UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
GUARCO CONSTRUCTION CO.
Respondent.

OSHRC DOCKET
NO. 93-2962

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 October 25, 1994. The decision of the Judge will become a final order of the Commission on November 25, 1994 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 November 14, 1994 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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Review Commission
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Petitioning parties shall also mail a copy to:

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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.

Date: October 25, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2962

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. GUARCO CONSTRUCTION, COMPANY Respondent.	OSHRC DOCKET NO. 93-2962

Appearances:

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For Complainant

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For Respondent

Before: Administrative Law Judge Barbara L. Hassenfeld-Rutberg

DECISION AND ORDER

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C., et seq, ("the Act"), to review a citation issued by the Secretary pursuant to section 9(a) of the Act and a proposed assessment of penalty issued thereon for an alleged repeat violation of 29 CFR 1926.652(a)(1) and an alleged other than serious violation of 29 CFR 1926.20(b)(3).

Respondent, Guarco Construction Company ("Guarco"), a corporation, was issued two citations on October 13, 1993, stemming from an investigation conducted by the Occupational Safety and Health Administration ("OSHA") of a construction site on South Main Street in East Granby, Connecticut on August 19, 1993. Thomas Foley and Joseph Normand, two OSHA representatives, conducted an investigation based on potentially serious violations that they had noticed while driving past the construction site after work on August 19, 1993. The Respondent was then issued two citations, one repeat carrying a total proposed penalty of $7000.00, and one other than serious with no proposed penalty .

Guarco filed a timely Notice of Contest and a hearing was held in Boston, Massachusetts on August 2, 1994, presided over by Judge Barbara L. Hassenfeld-Rutberg.

DISCUSSION

I. Repeat Citation 1, Item 1

The Secretary alleges that the Respondent, Guarco, committed a repeat violation of 29 CFR 1926.652(a)(1) because its employees were not protected from cave-ins at an excavation by an adequate protective system, i.e. the excavation was not shored or sloped.[1] The classification of repeat violation stemmed from the fact that the Respondent had been previously cited for the same hazard. (Tr. 38; Exhibit C-8). The parties settled that case and the settlement included an affirmation of the citation. (Tr. 40-41; Exhibit C-9).

Guarco is a small construction company, which at the time of the citation, was installing pipe for a sewer line at the Blue Goose Restaurant in East Granby, Connecticut, an establishment owned by Allessio Guarco, a cousin of the Respondent's president, Carl Guarco. (Tr. 25-26, 75). On August 19, 1993, two OSHA representatives, Safety Supervisor Joseph Normand and Compliance Officer Thomas Foley, were driving by the restaurant and noticed potentially serious OSHA violations, i.e. that the trench did not appear to be shored or sloped. (Tr. 17). Even though the inspectors were "off duty", they decided to conduct an inspection of the excavation site because of the serious hazards associated with trenching work which were recognized in OSHA's National Emphasis Program. (Tr. 17-18). At the time of the inspection, Mr. Daniel Cowles was standing in the excavated area/trench while Mr.Carl Guarco was working in an excavator. (Tr. 23-24, 27; Exhibits C-1, C-2, C-3). Mr. Gilman Gagnon, an employee of Respondent, was the only other person present on site. (Tr. 46, 99). Mr. Normand and Mr. Foley determined that the excavation was unsafe and in violation of OSHA standards as it had not been shored or sloped to prevent cave-ins which could cause serious injury or death to a person in the trench. (Tr. 38). OSHA requires shoring and sloping of any trench that is deeper than 5 feet (see footnote 1). Mr. Normand and Mr. Foley measured the depth of the trench at approximately where Mr. Cowles had been standing when they came on site by using Mr. Carl Guarco's surveyor's stick. They determined that the depth ranged from about 5 feet, 4 inches to 5 feet, 7 inches, thus subject to OSHA standards. (Tr. 29-32, 44-45; Exhibits C-4, C-5).

The Respondent proffered four affirmative defenses in response to the citations. Its first defense asserts that it should not have been cited by OSHA because OSHA standards did not apply to

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[1] The relevant portion of 29 CFR 1926.652(a)(1) 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 the section except when:. . .
>
> (ii) Excavations are less than 5 feet (1.52m) in depth.

that excavation because at the time of the inspection, none of Guarco's employees were exposed to the potential hazard in the trench. Mr. Cowles, who testified that he was not an employee of Guarco, was the only worker in the trench at that time. (Tr. 75-77). This argument, that OSHA does not apply to such a situation, lacks merit. It is well-established in the case law that where an employer is in control of a work site and/or has created a hazard, its own employees need not be exposed to the hazard for the employer to be found in violation of OSHA standards. It is enough that any employees at the work site could be exposed to the hazard that was created and/or under the control of the cited employer. *See, e.g., Donovan v. Adams Steel Erection*, 766 F.2d 804, 811 (3rd Cir. 1985); *Beatty Equipment Leasing, Inc. v. Secretary of Labor*, 577 F.2d 534, 536-37 (9th Cir. 1978); *Brennan v. OSHRC*, 513 F.2d 1032, 1037-38 (2nd Cir. 1975). When Mr. Carl Guarco told Mr. Cowles to get out of the trench, he did so, which proves that Mr. Guarco had control over the work site. (Tr. 24; Exhibit C-2). Respondent's fourth defense of "insufficient exposure" is also erroneous in light of this case law since exposure is not a required element. Any employee need only have access to the hazard for an employer to be found in violation of OSHA standards. *Brennan*, 513 F.2d at 1038.

Rationale for this interpretation lies in the legislative history of the Act which is to prevent accidents and injuries to all employees; thus, to absolve an employer from responsibility for a hazard it created and/or controlled regardless of how many employees were exposed, simply because none of its own employees were exposed, would defeat the purpose of the Act. *See, e.g., Adams Steel Erection*, 766 F.2d at 811; *Beatty Equipment*, 577 F.2d at 536-37; *Brennan*, 513 F.2d at 1037-38. Mr. Cowles testified that he had been requested by the Respondent's cousin, Allessio Guarco, the owner of the restaurant where the construction was taking place, to repair and/or replace an underground conduit that had been damaged. (Tr. 75-77). This task necessitated that Mr. Cowles work in the excavation which had been dug by the Respondent, and Mr. Normand and Mr. Foley saw Mr. Cowles working in the trench when they arrived on site. (Tr. 23-24, 27; Exhibits C-1, C-2, C-3). Mr. Cowles was therefore inarguably exposed to the hazard of a possible cave-in. Guarco was the general contractor at the work site, had complete control over the work site, and had excavated the trench, creating the hazard, (Tr. 34, 103); therefore, the citation for a violation of OSHA standards in the construction of the trench was appropriate even though none of Guarco's own employees were exposed to the hazard at the time of the inspection. *See, e.g., Adams Steel Erection*, 766 F.2d at 811; *Beatty Equipment*, 577 F.2d at 536-37; *Brennan*, 513 F.2d at 1037-38.

In its second defense, Respondent maintains that there was no need to shore or slope the trench because it was not over 5 feet deep and thus it was not an excavation subject to OSHA regulations. Respondent insists that the trench was not over 5 feet deep. (Tr. 104, 117). Mr. Carl Guarco maintained that his stick used by the OSHA representatives was inaccurate, and that even if it was accurate, it was bowed out at such an angle so as to significantly increase the measurements taken

of the depth of the trench. (Tr. 106). Furthermore, Respondent asserts that his widening of the trench to accommodate excess soil in the case of a cave-in was a sufficient safety precaution. (Tr. 103). Mr. Normand, the OSHA Assistant Area Director, Safety Supervisor, who had conducted the inspection, testified that widening a trench is not a recognized means of protecting an excavation under OSHA standards because the side walls could still collapse and cause serious injury or death. (Tr. 121). In addition, Mr. Normand testified that the surveyor's stick that was used to measure the depth of the trench was not sufficiently bowed out to bring the height differential down 4 inches. (Tr. 121-22). Mr. Normand confirmed that the stick was slightly bowed out so as to cause about a one-half inch difference in the measurement of the depth of the trench; however, a 4 inch difference would be necessary to bring the actual measurement under 5 feet and out of the range of the OSHA standard cited. (Tr. 122). Mr. Guarco admitted that he had not mentioned his concern over the accuracy of the stick at the time of the inspection. (Tr. 112-13). Mr. Normand also stated that the stick had been assembled properly and thus there was no reason to believe that it was inaccurate. (Tr. 72, 123-25, Exhibits C-4, C-5). He demonstrated that assembly at the hearing and in photos. (Tr. 123-25; Exhibits C-4, C-5).

Respondent's third affirmative defense that the alleged job site was not a "recognized hazard" is completely erroneous. This is not a section 5(a)(1) of the Act, General Duty Clause citation but a situation where the Respondent allegedly violated a specific OSHA standard relating to necessary safety procedures when constructing and working in a trench. The argument that this was not a recognized hazard is totally inappropriate in this case because OSHA has a regulation which expressly recognizes this situation as a hazard.

Section 17(j) of the Occupational Safety and Health Act of 1970 mandates that the Commission give "due consideration" to four criteria when assessing penalties. These four criteria are: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's history of previous violations. *Secretary of Labor v. Dream Set Fashion, Inc., OSHRC Docket No. 92-2962 (July 11, 1994); State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161-62, 1993 CCH OSHD para. 30,042, p. 41,227 (No. 90-1620, 1993). In this case, although the Respondent, a corporation, employs only two people (Mr. Guarco and Mr. Gagnon), the severity of any possible injury would be high as death could result from a cave-in of the trench. In addition, there doesn't appear to have been any substantial precautions taken against injury; although Mr. Guarco maintained that he widened the trench to compensate for a potential cave-in, this is not an OSHA recognized means of preventing trench cave-ins. Moreover, the likelihood of injury is high since the trench was not shored or sloped and Mr. Cowles was working in the trench at the site. Finally, since this has been established as a repeat violation, Respondent is not entitled to any reductions in penalty based on good faith. The history of the company indicates being cited for the

same violation previously. The proposed penalty of $7000.00 is amply supported by the evidence and no mitigating factors are found so as to warrant a change in penalty. Thus the repeat citation with its proposed penalty of $7000.00 is AFFIRMED.

II. Other Citation 2, Item 1

The Secretary also alleged that Guarco violated 29 CFR 1926.20(b)(3) because of the presence of a saw at the work site that was improperly wired into a wall box and was equipped with a frayed attachment cord.[2] Mr. Normand testified to these conditions, i.e. that the saw had a frayed cord and that it was directly wired into the wires in an electrical outlet box on the outside of the restaurant. (Tr. 35-36; Exhibits C-6, C-7). During the inspection, Mr. Guarco stated that the saw had been used by Cowles to cut the plastic pipe being laid in the trench. (Tr.36-37).

Respondent maintained that he should not have been cited because the saw was the property of Mr. Cowles, not the Respondent, and Mr. Cowles was the only one who used the saw. Again, this argument fails. It has been established that Guarco was the general contractor and in complete control of the work site. Thus it is responsible for the safety of all employees working at that site. Mr. Cowles testified that the saw in question was his own property and that he was the only one who used it, (Tr. 70, 76); however, Respondent should have informed Mr. Cowles of the hazards of using that saw and refused to allow him to use it. This approach would have been a feasible solution since Mr.Guarco testified that he had another saw at the work site and thus Mr. Cowles could have performed his job by using that saw. (Tr. 114-15). This citation was classified as other than serious and no penalty was proposed. Considering the four statutory criteria required when assessing a proposed penalty, there is nothing in the record that would warrant a penalty being imposed in this instance. The citation is hereby AFFIRMED and no penalty is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(A) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

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[2] 29 CFR 1926.20(b)(3) states:

> The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited. Such unsafe machines, tools, materials, or equipment shall be either identified as unsafe by tagging or locking the controls to render them inoperable or shall be physically removed from its place of operation.

ORDER

Repeat Citation 1, Item 1, alleging a violation of 29 CFR 1926.652(a)(1) is AFFIRMED with a penalty of $7000.00.

Other than Serious Citation 2, Item 1, alleging a violation of 29 CFR 1926.20(b)(3) is AFFIRMED without penalty.

Barbara L. Hassenfeld-Rutberg

BARBARA L. HASSENFELD-RUTBERG
Judge, OSHRC

Date: October 19, 1994
Boston, Massachusetts