



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

EARL A. EICHLIN ENTERPRISES, INC.
Respondent.

OSHRC DOCKET
NO. 92-1283

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 8, 1993. The decision of the Judge will become a final order of the Commission on March 10, 1993 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 March 1, 1993 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
1825 K St. N.W., Room 401
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Petitioning parties shall also mail a copy to:

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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr. / RHD
Ray H. Darling, Jr.
Executive Secretary

Date: February 8, 1993

DOCKET NO. 92-1283

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

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v.

EARL A. EICHLINER ENTERPRISES, INC.,

Respondent.

OSHRC DOCKET
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APPEARANCES:

For the Complainant:
Cyrus A. Alexander, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, IL

For the Respondent:
Mark M. Camp, Esq., Wauwatosa, WI

DECISION AND ORDER

Loye, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq., hereafter referred to as the Act).

Respondent, Earl A. Eichline Enterprises, Inc. (Eichline), at all times relevant to this action maintained a worksite and place of business at Rogers and Mooreland Road, New Berlin, Wisconsin where it was engaged in repairing a water line valve (Tr. 42, 178; Answer ¶II(b)). Eichline admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Answer ¶III).

On March 5, 1992, an Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) conducted an inspection of Eichline's New Berlin worksite (Tr.

41). Following the inspection, Eichline was issued "serious" citation 1 alleging violations of 29 CFR §§1926.651(c)(2), 1926.651(d), and "repeat" citation 2, alleging a violation of §1926.652(a)(1), together with proposed penalties. Eichline filed a timely notice of contest to all items cited, bringing this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 29-30, 1992 a hearing was held in Milwaukee, Wisconsin on the contested items. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 states:

1

29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

(a) Employer failed to provide a stairway, ladder, ramp or other safe means of egress for excavation that was 10 feet or more in depth so as to require no more than 25 feet of lateral travel for employees. No safe means of egress was provided to employee working in bottom of the excavation.

Serious citation 1, item 2 states:

2

29 CFR 1926.651(d): Employees exposed to public vehicular traffic were not provided with a warning vest or other suitable garments marked with or made of reflectorized or high-visibility material:

(a) Employees located outside the excavation along S. Moorland Rd., New Berlin, WI. were not wearing safety vests or other suitable reflective garments to avoid potential hazards from on-coming vehicular traffic.

Repeat citation 2, item 1 states:

1

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(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) On the corner of W. Rogers Dr. and S. Moorland Rd.; in New Berlin, Wisconsin, there was an employee working at the bottom of an excavation measuring 20 feet plus in length, by 17 feet in width, by 11 feet in depth, not protected by an adequate protective system. A potential cave-in/ground moving hazards (sic) exists.

Alleged Repeated Violation of §1926.652(a)(1)

Section 1926.652(a)(1) 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 (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Paragraph (b) allows the employer to determine its own sloping requirements based on soil types A, B and C, described in Appendix A, and on sloping configurations described in Appendix B. Appendix B to Subpart P, Table B-1 states that a excavations in Type C soil shall be cut back 1-1/2 foot horizontal to each foot vertical. Excavations in B soil shall be cut back one horizontal foot for each foot vertical.

Paragraph (c) describes alternative support systems such as shoring.

It is undisputed that the cited section applies, that an Eichline employee was working in the trench and that no trench box or shoring were present at the Eichline worksite. Only the trench measurements and soil type are contested.

The Excavation's Dimensions

On March 5, 1992 CO George D. Petaway inspected an Eichline excavation running south to north along South Mooreland Road in New Berlin (Tr. 42, 45). Petaway testified that he measured and logged the measurements of the excavation at its south end (Tr. 48-49, 61; Exh. C-10). At the south wall the excavation was 17 feet wide, east to west (Tr. 61, 114). The west wall measured in excess of 20 feet north to south (Tr. 63-64; *see also*, R. Rinehart's testimony, Tr. 288). Petaway measured the depth of the excavation at 11 feet at the south wall (Tr. 50). The trench was approximately 5 feet at the base (Tr. 261, 282).

Petaway observed and photographed an Eichline employee, Jerry Rinehart, enter the north end of the excavation to loosen soil around the water main (Tr. 56, 124; Exh. C-17, C-18, C-19, C-20).

During discovery, Eichline admitted the length and width of the excavation (Tr. 133; Exh. C-22, No. 8, 9). At the hearing, however, both Raymond Rinehart, Eichline's foreman, and Duane Phillips, Eichline's top man, testified that the trench was 21 feet 6 inches wide (Tr. 260, 332). Rinehart indicated, however, that his measurements were made at the end of the job after CO Petaway had left (Tr. 480-481). Petaway testified that Eichline's backhoe was in operation during his inspection, cutting back the wall and widening the excavation (Tr. 63-64, 218; Exh. C-10, 20).

Rinehart and Phillips also testified that Petaway measured the excavation's depth incorrectly, with his engineering rod at an angle, and stated that the excavation was only 8 feet deep (Tr. 307, 339, 344). Rinehart stated that the excavation reached 18 inches past the water main valve 6 feet 6 inches below ground level (Tr. 305), and that the water main, which was 7 feet 6 inches deep, was never fully exposed (Tr. 271-72, 305).

Both Rinehart and Phillips testified that the excavation walls were sloped to 1-1/2:1, except for a 2-1/2 to 3 foot bench above a concrete buttress in the west wall (Tr. 262, 332, 341, 473-76). The photographic evidence, however, shows a vertical wall to approximately to the height of J. Rinehart's head on the west side (Tr. 383, 384; Exh. C-17, C-18, C-20; *See also* Petaway's testimony, Tr. 67); J. Rinehart indicated that he was standing on top of the buttress (Tr. 425). Moreover, Russel Moeller, Eichline's backhoe operator, admitted that he left four or five vertical feet above the water main before sloping to prevent the curb from sliding down into the excavation (Tr. 402).

Soil Classification

Petaway stated that he took penetrometer and torvane readings of the soil, and took a sample from the west wall of the excavation (Tr. 70). The penetrometer reading indicated an unconfined compressive strength of less than .5 (Tr. 73, 222). Petaway stated that he was unable to get a sheer strength reading from the torvane because the soil was too soft (Tr. 74, 223). Petaway later conducted a sieve test on the sample obtained from the Eichline excavation and found that the soil was mostly sand, which is classified as a Type C soil (Tr. 81-82, 221; Exh. C-6).

Rinehart, however, stated that based on his visual and thumb analyses he determined that the excavation walls consisted of a layer of loose black dirt covering a highly plastic,

hard moist clay (Tr. 263-65, 276-77, 313). Rinehart also rolled the soil and found it to be highly cohesive (Tr. 313). Duane Phillips testified that the soil around the water valve appeared to be a glossy clay which was saturated around the water box (Tr. 330-32). Russel Moeller and Eichline's superintendent, Albert Will, corroborated Rinehart's and Phillips determination of the soil type (Tr. 355, 371).

Rinehart attacked the CO's soil sample and analysis, testifying that the west side of the trench was inaccessible because of the spoil filling the curb lane, and stating that he saw Petaway take his soil sample from the center of the south wall. The center of the south wall consisted of backfill from a previous 30 inch excavation dug when the pipe was originally laid (Tr. 262-63, 273-75, 309). However, Russel Moeller, Eichline's backhoe operator, testified that he placed all the spoil behind the hole, to the north (Tr. 369), and Duane Phillips testified, inconsistently, that *he* saw Petaway take the sample from the topsoil on the west wall (Tr. 339).

Water from a broken water main valve was visible in the bottom of the excavation (Tr. 69). Rinehart testified that there had been some water on the surface, and that they had to dig far enough down to get a pump into the area around the broken valve to remove water accumulated around the leak (Tr. 258, 326). Rinehart stated that the only water in the excavation was from the valve, however, and that there was no groundwater seepage (Tr. 304).

Discussion

CO Petaway's measurements are accepted as accurately representing the dimensions of the excavation at the time J. Rinehart was working at the bottom. Length and width measurements were admitted during discovery; conflicting measurements were not taken until the job was finished. Because Eichline continued excavating after the OSHA inspection, the final configuration of the excavation is irrelevant, and clearly cannot be used to show the dimensions of the trench at the time of the cited violation.

Rinehart's testimony as to the depth of the trench in the area where J. Rinehart was working is, however, accepted. The undersigned finds Rinehart's testimony as to the depth of the water main credible, and the photographs do not show the water main in the bottom of the trench.

Complainant's determination of the soil type is credited. Eichline's witnesses' attempts to discredit the OSHA soil sample were contradictory and, therefore, lacking in credibility. Two "eyewitnesses" placed Eichline's spoil pile first to the north and then to the west of the excavation, preventing the CO's access to that side of the trench. Two more report seeing Petaway take his soil sample taken from completely different walls of the trench. Because there appears to be no way to reconcile the testimony of Respondent's witnesses, it is discounted.

The undersigned finds that Eichline was in violation of the cited standard on March 5, 1992. An eight foot trench in type C soil must be cut back 12 feet on each side. An excavation with a five foot base must measure 29 feet across the top. Eichline's excavation was cut back only 17 feet total and was clearly out of compliance.

Moreover, the undersigned notes that even were Eichline's soil classification accepted, its excavation would still be out of compliance. An eight foot excavation in type B soil must be cut back eight feet on each side. The total top width would have had to be 20 feet¹ when J. Rinehart first entered the excavation. Because it was not, the cited violation will be affirmed.

Repeat Classification

The Commission has held that:

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, 1063, 1979 CCH OSHD ¶23,294, p. 28,171 (No. 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 [is] sufficient to complete the Secretary's prima facie case.

¹ Because the overall configuration of the excavation does not comply with the standard's guidelines, it is unnecessary to address the height of the bench on the west wall. For the record, however, the undersigned finds CO Petaway's representation of its height more credible than Eichline's two and one half to three feet estimate.

Id. at 1065, 28,173; *See also, Stone Container Corp.*, 14 BNA OSHC 1757, 1987-90 CCH OSHD 129,064 (No. 88-310, 1990). The burden of demonstrating the dissimilarity of the violation is then shifted to the Respondent.

Eichline was cited for violation of §1926.652(a)(1) on August 8, 1990 (Tr. 97; Exh C-1). Eichline made no attempt to distinguish that violation from the one at bar. The violation, therefore, will be affirmed as a “repeat” violation.

Eichline is a small employer (Tr. 85). The gravity of the violation is high, because of the possibility of death in cave-ins (Tr. 85). Only one employee was exposed, however, for a short period of time.

Taking into consideration the relevant factors, the Secretary’s proposed penalty of \$12,000.00 is considered excessive. A penalty of \$10,000.00 will be assessed.

Alleged Violation of §1926.651(c)(2)

The cited standard requires:

Means of egress from trench excavations. A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

Petaway testified that there was no ramp, ladder or other means of access to the excavation (Tr. 59, 60). Petaway stated that J. Rinehart had to jump in to work around the pipe and crawled out to exit the excavation (Tr. 56, 60).

Both Raymond Rinehart and Russel Moeller testified that the north wall of the excavation was sloped to create a ramp (Tr. 261, 377). Rinehart did not measure the angle of the ramp but stated that he had no problem walking up and down it (Tr. 261). Rinehart and Phillips stated that J. Rinehart used the ramp to walk into the trench (Tr. 289, 338). J. Rinehart corroborated that testimony (Tr. 432, 439-40). The photographic evidence indicates some kind of sloped surface on the north side of the excavation from which the backhoe was working (Exh. C-18)

The evidence on this item is inconclusive; neither party took measurements, and the photographs show only the base of the slope. The Secretary, however, has the burden of

showing non-compliance, and has failed to show, by a preponderance of the evidence, that Eichline failed to comply with the cited standard.

Serious citation 1, item 1, will, therefore, be vacated.

Alleged Violation of §1926.651(d)

The cited standard provides:

(d) *Exposure to vehicular traffic.* Employees exposed to public vehicular traffic shall be provided with, and shall wear, warning vests or other suitable garments marked with or made of reflectorized or high-visibility material.

CO Petaway testified that barricades had been erected in the curb lane immediately to the west of Eichline's excavation (Tr. 43-44, 151). Petaway stated that he asked Mr. Rinehart whether the employees who had erected the barricades had reflective vests, and that Rinehart had told him no (Tr. 51-53).

At the hearing, Mr. Rinehart testified that the barricades had been set by Barricade Flasher Service, and that his employees were not involved (Tr. 251-252, 294). Rinehart's testimony was corroborated by Duane Phillips (Tr. 338), and Russel Moeller (Tr. 375).

The evidence indicates that Eichline employees did not set the barricades at their worksite and, therefore, were not exposed to the cited hazard. Serious citation 1, item 2 is vacated.

Findings of Fact and Conclusions of Law

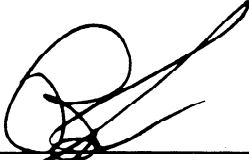
All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law that are inconsistent with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

Order

Serious citation 1, item 1, alleging violation of §1926.651(c)(2) is VACATED.

Serious citation 1, item 2, alleging violation of §1926.651(d), is VACATED.

Repeat citation 2, item 1, alleging a violation of §1926.652(a)(1), is AFFIRMED, and a penalty of \$10,000.00 is ASSESSED.



Benjamin R. Loye
Judge, OSHRC

Dated: January 29, 1993