-3, C-4). Cleveland Little, ICG's foreman, agreed that the measurements were accurate (Tr. 91). The east excavation had vertical walls and was unshored (Tr. 26). CO Kelly tested the soil from the spoil pile, performing penetrometer tests and ribbon tests (Tr. 34-35). From those tests, Kelly determined that the east excavation was dug in non-cohesive Type C soil (Tr. 36). Kelly also noted that portions of the excavation were undercut, and that the excavation was located 10 to 12 feet from a traffic lane used by large vehicles (Tr. 30, 37; Exh. C-5).

ICG stipulated that one or more employees had been in the west excavation the morning of the inspection prior to the CO's arrival (Stipulation of Facts #10). The west excavation, the boring pit, was four feet, six inches deep sloping to five feet, six inches at the southwest corner (Tr. 40). By observation and testing, Kelly determined that the boring pit was dug in Type C pre-disturbed soil (Tr. 41-42, 44). At the hearing, Foreman Little agreed that the soil in the excavation was Type C and had been previously disturbed (Tr. 116). The boring pit was partially benched (Tr. 45), though Little knew that OSHA regulations state that benching is not an adequate means of preventing cave-ins in Type C soil (Tr. 117). Kelly testified that traffic passed within a few inches of the gutter side of the west trench (Tr. 43).

ICG stipulated that Harold Little was the "competent person" on site responsible for inspecting the excavation and adjacent areas (Stipulation of Facts #9). Little visually examined the soil in the cited excavations on the morning of the OSHA inspection, but did not perform any manual tests (Stipulation of Facts #8). Little stated that he could tell from his operation of the backhoe that the excavations were stable (Tr. 93, 96). Little testified that further manual tests would have been a waste of time (Tr. 111), though he was aware they were required by the standard (Tr. 123). At the hearing Little maintained that he felt no vibration from traffic passing the worksite (Tr. 93). Little also testified that the excavations remained

open 35-40 days after the OSHA inspection without any sloughing or other signs of deterioration (Tr. 94). Michael Gilbreth, ICG's owner, admitted, however, that "any trench is a potential cave-in" (Tr. 200).

Alleged Violation of §1926.651(k)(1)

Citation 1, item 2 alleges:

29 CFR 1926.651(k)(1): An inspection of the excavations, the + adjacent areas, and protective systems was not conducted by the competent + person prior to the start of work and as needed throughout the shift:

a) At Chambers and Mississippi, Aurora, CO; Employees working in excavations boring holes under the roadway were exposed to possible cave-ins due to no inspections of the soil by a competent person.

The cited standard provides:

(k) Inspections. (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

Appendix A to subpart P further provides:

(c) . . . Each soil and rock deposit shall be classified by a competent person . . . (2) Basis of classification. The classification of the deposits shall be made based on the results of at least one visual and at least one manual analysis. Such analyses shall be conducted by a competent person using tests described in paragraph (d) below, or in other recognized methods of soil classification and testing such as those adopted by the American Society for Testing Materials, or the U.S. Department of Agriculture textural classification system.

Paragraph (d) describes acceptable manual tests and the soil characteristics that tests, in order to be acceptable, must be designed to determine. Those characteristics include plasticity, dry strength, unconfined compressive strength.

Discussion

ICG admits none of the manual tests described in Appendix A were performed on the day of the OSHA inspection. Rather it suggests that it was justified in substituting the opinion of its foreman, Little, for the required manual tests, because such tests would have provided no additional information. It further suggests that Little's operation of the backhoe constituted a "manual" examination.

ICG's arguments are rejected. The standards prescribe specific methods for the classification of soils, and include a mandatory manual examination. The standard is performance based only to the extent that an employer may substitute other "recognized methods of classification and testing" which provide them with the required information. ICG failed to conduct any of the listed manual examinations, and failed to establish that operating a backhoe is a "recognized method of classification and testing." The Complainant has established the violation.

ICG contests the proposed \$4,000.00 penalty.

According to §17k of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm. The substantial probability of death or serious physical harm required by the Act does not refer to the probability that an accident will, in fact, result, but only that if the accident were to occur, there would be a substantial probability that death or serious physical harm would result. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1987-90 CCH OSHD ¶28,501 (No. 87-1238, 1989). CO Kelly testified that cave-in of the inadequately protected excavations could have resulted in crushing injuries, internal injuries, broken bones, wrenched joints, and/or possible death (Tr. 53). Kurt Schlegel, the Aurora firefighter who filed the OSHA complaint, testified that he had been involved in rescue operations involving cave-ins in shallow excavations, and that serious injuries were involved (Tr. 84). The violation was properly classified as serious.

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).

ICG employs approximately 125 workers (Stipulation of Facts #4). The gravity of the violation is moderate. Two employees were exposed to a risk of serious harm during boring operations on the 16th and attempting to make the PVC connection on the 17th (Tr. 29, 39-40). The probability of an accident occurring may have been somewhat overstated, in that the excavations cited remained open for some time following the OSHA inspection without signs of deterioration. Respondent has received five separate OSHA citations during the last three years, which Raymond K. Nellor, assistant area director for the OSHA, Englewood area office, deemed "very high" for the industry (Tr. 230). ICG's demonstrated attitude towards OSHA regulation shows an absence of good faith.

ICG failed to install trench protection in their excavations even though they were contacted by the Aurora fire department and told a complaint would be filed with OSHA on the day preceding the

inspection (Tr. 102, 114, 233-236)¹ Moreover, Mike Gilbreth's testimony establishes that ICG made little effort to enforce OSHA regulations. Gilbreth testified that ICG had effectively scrapped a safety plan it had drafted by a consultant two to three years ago as part of a settlement agreement with OSHA (Tr. 210). Gilbreth stated that ICG could not fire employees for breaking rules in the safety manual if he wanted to keep any employees at all (Tr. 207-208).

The undersigned finds that the demonstrated bad faith of the Respondent outweighs any overstatement of the probability of an accident occurring, and that the post-facto longevity of the trench cannot be used to justify ICG's failure to perform soil testing at the time the trench was excavated. The proposed penalty is deemed appropriate and will be assessed.

Alleged Violation of §1926.652(a)(1)

Citation 2, item 1 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 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

a) At Chambers and Mississippi, Aurora, CO; Employees working in excavations boring holes under the roadway were exposed to possible cave-ins.

I.C.G. Electric was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard 1926.652(a)(1) which was contained in OSHA inspection number 109547976, citation number 01, item number 02, issued on 07/10/92. I.C.G. was also cited for the same violation in OSHA inspection number 109548487, citation number 02, item number 01, issued on 01/15/93.

The cited standard states:

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: (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.

Discussion

The relevant facts, discussed above, are undisputed. Respondent's only defense to this item is its contention that the cited trenches posed no hazard to ICG employees. ICG maintains that, in the industry,

¹ The undersigned finds that the testimony of Larry Modak of Trench Shoring Services was credible, in that it was rendered by a disinterested party and supported by business records. Modak stated that ICG did not call for trench boxes until 9:20 a.m. August 17, 1994, after the OSHA CO was on site.

“field tolerances” render a 5'4" trench the equivalent of a 5 foot trench. ICG argues that because the cited excavations were the equivalent of five feet, any violation of the standard was *de minimis*, i.e., ICG’s departure from the terms of the standard bore a negligible relationship to its employee’s safety or health.

The cited standard states that “[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system. . . except when. . . [e]xcavations are less than 5 feet in depth. . . . Five feet is the depth certain, at which time protective systems must be installed. 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 (No. 15983, 1978). The cited standard presumes a hazard when an excavation reaches 5 feet in depth. Field tolerances are not provided for. ICG may not substitute its judgment for the judgment of the drafters. The Complainant has established the violation.

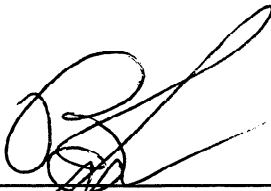
“Repeated” Characterization

ICG stipulates that it was twice previously cited for violations of §1926.652(a)(1), in July 1992, and January 1993. The first citation was not contested and became a final order of the Commission in July 1992. The second was cited as a “repeat” violation and was settled in June 1993 after OSHA amended the citation to “serious.” (Stipulations of Fact, #s 12-13; Exh. C-15, C-16). Kenneth “Red” Majors was the superintendent in charge of both the previously cited work sites, and of the worksite involved in this action (Stipulations of Fact #14).

ICG does not dispute the repeated nature of the violations. The violation will be affirmed, and the proposed penalty of \$8,000.00 assessed.

ORDER

1. Serious citation 1, item 2, alleging violation of §1926.651(k)(1) is **AFFIRMED** and a penalty of \$4,000.00 is **ASSESSED**.
2. Repeat citation 2, item 1, alleging violation of §1926.652(a)(1) is **AFFIRMED** and a penalty of \$8,000.00 is **ASSESSED**.



Benjamin R. Loye
Judge, OSHRC

Dated: March 22, 1996