

BEFORE THE WORKERS' COMPENSATION BOARD  
STATE OF OREGON  
HEARINGS DIVISION

Oregon Occupational Safety & Health Division	)	Docket No. 09-00130SH
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Citation No.: S0023-088-09
	)	
MOORE EXCAVATION, INC.,	)	
	)	AMENDED
Defendant.	)	OPINION AND ORDER

This is to amend the September 30, 2010 Opinion and Order to include the appeal rights.

Pursuant to notice, a hearing was held in Portland, Oregon, on August 2, 2010 before Administrative Law Judge (ALJ) Fisher. Plaintiff, OR-OSHA, was represented by Assistant Attorney General Sylvia Van Dyke. Defendant, Moore Excavation, Inc., was represented by attorney George Goodman. Roy Moore, president of Moore Excavation, was also present.

Exhibits 1 through 23, 25 through 34, 3A, and 4A were submitted and admitted into evidence.<sup>1</sup>

The hearing was reconvened on August 11, 2010, for closing arguments. The proceedings of August 11, 2010, were recorded by the ALJ.

The record closed on August 11, 2010.

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<sup>1</sup> Defendant's objection to proposed Exhibit 24 was sustained.

## ISSUES

The employer appeals the propriety of a citation issued on May 29, 2009 for alleged violations with proposed fines of \$1,925.00.

## FINDINGS OF FACT

Moore Excavation Inc., which has about 100 employees, is generally engaged in providing various types of excavation services in Oregon, Washington, and sometimes Idaho. On May 7, 2009, defendant was providing those services at 51681 Huntington Road in LaPine, Oregon.

At that time and place, Senior Compliance Officer (SCO) Hawkins observed one of the defendant's workers (later determined to be Mr. Buck) standing in a trench appearing to be more than five feet in depth without the use of cave-in protection. SCO Hawkins introduced himself and presented his credentials to Travis Moore, the foreman and competent person on site and conducted an opening conference. Immediately thereafter, SCO Hawkins walked around the work site, took photographs of his observations, and interviewed Buck and Moore.

SCO Hawkins determined that the trench, in which Buck had been standing, was six feet two inches deep. SCO Hawkins further determined that a three foot high spoils pile was eight inches from the trench.

During SCO Hawkins' interview of Moore, Moore stated that he had been trained and was aware of the rules for trench shoring and spoils piles, but that he "screwed up" and in trying to hurry chose not to use shoring that was on site and readily available. During SCO Hawkins' interview with Buck, Buck stated he had been trained and knew the five foot shoring rule, but that had been working in the trench because he had been so instructed by Moore.

Defendant terminated Moore's employment on May 7, 2009. Buck's employment was terminated on May 8, 2009. Eventually, both men were rehired.

On May 29, 2009, OR-OSHA issued Citations and Notifications of Penalties as follows:

Citation 1 Item 1a: A violation of OAR 437-001-0760(1)(a) requiring that workers be properly instructed in the safe operation of any machinery, tools, equipment, process, or practice which they are authorized to use;

Citation 1 Item 1b: A violation of 29 CFR 1926.651(k)(2) requiring the competent person to remove exposed employees from a hazardous area where the competent person has found evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. OR-OSHA grouped items 1a and 1b together and assessed a proposed penalty of \$875.00.

Citation 1 Item 2: A violation of 29 CFR 1926.652(a)(1) requiring that each employee in an excavation be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section. OR-OSHA assessed a proposed penalty of \$875.00.

Citation 1 Item 3: A violation of 29 CFR 1929.651(j)(2) requiring that excavated or other materials or equipment be kept at least 2 feet from the edge of excavations. OR-OSHA assessed a proposed penalty of \$175.00.

Defendant's safety program has evolved over time, becoming more comprehensive and stringent over the last few years. Approximately 2½ years ago, defendant hired Mr. Ray to grow its safety program. In addition to increasing the number of safety meetings (superintendent meetings are held weekly and "tool box" talks held almost every Monday), Mr. Ray performs unannounced work site inspections during which he offers safety instruction. If circumstances warrant it, the unannounced inspections result in employee discipline. Unannounced work site inspections are also conducted about three days per week by the defendant's president.

The defendant routinely took advantage of OR-OSHA's consulting service to improve its safety.

In the three to four years preceding the issuance of the above-listed citation, Moore and Buck attended many of the defendant's safety meetings.

### CONCLUSIONS OF LAW AND OPINION

Because the employer timely appealed the citation under ORS 654.078, OR-OSHA has the burden to not only establish a denied violation, but also that the penalties assessed therein were reasonable. OAR 438-085-0820(1).

The parties do not dispute that the defendant was subject to the Act or that one of defendant's employees (Buck) was exposed to a hazard. Nor is there much dispute that: (1) the trench in question should have been shored, but was not; and (2) the spoils pile was too close to the trench. Rather, the primary dispute is over the employer's knowledge. OR-OSHA asserts that because Moore was a supervisor acting within the scope of his duties, his knowledge is imputed to the defendant. Defendant argues otherwise.

The record establishes that Moore and Buck were aware (through the employer's training) of the rules pertaining to trench shoring and spoils piles. The record further establishes that at the time of SCO Hawkins' inspection, trench shoring was available on site, but that Moore chose not to use it, despite instructions to the contrary, and ordered Buck into the trench. The record further establishes that very shortly after the employer learned of Moore and Buck's conduct, their employment was terminated.

Based on all that, and considering further the testimony about employer's unannounced work site inspections and the employer's routine use of OR-OSHA's consulting service to improve safety, I conclude that: (1) the employer had work rules in place that were reasonably designed to prevent violations of the type cited; (2) the employer adequately communicated those rules to its employees; (3) the employer took reasonable steps to discover violations of its work rules; and (4) the employer effectively and uniformly enforced its work rules when violations were discovered. In other words, I conclude that the record establishes that Moore was "a rouge supervisor," and that as such, his knowledge is not imputed to the defendant.<sup>2</sup>

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<sup>2</sup> I reach this conclusion regardless of whether I consider the so called "rouge supervisor defense" as merely a rebuttal to OR-OSHA's *prima facie* case, or an actual "affirmative defense."

Having reached such a conclusion, I necessarily further conclude that OR-OSHA's citation must be vacated and set aside.

ORDER

The May 29, 2009 Citation issued to Defendant Moore Excavation, Inc., is vacated and set aside.

Entered at Portland, Oregon, **October 12, 2010**

Workers' Compensation Board

/s/Emerson G. Fisher

Emerson G. Fisher

Administrative Law Judge