



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.
R & R PLUMBING
Respondent.

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OSHRC DOCKET
NO. 95-0423

**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 February 5, 1996. The decision of the Judge will become a final order of the Commission on March 6, 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 February 26, 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
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Petitioning parties shall also mail a copy to:

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Counsel for Regional Trial Litigation
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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.
Ray H. Darling, Jr.
Executive Secretary

Date: February 5, 1996

DOCKET NO. 95-0423

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,
v.
R & R PIPELINE, INC.,
Respondent.

OSHRC DOCKET NO. 95-0423

APPEARANCES:

For the Complainant:

Tobias B. Fritz, Esq., Office of the Solicitor, Department of Labor, Kansas City, Missouri

For the Respondent:

Richard C. Cornish, Esq., Englewood, 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, R & R Pipeline (R & R), at all times relevant to this action maintained a workplace at 8492 South Wadsworth Court, Littleton, Colorado where it was engaged in work as a utilities contractor. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On December 28, 1994 the Occupational Safety and Health Administration (OSHA) conducted an inspection of R & R's Littleton worksite. As a result of that inspection, R & R was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest R & R brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 6, 1995, a hearing was held in Denver, Colorado. The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

On December 28, 1994, Compliance Officer David Nelson arrived at R & R's Littleton worksite, where he noted a trench 68 feet long, running east to west, which was approximately 32 inches wide on average (Tr. 33; Exh. C-3). The trench was 10 feet deep on the east end, 11 feet deep on the west (Tr. 37, 58; Exh. C-3). For 40 to 45 feet on the east end of the trench, a spoil pile located along the south side of the excavation was less than two feet away from the side of the trench (Tr. 34-36, 58; Exh. C-3). A ladder was located approximately 30 feet from the house located at the east end of the trench (Tr. 38, 58; Exh. C-3). The eastern portion of the trench, from the house to the ladder, had been opened the previous day; the western portion, from the ladder towards the street, had been dug the morning of the inspection (Tr. 37). Nelson took samples, and performed tests including penetrometer, dry strength and ribbon tests, from which he determined that the soil in the trench was mainly type B (Tr. 40, 58; Exh. C-3). The bottom three feet of the trench approximately 10 feet from the west end of the trench was type A soil (Tr. 41). In three places the soil in the trench had been previously disturbed: along the house; where a light PVC pipe ran diagonally across the trench; and where the trench intersected the main sewer connection (Tr. 59). The soil in those areas was downgraded to type B from type A, or type C from type B (Tr. 59).

Nelson observed an R & R employee, Steve Bishop, use the ladder to exit the trench at the direction of his leadman, Steve McKay, who was watching Bishop probe for the existing sewer line in the trench (Tr. 22-23, 39, 60, 147, 165; Exh. C-3, C-4, C-5). Bishop told the CO that he had been in the trench for approximately 45 minutes that day (Tr. 43, 178).¹

McKay told Nelson that he had not conducted any inspections to determine the soil type though he was the "competent person" on site for purposes of the standard (Tr. 55; Exh. C-2). However, John Roberts, R & R's president, who was also qualified as a competent person (Exh. R-5), testified that he had visually identified the soil in the east end of the trench as type B on the Monday preceding the OSHA inspection (Tr. 198). Roberts further testified that he was on site between 7:30 and 8:00 a.m. on Wednesday, December 28, before McKay started to dig (Tr. 202). Roberts stated that he inspected the soil visually and manually, with a dry strength test (Tr. 205; *See also*, testimony of Steve Bishop, Tr. 178). Roberts stated that he felt the soil was type B soil (Tr. 205).

¹ Respondent's objection to Nelson's testimony regarding his conversation with Bishop was upheld at the hearing (Tr. 44). The undersigned reverses that ruling; Bishop's comments are non-hearsay under Federal Rule of Evidence 801(d)(2)(D) which excepts statements by the agent or servant of a party-opponent "concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

Nelson noted that two aluminum shores, 22-36" span, were located on the side of the trench on the 28th (Tr. 39, 60). Roberts testified that he had brought additional speed shores, as well as steel plating and plywood, onto the site the morning of the OSHA inspection, and stored them under the job trailer out back (Tr. 202-03). Roberts testified that on the preceding day, Tuesday, he spoke to McKay, discussing the spacing of speed shores and the use of steel plates and/or banking should McKay encounter type C soils (Tr. 201). On Wednesday, Roberts told McKay that because a trench box would not fit in between the gas line and the water line, McKay would have to use shoring, though it was difficult and time consuming to install and remove (Tr. 205). Roberts testified that he specifically stated that he did not want to see anyone down in the trench without shoring (Tr. 206).

McKay told Nelson that the shores would have been installed once the sewer line was located (Tr. 39, 60; Exh. C-2). Bishop testified at the hearing that "[i]t wasn't either one of us' decisions specifically. . . it just came so natural to get in there and do it. The ditch looked good to us." (Tr. 172-73). Bishop admitted he knew at the time that working in the trench without a trench box was against the regulations, and stated he believed that Roberts' would have fired him on the spot if he had caught him (Tr. 179). However, Bishop stated, they were in a hurry, and putting the jacks in and taking them out was slow and tedious work (Tr. 173, 177, 180). Bishop further stated that it was not possible to dig the trench with shoring in place because it got in the way of the shovel (Tr. 186-87).

McKay stated he was aware that the spoil pile was too close to the trench; he told CO Nelson that he did not have room to place the spoil back any further (Tr. 83; Exh. C-2).

Carol Finley, an employee at R & R, testified that she was responsible for seeing that employees receive their first safety instruction (Tr. 102). Finley testified that all new employees are informed of R & R's excavation policy, which states that:

All soils are classified TYPE C SOIL unless otherwise identified by a professional. All simple slope excavations 20 ft. or less in depth shall have a maximum allowable slope of 1½:1. If jobsite is such that proper sloping is not allowable SHORING must be used. We have our own trench boxes and Trench Shoring may also be called to rent shoring if our shoring is unavailable. If shoring is used on any job employees must stay within the shoring boxes at all times. DO NOT work in front of or behind boxes. They are there for your protection.

(Tr. 109; Exh. R-1). Finley testified that employees are also informed that any willful violations of Federal or State OSHA regulations can be considered grounds for dismissal (Tr. 115; Exh. R-2). Finley stated that Bishop and McKay were both informed of the policy at the time they were hired, Bishop in early to mid-1994, and McKay in 1991 (Tr. 110, 112, 129; Exh. R-4, R-7).

In October 1994, Bishop participated in Trench Shoring Services' Safety in Excavation Course, receiving "competent person" training in OSHA standards, soil and hazard identification, and protective systems, including trench shoring (Tr. 120, 163; Exh. R-4). McKay participated in the same course in January 1995, following the December 1994 OSHA inspection (Exh. R-7). Finley stated that McKay had been trained as a competent person in 1991, but that he was required to repeat the training in 1995 because of the December 1994 OSHA inspection (Tr. 149, 212).

Finley also testified that R & R holds weekly safety meetings, at least one of which, the October 17, 1994 meeting, dealt with the use of trench boxes, and was attended by Steve Bishop (Tr. 134-36, 142, 156; Exh. R-9).

Roberts testified that he was aware of four or five incidents in the last five years in which R & R workers have been in unprotected excavations (Tr. 239). Roberts stated that he has sent home workers he caught working outside a trench box, as well as workers caught without safety glasses or proper boots (Tr. 238). Finley testified that she did not know of any employee who was dismissed for safety rule infractions prior to the December 1994 inspection (Tr. 139). Letters of reprimand had been placed in some employees' files, and some employees were suspended for failing to have hard hats or steel toed boots (Tr. 139-40).

Following the December OSHA inspection, however, no immediate disciplinary action was taken by R&R. Roberts stated that he did not learn of the inspection from McKay until the following Friday (Tr. 209). According to Roberts, McKay told him "I don't know what you're getting so worked up about on all this. They're just going to fine you \$100 bucks" (Tr. 210). Roberts testified that he did not believe he could fire employees for safety violations, but was encouraged by OSHA at R & R's informal conference to fire the employees involved in the December 28, 1994 incident (Tr. 236). On March 17, 1995 Finley typed a memo for the files of Messrs. McKay, Bishop and Villareal, which stated that all three had been terminated for "blatant disregard of company safety policy" (Tr. 146; Exh. R-8).

Bishop testified that he was not fired in March 1995, but quit R & R at about that time because he did not like the way a ditch he was working in was shored (Tr. 176, 182). Bishop stated that in that case, the operator should have stepped, or benched the ditch he was working in. When the operator refused, Bishop walked off the job after giving notice to his supervisor (Tr. 176-77). Roberts stated that he was on his way to fire Bishop when he found out Bishop had quit (Tr. 213-14, 222). Villareal had quit prior to March 1995 (Tr. 213).

Alleged Violation of §1926.651(j)(2)

Serious citation 1, item 1 alleges:

29 CFR 1926.651(j)(2): Protection was not provided by placing and keeping excavated or other materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining + devices that were sufficient to prevent materials or equipment from falling + or rolling into excavations, or by a combination of both if necessary:

a) 8492 Wadsworth Ct. Littleton Co.: A retaining device or the required spacing for excavated materials was not maintain from the trench edge (sic).

The cited standard states:

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.

Discussion

It is clear from the testimonial and photographic evidence that R & R was in violation of the cited standard on the date of the inspection. Employee Bishop was exposed to the hazard posed by the improperly placed spoil pile when he climbed up and down the ladder in the center of the trench. McKay, the leadman on the site, was aware both that the spoil pile was too close to the trench, and that Bishop was working inside.

Nelson testified that an employee could have been seriously hurt or killed from materials falling from the spoil pile into the excavation. In addition, the extra surcharge to the trench side could cause a cave-in, resulting in serious injury or death (Tr. 53). The cited item was, therefore, a “serious” violation.

R & R’s affirmative defense, unpreventable employee misconduct, was not proved in regard to this item. In order to establish an unpreventable employee misconduct defense, the employer must establish that the violative conduct on the part of an employee was a departure from a uniformly and effectively communicated and enforced work rule designed to prevent the violation. *Mosser Construction Co.* 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991). R & R introduced no evidence of any work rule specifically addressing the placement of the spoil pile. Rather their evidence was directed to the sole issue of employees working in unprotected trenches. The violation has been established.

The proposed penalty of \$2,800.00 was computed based, in part, on R & R’s size. The CO believed that R & R had 12 employees. At the hearing, Roberts testified, without contradiction, that R &

R had only 9 employees (Tr. 192). This judge notes that OSHA Instruction CPL 2.107 (Penalty Policy for Employer Size), effective October 2, 1995, recognizes the inability of small employers to pay penalties calculated at the current levels, which have increased seven fold in recent years. The new policy calls for reductions of up to 80% for employers with 10 or fewer employees. [25:12 Current Report] O.S.H. Rep. (BNA) 474 (Aug. 23, 1995). This judge finds that the penalties assessed in this matter are excessive for an employer of R & R's size, and that an additional 20% reduction over the 60% already given is appropriate. A penalty of \$1,400.00 will be assessed.

Alleged Violation of §1926.651(k)(1)

Serious citation 1, item 2 alleges:

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

a) 8492 Wadsworth Ct. Littleton Co.: An inspections of the excavation was not conducted prior to the start of work to determine if/what type of protective system would be needed (sic).

The cited standard provides:

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, subsection (c)(2) describes the required substance of such daily inspections.

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 America Society for Testing Materials, or the U.S. Department of Agriculture textural classification system.

Discussion

The citation alleges that an inspection of the worksite was not conducted prior to the start of work on Wednesday, the day Bishop was observed working in the trench. At the hearing, CO Nelson testified that the soil needs to be inspected daily in order to determine what type of protective system is needed in

the trench to prevent cave-ins (Tr. 56). Nelson was unaware that any other competent person from R & R had been on the worksite that day (Tr. 55). At the hearing, however, Roberts testified in detail about the required testing, which he maintained he had performed prior to the start of work on the day of the inspection.

Complainant failed to establish by a preponderance that the required daily testing was not performed. The citation is, therefore, dismissed.

Alleged Violation of §1926.652(a)(1)

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

a) 8492 Wadsworth Ct. Littleton Co.: Employees working in a trench were not protected from cave-ins by the use of an adequate protective system.

R & R Pipeline 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 110534427, citation number 1, item number 1, issued on 05-18-94 (sic).

The cited standard provides:

Protection of employees in excavations. (1) 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 evidence establishes that the cited standard was violated. Respondent raises the affirmative defense of unpreventable employee misconduct.

The Commission has held that where the misconduct of a supervisory employee is alleged, the employer must establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory employee. *Daniel Constr.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD 26,027, p. 32,672 (No. 16265, 1982). A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax. *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321, 1991 CCH OSHD 29,500, p. 39,810 (No. 86-0351, 1991). Therefore, where a supervisory

employee is involved, the defense of unpreventable employee misconduct is more difficult to establish. *Id.*

In this case, R & R established that it had a work rule specifically requiring the use of shoring in excavations where sloping was impractical, and that Bishop and McKay were told of the policy. Moreover, those employees were specifically told by Roberts, the morning of the OSHA inspection, that they were not to be in that particular trench without protection. In addition to his safety instructions, Roberts provided them with the shoring equipment they needed to protect themselves in the trench. It is clear from the testimony that Bishop and McKay knew that they were working in violation of both OSHA and company rules.

The record fails to establish, however, that R & R enforced its safety rules with a system of written reprimands and suspensions. Bishop, a new employee, believed he would be disciplined for the infraction if caught. According to Robert's own testimony, however, McKay, a longtime employee and lead man, thought nothing of the OSHA violation. McKay initially failed to inform Roberts of the OSHA inspection; when he finally did, he couldn't understand Roberts' concern. McKay clearly believed there would be no serious consequences for his failure to follow company policy, and indeed there were none for three months, until Roberts was told at R & R's informal conference that firing the employees would strengthen his employee misconduct defense. Other evidence in the record supports this judge's conclusion that R & R failed to adequately enforce its safety rules, namely, R & R's failure to discipline employees for known violations of the trenching rules unless caught in the act, and the fact that there was virtually no management supervision at the worksite despite R & R's citation by OSHA for violation of the same standard following an inspection of a separate worksite in May 1994 (Tr. 19-21).

Respondent failed to establish the affirmative defense of unpreventable employee misconduct.

Repeat

Complainant's exhibit C-6 establishes that a citation for the identical standard, §1926.652(a)(1) became a final order of the Commission on September 14, 1994 (Tr. 21). A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16183, 1979). The entry into the record of a prior citation issued to respondent alleging a violation of the same standard, combined with respondent's further concessions that the prior citation was not contested and had become a final order prior to the date of the inspection giving rise to the present citation was sufficient to complete the Secretary's prima facie case. *Stone*

Container Corp., 14 BNA OSHC 1757, 1990 CCH OSHD ¶29,064 (No. 88-310, 1990). The burden of demonstrating the dissimilarity of the violation is then shifted to the Respondent.

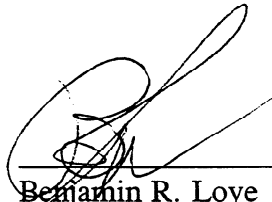
R & R failed to demonstrate that the May 1994 violation was not substantially similar to the one cited here. R & R points out that the trench cited in May was dug in sandy soil and was sloped rather than shored (Tr. 66, 217). Nonetheless, the citation clearly focused on the presence of employees in an inadequately protected trench, and should have put R & R on notice of problems in this area.

The citation will be affirmed as a "repeated" violation.

A penalty of \$5,600.00 was proposed. For the reasons discussed in citation 1, item 1, the penalty is deemed excessive. \$2,800.00 will be assessed.

ORDER

1. Serious Citation 1, item 1, alleging violation of §1926.651(j)(2) is AFFIRMED and a penalty of \$1,400.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1926.651(k)(1) is VACATED.
3. Repeat citation 1, item 1, alleging violation of §1926.652(a)(1) is AFFIRMED and a penalty of \$2,800.00 is ASSESSED.



Benjamin R. Loye
Judge, OSHRC

Dated: December 22, 1995