

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

OREGON OCCUPATIONAL SAFETY &)	Docket No. 12-00002SH
HEALTH DIVISION,)	
)	
Plaintiff,)	
)	
vs.)	Citation No.: Y6776-046-11
)	
ROCKFORD CORPORATION,)	
)	OPINION AND ORDER
Defendant.)	ON RECONSIDERATION

Pursuant to notice, a hearing was held in Salem, Oregon, on December 11, 2014 before Administrative Law Judge Bruce D. Smith. Plaintiff Oregon Occupational Safety and Health Division (OR-OSHA) was represented by Senior Assistant Attorney General Susan G. Bischoff. Also present was OR-OSHA representative Brandon Walston. Defendant employer Rockford Corporation was represented by attorney James S. Anderson. The record consists of Exhibits 1 through 9; 12; 14 through 18; 20 through 24; 26; 28 through 30; 33 through 37; 38-102 through -105;¹ 44 through 47; and 50 through 52. The proceedings were recorded by the undersigned.

The following exhibits were withdrawn: Exs. 10; 11; 19; 32; 38-1 through -101, and -106 through -135; 39 through 43; 48; and 49.

The following exhibits were excluded: Exs. 13; 25; 27; 31; 53.

The record closed on August 24, 2015 the date of receipt of OR-OSHA's written reply argument.

¹ At commencement of the hearing OR-OSHA withdrew Exhibit 38, but thereafter offered Ex. 38-102 through -105, which was received.

An opinion and order was issued on October 19, 2015. On December 18, 2015 OR-OSHA moved for reconsideration. Pursuant thereto the opinion and order was withdrawn and the record was reopened on February 21, 2016. Written briefing followed, and was concluded on April 7, 2016 with OR-OSHA's reply argument, and the record was reclosed.

OR-OSHA'S MOTION FOR RECONSIDERATION

OR-OSHA seeks reconsideration of that part of the order that found that the agency had failed to meet its burden of proof relating to Item 2-3. (OR-OSHA's Motion for Reconsideration, p. 2). OR-OSHA contends that the record supports a conclusion that Rockford had not used proper sloping. The agency argues that,

“had SCO Walston been able to safely enter the excavation at issue here and take a photo of the trench at ground/floor level as he was able to do during the earlier inspection, OR-OSHA would have had the ability to provide more direct evidence of the violation.” (*Id.*, p. 5).

In response, employer contends that Citation Item 2-3 was properly vacated, based upon the record developed at hearing. (Employer's Response to OR-OSHA's Motion for Reconsideration, p. 3). I agree with employer.

In his interview with the SCO, employer's safety officer David Poe indicated that the employer uses sloping as its primary means of trench protection. (Ex. 28-25). He acknowledged, however, that sloping was not always possible in mountainous terrain. (Ex. 28-28). At that point the SCO only needed to ask one more question: what did you do here? His failure to do so leaves a critical gap in OR-OSHA's proof.

At hearing the agency did its best to shore up this failure of proof – counsel directed the SCO's attention to a photograph (Ex. 2-3) that the SCO had taken several weeks before the events at issue here, relating to an earlier citation. When asked whether a trench depicted in that photograph was “essentially similar to the trench existing at the job site that [he] investigated in connection with this case,” the SCO testified that the trench in the photo and the trench at issue here had “similar styles of excavation and wall structure.” (Tr. 35). Critically, however, the he was not asked to compare the *slope angle* of the two trenches. It follows that the protractor-overlay copy of the unrelated trench photo now proffered by OR-OSHA (Employer's Response, Ex. A) would not change the outcome.

For reasons stated in the original opinion, as modified here, I find that OR-OSHA has failed to prove that adequate trench cave-in protection was not provided. Accordingly, Citation Item 2-3 will be vacated.

Alternatively, OR-OSHA, without argument, moves to reopen the hearing record “for the limited purpose of clarifying the photographic evidence and more precisely articulating the state of the excavation trench walls and surrounding circumstances forming the basis of the Citation Item 2-3.” (*Id.*, p. 6).

Employer objects to reopening of the record, noting that OR-OSHA has offered no proper justification for doing so. Again, I agree with employer.

The agency offers no explanation for its failure at hearing to clarify the photographic evidence, or to more precisely describe the excavation at issue here. *See, e.g., Article II Gun Shop, Inc., dba Gun World*, 1994 OSAHRC Lexis 124; 16 OSHC (BNA) 2035; 1994 (CCH) P30, 563 (motion to reopen the record denied where employer had ample opportunity to present evidence at hearing). Nor does the agency cite error, omission, or misconstruction of a statute or rule. OAR 438-085-0870. Finally, as noted, the agency’s newly-proffered evidence (Ex. A) is not germane to the question before me, and therefore does not justify reopening of the record. Accordingly, I find that OR-OSHA’s alternative motion to reopen the hearing record should be denied.

ROCKFORD’S CROSS-MOTION FOR RECONSIDERATION

Employer reiterates the argument it made at hearing that Citation 1 Item 2(a) should be vacated, contending that OR-OSHA had failed to produce credible evidence to identify the location at which Rockford’s employee had entered the trench. (Employer’s Response to OR-OSHA’s Motion for Reconsideration, p. 3). For the reasons stated in the original opinion and order, and republished here, employer’s cross-motion is denied.

The original opinion and order is hereby republished, as modified. The parties’ appeal rights run from the date of this Opinion and Order on Reconsideration, which replaces the original opinion and order.

ISSUES

At issue is propriety of the August 26, 2011 Citation and Notification of Penalty, as amended, alleging three violations with total proposed penalties of \$5,875.²

Also addressed herein are employer's prehearing motions for exclusion of evidence and dismissal of the citations; and its post-hearing motion to dismiss.

Issues raised on reconsideration are addressed in a separate section.

SUMMARY OF THE EVIDENCE

On March 14, 2011 a Rockford Corporation worker was seriously injured when he was struck in the chest by a length of industrial pipe that was being moved with heavy equipment. The accident occurred in a remote location near Adel, Oregon, where Rockford ("employer") was installing underground pipe as part of the Ruby Pipeline project.³

Three days after the OR-OSHA Safety Compliance Officer (SCO) Brandon Walston visited the accident scene, and held an opening accident investigation conference with employer's safety officer David Poe. Shortly thereafter the SCO prepared the following synopsis of the accident:

"The accident victim was a laborer on the set up crew. The set up crew stacks wood timbers to crib the pipe off the ground as it is laid out on the right-of-way surface near the open trench. The pipe is set up by specific numbers with some pipe having a bend to match the layout of the trench field. The pipe sections vary in length to match the trench grade at installation. The pipe sections at this accident site were approximately 70-80 feet in length and weighing approximately 20,000 pounds each. The pipe sections are moved with side boom tractors.

² On December 3, 2014 OR-OSHA amended the citation, withdrawing Citation 1 Item 1 (with proposed penalty of \$2,500), and Citation 3 Item 4 (proposed penalty \$2,500). (Rec.).

³ Ruby Pipeline is a 680-mile, 42-inch diameter pipeline system that extends from Wyoming to Oregon providing natural gas supplies from the major Rocky Mountain basins to consumers in California, Nevada and the Pacific Northwest. http://www.kindermorgan.com/business/gas_pipelines/west/Ruby (last visited October 13, 2015).

“The side boom operators are in direction and control of the lifting and maneuvering of each pipe section. The pipe sections were suspended by a single pick with use of an endless web sling used in a choker hold at the center of the pipe. The pipe sections are guided by the physical control of the laborers and the side boom operator.” (Ex. 12-1).

According to the SCO’s synopsis the accident victim had been working alongside other laborers near the side boom tractor, stacking wood timbers under the pipe sections near the open trench. (Ex. 12-1, and -2). The SCO describes the accident as follows:

“The accident victim was located between a section of steel pipe that was positioned on wood cribbing near the open trench, and a section of steel pipe that was suspended and in travel, as a side boom operator was moving along the right-of-way to lay out the pipe in correct order of placement.

“The side boom operator began lifting and travelling before the accident victim was in the clear. The suspended pipe section that was in travel approximately [four] feet from the grade, struck the end of the cribbed pipe section causing the other end near the victim to swing into his upper torso and crushing him between the two pipes.” (Ex. 12-2).

The accident victim was removed from the scene by air ambulance to St. Charles Medical Hospital in Bend, Oregon. (*Id.*)

The first phase the investigation began with the SCO’s March 17, 2011 site visit and opening conference, at a time when employer was suspending operations due to inclement weather. The SCO returned to the job site two months later, after operations had resumed. In the meantime he had learned – in an April 12, 2011 interview with Rockford equipment operator Jonathan Keith Roberts – that shortly before the accident “the boom operator” – Wes Blevins – had entered a water-filled trench to assist in the retrieval of a section of pipe that had fallen into the trench. (Ex. 26-8). It was this activity that ultimately gave rise to the citation.

In a May 27, 2011 interview Blevins told the SCO that the trench had been full of water both days he had been working, because it was dammed up due to the

animal crossing. (Ex. 29-43). Blevins told the SCO that the section of pipe was completely submerged. (Ex. 29-48).

When he visited the project three days after the accident, the SCO had taken a number of photographs, including one (Ex. 3-19) which shows the trench at the place where Blevins entered, just uphill from the animal crossing. (Testimony of Brandon Walston). Rockford safety officer David Poe told the SCO that conditions shown in this photo were very similar to those that existed on the day of accident. (*Id.*) Blevins agreed that the pipe section that he had retrieved had probably fallen off the skids because the edge of the trench had been caving in. (Ex. 29-42).

Blevins told the SCO that he had stripped out of his shirts and sweatshirt, and had gone into the frigid water wearing his bib overalls and cowboy boots. (Ex. 29-61, and -62). He told the SCO that he had gotten wet up to his chest. (Ex. 29-83). He had even intended to put his head under the water, “but it was too damn cold.” (*Id.*) Blevins told the SCO that he had located the submerged pipe with a shovel handle. (Ex. 29-47). According to pipe foreman Greg Gallaher, Blevins spent about 10 minutes in the water. (Ex. 30-55).

ON AUGUST 26, 2011 OR-OSHA issued a Citation and Notification of Penalty (“the citation”), alleging that Rockford had committed three⁴ violations the Oregon Safe Employment Act (“OSEA”).⁵

Citation 1 Item 2a alleges a serious violation of 29 CFR 1926.651(h)(1):

“Employees were working in excavations in which there was accumulated water, or excavations in which water was accumulating, and adequate precautions had not been taken to protect employees against the hazards posed by water accumulation[.]” (Rec.).

For this alleged violation OR-OSHA proposes a penalty of \$875.⁶

Citation 1 Item 2b alleges a serious violation of 29 CFR 1926.651(c)(2):

⁴ The citation originally alleged five separate violations (Ex. 35), but Citation 1 Item 1 and Citation 3 Item 4 – have been withdrawn.

⁵ The OSEA is codified in ORS Chapter 654.

⁶ OR-OSHA had initially proposed a penalty of \$2,500 (Ex. 35-5), but amended it at hearing.

“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[.]” (Rec.).

No additional penalty is proposed for Item 2b.

Citation 2 Item 3 alleges a repeat violation of 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 paragraph (b) or (c) of this section[.]” (Rec.).

For this alleged violation OR-OSHA proposes a penalty of \$5,000.

FINDINGS AND CONCLUSIONS

Prehearing Motions

The Interim Order dated December 13, 2013, denying employer’s motions for exclusion of evidence and dismissal of the citations, is hereby incorporated in its entirety into this order.

Post-Hearing Motion to Dismiss

Employer reiterates its pre-hearing motion to dismiss the citations; and argues that, in any event, dismissal is justified by virtue of OR-OSHA’s admission that the citations at issue are not directly related to the injury accident that prompted the initial investigation. For reasons addressed in the Interim Order the post-hearing motion is denied.

Burden of Proving Alleged Violations and Reasonableness of Penalty

OR-OSHA has the burden of proving, by a preponderance of the evidence, the denied violations and the reasonableness of the contested penalty. OAR 438-085-0820(1), (3). Employer Rockford Corporation does not deny that it is subject to the Oregon Safe Employment Act;⁷ and I find that it was at all relevant times doing business as an Oregon employer, and is subject to the Act.

⁷ The Oregon Safe Employment Act is codified at ORS 654.001 *et seq.*

In addition to proving applicability of the cited standard, and employer's noncompliance with its terms, OR-OSHA must prove employee exposure to the violative condition. *See OR-OSHA v. Moore Excavation, Inc.*, 257 Or App 567 (2013) (adopting federal standard requiring proof that it was reasonably predictable that employees would be exposed to violative condition).

Where, as here, employer is charged with a serious violation, the citation will not be upheld if employer "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." ORS 654.086(2).⁸ *See, e.g., OR-OSHA v. CBI Services, Inc.*, 356 Or 577 (2014). Proper interpretation of the statute requires parsing of the phrases "reasonable diligence" and "could not * * * know." *Id.*, at 588.

I find that here OR-OSHA is not required to establish the hazardousness of the violative condition(s). *See, e.g., Oregon Occupational Safety & Health Div. v. Mowat*, 237 Or App 576, 580-82 (2010), where the court explained that there are two types of rules: those that explicitly or implicitly make hazardousness an element of the agency's prima facie burden (*e.g.*, whether a common duct system in a manufacturing plant creates a hazardous condition); and those that presume the existence of a hazard (operation of power equipment within 10 feet of energized power line is presumed hazardous). In doing so, I find that the regulations at issue here – relating to activities in trench excavations – presume that their violation creates a hazardous condition.

Citation 1 Item 2a (Failure to Protect Employees Against Water Accumulation Hazards)

In Citation 1 Item 2a employer is charged with a serious violation of 29 CFR 1926.651(h)(1), as follows:

"Employees were working in excavations in which there was accumulated water, or excavations in which water was accumulating, and adequate precautions had not been taken to protect employees against the hazards posed by water accumulation:

⁸ ORS 654.086(2) reads: "For the purposes of ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780 a serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

“a) An employee entered a near vertical trench, without adequate protection, that was approximately 9 feet in depth, had filled with run off water to a level of approximately 6 feet, while attempting to locate and retrieve a steel pipe section of the Ruby Pipeline gas line near L-314A Deep Creek.” (Ex. 35-5).

The proposed penalty is \$875.⁹

The Cited Standard is Applicable Here

According to the unrebutted testimony of OR-OSHA’s Standards and Technical Specialist Tomislav Bozicevic, 29 CFR Section 1926.651(h)(1) applies to the circumstances described by the SCO – the rule applies to a trench of five feet or more, regardless of the depth of the water. According to Bozicevic potential hazards include drowning, and cave-in of the trench due to erosion of the soil. He testified that the soil in the trench is properly classified as Type C because it was subject to water accumulation.

Bozicevic testified that precautions would include pumping the water out, or diverting it to avoid accumulation; or use of a personal flotation device to avoid the drowning hazard. He indicated that the worker could not meet the standard by standing on the pipe, as doing so would not eliminate the hazards.

I find that OR-OSHA has met its burden of proving that the standard set forth in 29 CFR Section 1926.651(h)(1) is applicable to this case.

OR-OSHA Proved Noncompliance With the Standard

I find that an employee – Wes Blevins – was working in an excavation in which there was an accumulation of water. This is based upon the unrebutted testimony of the SCO, and upon his investigation record, including Mr. Blevins’ own transcribed interview.

Further, the SCO’s testimony, including photographs that he took three days after the events in question, establish that the trench that Blevins had entered was approximately eight feet deep. It is undisputed that the 42-inch diameter pipe was completely submerged. Blevins told the SCO that he was up to his chest in water,

⁹ OR-OSHA had initially proposed a penalty of \$2,500 (Ex. 35-5), but amended it at hearing.

with no protection except his bib overalls and his cowboy boots. He also told the SCO that he could not put his head under water because the water was too cold. Blevins' supervisor, pipe foreman Greg Gallaher, was operating the side boom at the time; and he told the SCO that Blevins had remained in the water about 10 minutes. Another worker who was present estimated that Blevins was in the water approximately 20 minutes. (Ex. 23-14).

Employer contends that the five-foot threshold for application of the rule is not met here because Blevins was allegedly standing on top of the 42-inch pipe, and would not have been in five feet of water unless there was at least eight and a half feet of water in the trench. Arguing that OR-OSHA has failed to establish the depth of the trench, employer argues that the agency has failed to meet its burden of proof. For reasons that follow, I disagree.

Safety officer Poe told the SCO that the trench runs nine to 11 feet deep, but due to the accumulation of mud and silt it was probably about eight feet deep where Blevins went in. (Ex. 28-39). Pipe foreman Gallaher – who was present when Blevins went into the trench – also told the SCO that the trench was about eight feet deep. (Ex. 30-26).

Although Blevins told the SCO that Gallaher was down on the other side of Deep Creek when Blevins retrieved the pipe (Ex. 29-51), Gallaher himself contradicts the equipment operator, giving the SCO a detailed account of the event. (Ex. 30-44 through -56). I find that Gallaher's version of events is more reliable for three reasons. First, Gallaher is a supervisor, having responsibility for approximately 100 men. (Ex. 30-2). As such, he speaks for the company.¹⁰ Second, the SCO, who personally interviewed both men and inspected the worksite, believed Gallaher. Finally, when asked how he had managed to get the sling under the submerged pipe, Blevins told the SCO that Gallaher "could probably tell you a lot more than I could." (Ex. 29-85). Gallaher did, in fact, tell the SCO a lot more, and I find that his detailed account of the event is consistent with the record here.

Roberts told the SCO that there was about three feet of water in the trench, but he also agreed with other witnesses that the pipe was completely submerged. (Ex. 26-11). It follows that there was more than 42 inches of water in the trench. According to Roberts the finished pipeline has to be covered by not less than four feet of earth. (*Id.*) Based upon the preponderance of the evidence, I find that the overall depth of the trench where Blevins went in was approximately eight feet.

¹⁰ See OEC Rule 801(4)(b)(D).

Further, the evidence fails to establish that Blevins was standing or walking on top of the submerged pipe, as assumed by employer. When asked whether he understood that Blevins had been walking along the top of the pipe while in the trench the SCO answered, “he did mention that.” When pressed about whether Blevins had walked along the top of the pipe in order to locate where it ended, the SCO said he was “not clear on that.” The only statement regarding this topic that appears in the transcript of the SCO’s interview with Blevins does not support a finding that he had been on top of the pipe. Explaining to the SCO that the pipe was completely submerged, Blevins said, “*if you were standing on top of the pipe, the water might have been up to here*¹¹ on me.” (Ex. 29-48). (emphasis added) There is nothing in the statement, however, to suggest that Blevins told the SCO that he had in fact been standing (or walking) on the pipe.

In any event, the unrebutted testimony of Mr. Bozicevic establishes that the standard would apply even if the worker were standing on top of the pipe.

Finally, I find that employer had failed to take reasonable safety precautions – such as providing proper training, and furnishing or requiring the employee to obtain waterproof, insulated clothing prior to entering the water-filled excavation. Equipment operator Jonathan Keith Roberts told the SCO that Rockford “hadn’t really offered any safety training.” (Ex. 26-47). Safety officer David Poe told the SCO that going into the water as Blevins did here is “not a recognized, common procedure * * * that you see out there.” (Ex. 28-41). Poe conceded that entering a water-filled trench to retrieve a submerged pipe is not covered during employee orientation. (Ex. 28-58). Blevins himself virtually conceded that the pipe-retrieval operation was unsafe when he told the SCO, “I would never put my hands¹² in that position.” (Ex. 29-48).

In sum, I find that OR-OSHA has met its burden of proving a violation of 29 CFR Section 1926.651(h)(1).

OR-OSHA Proved Exposure to the Violative Condition(s)

I find that Blevins was actually exposed to hazards posed by water accumulation, including drowning, entrapment due to erosion and cave-in of the excavation, and potential hypothermia.

¹¹ The record does not include a description of what the witness meant by “up to *here* on me.”

¹² Blevins uses the term “hands” here to refer to the men who were working under his direction on the setup crew.

OR-OSHA Proved Knowledge of the Violative Condition

Because employer is charged with a serious violation, the citation will not be upheld if employer “did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” ORS 654.086(2).¹³ *See, e.g., OR-OSHA v. CBI Services, Inc., supra.*

I find that employer did know of the presence of the violation – Mr. Gallaher was a supervisor, and he directly participated in the pipe retrieval operation, and was present when Blevins went into the trench.

The Proposed Penalty is Appropriate

The SCO testified that the probability of injury here was medium, and that the severity rating is potential death, based upon the depth of the trench, the presence of water in the trench, and vibrating equipment operating nearby, all contributing to the possibility of drowning or cave-in of the trench. Applying the matrix considerations summarized in the violation worksheet (Ex. 45-4, and -5), and taking into account the appropriate adjustment factors, OR-OSHA had adjusted the proposed penalty down to \$875.

Employer does not challenge the agency’s penalty evaluation; and I find that the proposed penalty of \$875 is proper here.

Citation 1 Item 2b (Failure to Provide Safe Means of Egress in Trench Excavation)

In Citation 1 Item 2b employer is charged with a serious violation of 29 CFR 1926.651(c)(2), as follows:

“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:

¹³ ORS 654.086(2) reads: “For the purposes of ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780 a serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.”

“a) An employee entered a trench with near vertical walls, approximately 9 feet in depth, containing water at a depth of approximately 6 feet, without adequate access/egress, while attempting to locate and retrieve a pipe section that was submerged under water in the trench near L-314A Deep Creek.” (Ex. 35-5).

This citation is grouped with Citation 1 Item 2a, and no additional penalty is proposed for Item 2b. (*Id.*)

The Cited Standard is Applicable Here

Standards and Technical Specialist Bozicevic testified that 29 CFR 1926.651(c) would be applicable to the above facts, and he agrees that there would be a violation if no ladder or similar means of egress was available. He testified that standing on the pipe would not avoid application of the standard. The associated hazards include fall hazard, cave-in hazard – the worker needs to be able to exit promptly, thus the 25-foot rule. Finally, Bozicevic testified that jumping into the trench would not be acceptable unless the trench is under four feet in depth, regardless of whether there is water in the trench.

Based upon the un rebutted testimony of Mr. Bozicevic, I find that 29 CFR 1926.651(c) is applicable here.

OR-OSHA Failed to Prove Noncompliance With the Standard

The SCO acknowledged that he did not ask Blevins how he had gotten into and out of the trench. (Testimony of Brandon Walston). He also conceded that nobody had told him there was no ladder in the trench within 25 feet of the employee. (*Id.*) In fact, the SCO does not believe that he had asked anyone whether the required means of egress was on hand when Blevins was in the trench. (*Id.*) The SCO testified that the citation is based upon the fact that on the day of his visit to the site three days after the accident there was no ladder in sight, and no visible structural element for access/egress. (*Id.*)

According to OR-OSHA, “Walston reasonably concluded that the absence of any statement by the Rockford Field Safety Manager and project foreman indicating that a safe access and egress method existed when Blevins was in the trench on March 14 was an admission by implication that the standard had been violated.” (OR-OSHA’s Closing Argument, pp. 9-10). Pointing out that employer

had offered no contrary evidence, the agency contends that it has met its burden of proving the violation.

Employer disagrees, contending that the evidence presented does not prove the alleged violation. I agree with employer.

The burden is upon OR-OSHA to prove each element of the alleged violation, including the allegation that there was no proper means of egress within 25 feet of lateral travel for employee(s) in a trench excavation. I find, however, that the SCO's conclusion that the standard had been violated is not based upon substantive evidence. Having neglected to ask any of the persons involved whether there was a safe means of egress, the SCO is left with nothing more than his assumption concerning what they might have said. That does not satisfy OR-OSHA's burden of proof. Nor does the mere fact that no ladder was in evidence three days after the events in question advance the agency's case. I find that the alleged violation has not been proven. Accordingly, the citation will be vacated.

Citation 2 Item 3 (Failure to Provide Adequate Cave-In Protection in Excavation)

In Citation 2 Item 3 employer is charged with a repeat violation of 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 paragraph (b) or (c) of this section:

“a) An employee was exposed to a potential cave-in, while working in a near vertical trench, containing water, that was approximately 9 feet in depth, without any form of adequate trench cave-in protection.” (Ex. 35-6).

The proposed penalty is \$5,000. (*Id.*)

The Cited Standard is Applicable Here

Mr. Bozicevic was asked to assume that the trench at issue had “near vertical sides,” and that neither sloping nor other protective system (such as shield, box or shoring) was employed. He testified that 29 CFR 1926.652(a)(1) would be applicable to the assumed facts; the only exceptions being for a trench in solid rock, or a trench no deeper than five feet. He testified that the rule assumes that a

cave-in could occur here, because the trench is not cut out of solid rock, and there was no benching or shoring. According to Bozicevic the cave-in hazard would not be avoided if the employee were walking on the submerged pipe.

Based upon the assumed facts I find that 29 CFR 1926.652(a)(1) is applicable here. For reasons that follow, however, I find that the agency has failed to prove that sloping was not employed.

OR-OSHA Failed to Prove Noncompliance With the Standard

Employer argues that Citation 2 Item 3 should be vacated because there is no proof concerning the depth of the trench where Blevins entered. For reasons cited in my discussion of Citation 1 Item 2a I disagree.

Employer further argues that the citation should be vacated because there is no proof that adequate cave-in protection was not provided. I agree with employer.

OR-OSHA contends that the evidence proves the absence of an adequate sloping system, and argues that the violation has been proved. Because I find that the agency has failed to prove that sloping was not employed here, I disagree.

Bozicevic testified that the soil at the excavation in question is Class C, and that under the cited rule the trench at issue requires an adequate protective system. Acceptable methods of cave-in protection under that rule include benching, sloping (at a ratio of one and a half horizontal to one vertical¹⁴), shielding (such as a trench box), and shoring.¹⁵

Mr. Poe told the SCO that the company does not use shoring (Ex. 28-26), and uses a trench box only on very rare occasions. (Ex. 28-25). Based upon those statements – and upon the absence of evidence that a trench box was used here – I find that neither shoring nor shielding was employed on this occasion. Further, although Poe told the SCO that the company had used benching one time in the desert (Ex. 28-26), there is no evidence that benching was employed here. This leaves sloping.

¹⁴ 29 CFR 1926.652(b)(1)(i). (Ex. 47-11).

¹⁵ The terms “benching,” “sloping,” “shielding,” and “shoring” are defined at 29 CFR 1926.650, Subdivision P. (Ex. 47-1 through -3).

The SCO asked Poe about available options for trench protections:

Q: [Walston] So what can you tell me about the options?

A: [Poe] Sloping? Is that what you're getting at?

Q: Yes.

A: Sloping?

Q: Yeah. Yeah. Trench protection. Sloping. Okay.

A: That's predominately what we –

Q: What – what –

A: – use.

Q: – is the sloping ratio?

A: It would be, what, 2:1? Well, I've got my math there, 1:2 – 2:1. It depends on what kind of area you're working in. And the right of way conditions will dictate that. (Ex. 28-25).

* * *

But most of the time we have enough right of way to where we can actually slope it out enough. Whatever they – what – whatever the situation dictates right there. They can slope it out enough.

Q: Do you believe that the company looks at the ratio between the cost of production and bringing in a box, and just go for it because it's not worth the –

A: It's –

Q: – the hassle?

A: It's easier to slope because we have the machinery there to do it. And we have enough space to do it.

Q: Um-hum (affirmative).

A: But in –

Q: Sometimes, not always.

A: – some – some areas, we just can't.

Q: Yeah. It's too narrow of a right of way.

A: And so we know that going into that, and they prepare for that.

Q: Okay.

A: A lot of the –

Q: Good.

A: – mountainous terrain they – I mean, let's face it, you can't do it. They know that. (Ex. 28-27, and -28).

This evidence does not meet OR-OSHA's burden of proving that adequate sloping was not employed in the area where Blevins had entered the trench. Nor does the agency contend that the SCO actually measured the angle of the slope in question, or made any effort to determine whether it conformed to the rule.

The SCO testified that his photograph of the trench in question (Ex. 3-19) shows four or five feet of the exposed excavation above the waterline. According to the SCO more than half of the slope lies beneath the water line at that location. That fact, compounded by the blanket of snow on the left bank, makes it difficult to accurately determine the angle of the slope. The offset angle of the camera viewpoint magnifies this difficulty. In contrast, the left slope of the excavation seen farther up the trench – after the bend in the line – provides a more straight-on view. It appears that the excavation depicted there may meet the sloping requirements of the rule.¹⁶ Further, there is no persuasive evidence that the angle of the slope at that distal point is significantly different from the angle where Blevins entered the trench.

¹⁶ An illustration of an acceptable slope appears in Appendix B of the rule. (Ex. 47-29).

In sum, I find that OR-OSHA has not proved that the trench in question fails to comply with the cited standard. Accordingly, the citation will be vacated.

ORDER

IT IS HEREBY ORDERED that Citation 1 Item 1-1, and Citation 3 Item 4 of the Citation and Notification of Penalty dated August 26, 2011 have been withdrawn, together with the proposed penalties associated therewith.

IT IS FURTHER ORDERED that Citation 1 Item 2a is affirmed.

IT IS FURTHER ORDERED that Citation 1 Item 2b, and Citation 2 Item 3 are vacated.

NOTICE TO ALL PARTIES: You are entitled to judicial review of this Order. Proceedings for review are to be instituted by filing a petition in the Court of Appeals, Supreme Court Building, Salem, Oregon 97301-2563, within 60 days following the date this Order is entered and served as shown hereon. The procedure for such judicial review is prescribed by ORS 183.480 and ORS 183.482.

Entered at Medford, Oregon on May 11, 2016

Workers' Compensation Board

BRUCE D SMITH
Administrative Law Judge