UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
RAWSON CONTRACTORS, INC.
Respondent.

OSHRC DOCKET
NO. 93-1759

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 31, 1994. The decision of the Judge will become a final order of the Commission on May 2, 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 April 20, 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

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./SFA

Date: March 31, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1759

NOTICE IS GIVEN TO THE FOLLOWING:

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Benjamin R. Loye
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SECRETARY OF LABOR,
Complainant,

v.

RAWSON CONTRACTORS, INC.,
Respondent.

OSHRC DOCKET NO. 93-1759

APPEARANCES:

Cyrus A. Alexander, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois.

Thomas G. Kreul, Esq., Pfannerstill, Camp and Kreul, Wauwatosa, Wisconsin.

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, Rawson Contractors, Inc. (Rawson), at all times relevant to this action maintained a place of business at Highway 83 and Sun Valley Drive, Delafield, Wisconsin, where it was engaged in water and sewer construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 2, 1993, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Rawson's Delafield worksite (Tr. 18). As a result of the

inspection, Rawson was issued a citation alleging violation of 29 CFR §1926.652(a)(1) of the Act, with a proposed penalty of $1,250.00. Rawson filed a timely notice contesting the citation and penalty, bringing this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 16, 1993, a hearing was held in Milwaukee, Wisconsin, on the contested issues. Following the hearing, Complainant moved to amend the pleadings to allege an additional violation of §1926.651(i)(3) (Tr. 132). The parties have submitted briefs on the contested issues and this matter is ready for disposition.

Alleged Violation of §1926.652(a)(1)

Serious citation 1, 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) Employees, installing a fire hydrant in an excavation which was greater than eight feet in depth in previously excavated soils, were not protected from a potential collapse of the walls of the excavation by shoring or sloping.

On the date of the inspection, Rawson was engaged in laying pipe from a water main to a fire hydrant being installed (Tr. 19). Two Rawson employees were observed in a trench perpendicular to the main, positioning and plumbing the fire hydrant prior to final bolt-up and bedding (Tr. 30, 96). The trench was approximately 8 feet deep, 12 to 14 feet long, and narrowed from 6 feet wide at the main to 3 feet at the back bank (Tr. 19-21; Exh. C-3). Rawson admits that the trench was dug in type B soils, was sloped at an angle greater than one-half horizontal to one vertical, and was not shored (Tr. 23, 103; Exh. C-1, C-2).

The facts establishing a violation of the cited standard are not contested. Rawson raises the affirmative defense of "greater hazard."

Greater Hazard

In order to establish the affirmative defense of a greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-

compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991).

Rawson maintains that the trench was too narrow for a shield, and that speed shores could not be used because of the slope of the trench (Tr. 110-112). Rawson's foreman, Steve Klomsten, testified that the hazard involved in installing wood shoring manually would have exceeded the two to three minutes required to connect the line to the fire hydrant (Tr. 107, 109). Klomsten admitted that it would have been possible to slope the trench to meet the standard's specifications (Tr. 124), but stated that "nobody wanted it done" (Tr. 127). Klomsten stated that the terms of Rawson's contract required that the roadway adjacent to the trench be kept open (Tr. 127).

Discussion

The undersigned finds that Rawson failed to prove that sloping was unavailable as a means of protecting its employees. The contractual provisions relied upon by Rawson were under its control, and should not have been accepted if they prevented the use of required safety procedures. An employer may not, through contractual provisions, divest itself of its duty to provide a safe workplace, or to comply with the strictures of the Act.

Penalty

The Secretary has proposed a penalty of $1,250.00. The cited violation is "serious." Compliance Officer (CO) Patrick Ostrenga testified that an employee in the trench could be crushed by soil collapse, resulting in permanent damage. The presence of unsupported pavement extending 1 to 1-1/2 feet over the trench (Tr. 29-32, 119; Exh. C-3) could lead to additional injury. The gravity of the violation is moderate to high. Although only two employees were exposed for two to three minutes, the probability of soil collapse was increased by the presence of heavy equipment in use on the road adjacent to the trench, moving equipment to and from a nearby construction site (Tr. 57-58, 60).

The proposed penalty of $1,250.00 is deemed appropriate and will be assessed.

Amendment

The Commission has held that pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, made applicable to Commission proceedings by 29 CFR §2200.2(b), post-trial amendment of the pleadings is proper "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties." *Carlstrom Brothers Construction*, 6 BNA OSHC 2101, 1978 CCH OSHD ¶23,155 (No. 13502, 1978). Consent may be implied from the parties' introduction of evidence relevant only to the unpleaded issue. *McWilliams Forge Company, Inc.*, 11 BNA OSHC 2128, 1984 CCH OSHD ¶26,979 (No. 80-5868, 1984).

The undersigned finds that a violation of §1926.651(i)(3)[1] was not tried by consent. During Rawson's cross-examination, CO Ostrenga specifically testified that the presence of the overhanging concrete slab was a contributing factor to the severity of the violation, but that no citation was issued based on that condition (Tr. 48). Evidence regarding the slab was introduced for the purpose of rebutting severity and cannot be construed as consent.

Amendment of the pleadings is, therefore, denied.

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.

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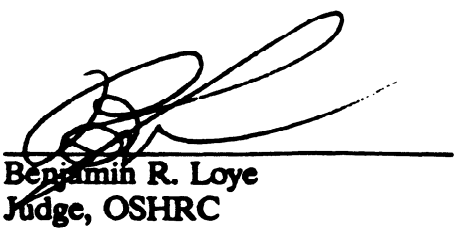
[1] §1926.651(i)(3) states:

> Sidewalks, pavements, and appurtenant structure shall not be undermined unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures.

ORDER

1. Citation 1, item 1, alleging violation of §1926.652(a)(1) is AFFIRMED, and a penalty of $1,250.00 is ASSESSED.



Benjamin R. Loye
Judge, OSHRC

Dated: March 25, 1994