UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. FIORE CONSTRUCTION CO., INC., Respondent.	Docket No. 99-1847

Appearances: Kevin E. Sullivan, Esq.
U.S. Department of Labor
Boston, Massachusetts
For Complainant

Barrett A. Metzler, C.S.P.
Northeast Safety Management, Inc.
Columbia, Connecticut
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) (the Act).

The Occupational Safety and Health Administration (OSHA) inspected a work site of Fiore Construction Company, Inc., (Respondent) located in Exeter, New Hampshire, on July 22, 1999.[1] As a result, on August 16, 1999, Respondent was issued one citation alleging serious violations of the construction safety standards appearing at 29 C.F.R.§1926.416(a)(1), requiring protection against potential electrical shock, and 29 C.F.R. §1926.652(a)(1), requiring adequate cave-in protection for employees working in a trench. Respondent timely contested. Following the filing of

[1] A decision in Docket No. 99-1217, which involves the same Respondent, albeit at a different work site in Exeter, New Hampshire, is also being issued on this date.

a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in Boston, Massachusetts. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

The following decision, findings and conclusions are based upon the citation, pleadings and the record as a whole, considering all of the testimony, documentary and photographic evidence.

Jurisdiction

Complainant alleges, and Respondent does not deny, that it is an employer engaged in excavation and installation of underground utilities. It is undisputed that at the time of this inspection, Respondent was engaged in excavating and replacing water and sewer lines in Exeter, New Hampshire. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act. Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Citation 1, Item 1
29 C.F.R. § 1926.416(a)(1)[2]

This item alleges that employees were permitted to work in proximity to electric power circuits without adequate protection against shock.

The OSHA Compliance Officer (CO) testified that he observed an employee use a wooden pole to lift overhead telephone and fire alarm wires out of the way of the excavator while it was digging. (Tr. 32; CX 14-15) He described the cables being moved as phone and fire alarm cables,

[2] The cited standard requires:

> (a)(1) No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means.

but noted that they were maneuvered "within inches" of electrical "service" lines. (*Id.*) He described the phone and fire alarm lines as "relative low voltage" (being not more than 90 volts) while the "service" line "is typically 240 to 120 volts." He then described a potential shock hazard based upon the ability of wood to conduct electricity. (Tr. 33) He elaborated on cross-examination, explaining that he believed electrocution was a possible hazard. (Tr. 49-50) The CO admitted, however, that he did not know the resistance of the wood or how long the pole was. He conceded that the weather was dry. The CO was evasive and, in the final analysis, did not answer questions aimed at determining if he knew how much voltage or amperage was required to present a hazard. (Tr. 51)

Complainant argues that the evidence that an employee used a wooden pole to lift and move wires "within inches" of a 120 to 240 volt conductor is sufficient to support the finding of a serious violation. Respondent maintains that the CO's attempt to show a hazard was insufficient in that "he did not know any of the values that would be required to show that a circuit could exist."

Because the standard allows for "guarding...effectively by insulation or other means," the CO's vague, evasive and unknowledgeable testimony regarding voltages and amperages of the lines involved, as well as the insulating values of wood, is insufficient to support the alleged violation. The method, manner and content of the CO's testimony left this trier of fact completely unconvinced that he was knowledgeable enough about electricity to determine the degree of insulation of the wooden pole used to move the lines. Despite his pertinacity regarding electrocution, there is virtually no record upon which to determine as fact that there was insufficient insulation against shock under the particular circumstances of this case. On this meager record, the Secretary has failed in her burden to show by a preponderance of credible and reliable evidence that the requirements of the cited standard were not met.[3] Accordingly, Citation 1, Item 1 is VACATED.

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[3] In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) that the employer knew, or with the exercise of reasonable diligence could have known, of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

Citation 1, Item 2
29 C.F.R. § 1926.652(a)(1)

Item 2 alleges a violation of the cited standard requiring adequate protection for employees in trenches.[4] The Secretary alleges that the trench box which was in the trench at the time of the inspection had been installed incorrectly and was thus not "adequate." The CO's testimony and photographs show that the trench box had been installed in such a manner as to leave a gap of 3 or 3.5 feet between the bottom of the trench and the bottom of the sides of the trench box and that employees were working in the trench. (Tr. 36; CX 10-13; CX-16) The manufacturer's directions for the trench box in use specified that the trench box bottom be no more than 2 feet above the bottom of the trench itself. (Tr. 38-39, CX-17)

Complainant maintains that the uncontroverted factual evidence supports the alleged violation. Respondent, on the other hand, posits first that another standard, 29 C.F.R. § 1926.652(e)(2)(i) is more specific and should have been cited. Respondent's argument is rejected.

The Secretary's case is based solely on the allegation that Respondent did not follow the manufacturer's directions for using the trench box as required by 29 C.F.R. § 1926.652(c)(2).. Thus, the issue is whether the manufacturer's directions were followed, regardless of the distance set by the manufacturer. The standard that Respondent claims is more specific, on the other hand, addresses the circumstances under which a 2-foot gap between the support system and the trench bottom is permissible. Thus, the standard claimed to be more specific is not applicable.

Respondent's second argument, which seeks to cast doubt the CO's measurements by referring to photographs in evidence, is also rejected. Establishing measurements in feet and inches from photographs is difficult, if not impossible and in the absence of a recognizable standard of measurement being present in a photo, almost all suppositions as to distances portrayed are suspect at best. . More importantly, Respondent had employees present when the CO took measurements, yet it points to no testimony from either of those employees contradicting the CO. (Tr.28-29, 36)

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[4] The cited standard provides, in pertinent part:

> (a)(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...

Respondent's failure to rebut the CO's testimony in this regard weighs heavily against finding otherwise. Also, Respondent does not mention that the CO testified that one of the employees on the site conceded that the trench box had not been installed as directed by its manufacturer. (Tr. 30) Consequently, I find that the trench box was installed in a manner inconsistent with its manufacturer's instructions.

Finally, Respondent argues that "the danger of collapse below the trench box has not been shown to be likely." The likelihood of collapse is a question going to gravity, not the existence of the violation, especially in a trench which was 11 to 11.5 feet deep. (Tr.28) Further, despite Respondent's argument otherwise, the CO's description of a "potential hazard" does not diminish the Secretary's case. Until an incident comes to fruition, hazards are merely potentials. With supervisory employees at the trench, its own employee placing the trench box in the trench, and Respondent's possessing the manufacturer's instructions for use of the box, all of the elements of the alleged violation have been shown. Accordingly, Citation 1, Item 2 is AFFIRMED.

Given the likelihood of death or serious physical injury occurring should a trench of this depth collapse, the designation as serious is correct. Moreover, considering the good faith, history and size of Respondent, the penalty of $ 1,000.00 as proposed is appropriate.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply with the

standard as alleged in Citation 1, Item 2.

4. The violation of the Act found above is serious within the meaning of § 17(k) of the Act..

5. Respondent was not in violation of § 5(a)(2) of the Act as alleged in Citation 1, Item 1.

6. A civil penalty of $1,000.00 is appropriate for the serious violation of the Act as described in Citation 1, item 2.

ORDER

1. Citation 1, Item 2 is AFFIRMED.
2. Citation 1, Item 1 is VACATED.
3. A civil penalty of $ 1,000.00 is assessed.

_____/s/_____
Michael H. Schoenfeld
Judge, OSHRC

Dated: 6/19/00
Washington, D.C.