

IN THE MATTER OF

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BEFORE THE

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COMMISSIONER OF LABOR

J.J.I.D., INC.

*

AND INDUSTRY

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MOSH CASE NO. 03056-015-004

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OAH CASE NO. DLR-MOSH-

41-04-00616

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FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. Following a planned job site inspection on October 3, 2003, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued three citations to J.J.I.D., Inc. ("Employer"), alleging various violations. A hearing was held on February 3, 2004, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Thomas E. Dewberry, Chief Administrative Law Judge sitting as the Hearing Examiner ("HE"), issued a Proposed Decision recommending that all citations be affirmed.

The Employer filed a timely request for review and the Commissioner, exercising his authority pursuant to Labor and Employment Article, § 5-214(e), ordered review. On June 30, 2004, the Commissioner of Labor and Industry¹ held a review hearing and heard

¹At the time of the hearing, the position of Commissioner of Labor and Industry was vacant. Pursuant to a delegation from the Secretary of Labor, Licensing and Regulations, Ileana O'Brien was designated to preside over the hearing. Robert L. Lawson, the current Commissioner has reviewed the record thoroughly and issues this decision.

argument from the parties. Based upon a review of the entire record and consideration of the relevant law and the positions of the parties, for the reasons set forth below, the HE's recommendations are AFFIRMED.

FINDINGS OF FACT

In October 2003, the Employer was engaged in a project involving the ongoing upgrade of the North East sanitary sewer system. The Employer was excavating an area to install a six inch diameter PVC sewer lateral line at the corner of Cecil and Mauldin Avenues in North East, Maryland. FF 1. On the morning of October 3, 2003, a MOSH assigned Compliance Officer, Kenneth L. Johnson ("MOSH Inspector" or "Inspector"), conducted a planned inspection of the site. Pursuant to that inspection, on November 4, 2003, MOSH issued three citations against the Employer, each of which was appealed and upheld by the HE. MOSH Ex. 1. On review before the Commissioner the Employer objects to all of the citations, each of which is addressed below.²

DISCUSSION

Citation 1 Item 1

MOSH charged the Employer with a repeat serious violation of 29 CFR § 1926.651(k) (1), which requires that a competent person perform inspections "as needed throughout the shift" and "when employee exposure can be reasonably anticipated" to

² At the review hearing, the Employer asserted for the first time the affirmative defense of employee misconduct. Such a defense must be pled and proven by the Employer. *See e.g., Maryland Comm'r of Labor and Industry v. Cole Roofing Co., Inc.*, 368 Md. 459 (2002). Specifically, the Employer must prove that it has (1) established work rules to prevent the reckless behavior and/or unsafe condition from occurring; (2) adequately communicated the rules to its employees; (3) taken steps to discover incidents of noncompliance; and (4) effectively enforced the rules when transgressed by employees. *Id.* The Commissioner finds that the Employer failed to plead the defense below and that there is insufficient evidence in the record to support such a defense. Rev. Tr. 91.

ensure that the trench is safe for employees. MOSH Ex. 1. A trench that is greater than five feet deep must be protected by an adequate protective system. 29 CFR § 1926.652(a). The photographic evidence and testimony in the record clearly show that an inspection was required during the October 3, 2003 shift because the trench had reached a depth of more than five feet by the time the MOSH inspector arrived at the site. MOSH Ex. 5, 8 and 10; Tr. 28-29; 149; 255-6, 268, 296, 298. These facts mandate that the Employer was required to conduct an inspection to ensure that an adequate protective system was in place.

The Employer has asserted that MOSH did not prove a violation of 29 CFR § 1926.651(k) (1) because it did not prove the absence of an inspection. The HE found that, while the Employer's Foreman, Paul Palandrani³ may have performed an inspection at the start of the day, he did not re-inspect as needed. FF 9. The record supports this finding. First, while Mr. Palandrani testified that he filled out inspection checklists after each inspection, there is no checklist for an inspection performed after the trench reached five feet. Tr. 181, 291-93. The Competent Person Interview Sheet, used by the MOSH Inspector to record his initial interview with Mr. Palandrani, also indicates that no inspection was performed other than the one at the start of the work day.⁴ MOSH Ex. 7.

Second, the conflicting testimony of the Employer's witnesses supports the HE's conclusion that there was no additional inspection. Allen Howard (Employer's safety

³ It is not contested that Mr. Palandrani was the Employer's competent person at the time of the inspection on October 3, 2003. Tr. 44.

⁴ The inspection performed that morning prior to the start of work is not sufficient for compliance with this Standard, which requires additional inspections "as needed throughout the shift" when the trench reaches a point at which employees may be unsafe. 29 CFR § 1926.651(k) (1). In this case, that point was reached when the trench reached a depth of five feet and thus additional safety measures were required. Rev. Tr. 80.

manager) testified that Mr. Palandrani had inspected the trench prior to the Inspector's arrival, determined that a small trench box was needed, and left the site to obtain one. Tr. 239-40. However, Mr. Palandrani testified that he had left the site at that time simply to use the bathroom and was not aware either that the trench was over five feet deep or that an employee was in a trench. Tr. 295, 320-27. The MOSH Inspector testified that, when he arrived at the site, he observed an employee (later determined to be Mr. Green) working without a trench box in the trench, the top of which was over his head, and which measured seven feet deep. Tr. 24-25, 28-29, 338. Considering this contradictory testimony, the HE found the MOSH Inspector to be the most credible and rejected the claim that Mr. Palandrani had inspected the site after it reached five feet deep. Proposed Decision, at 11. In assessing the credibility of a witness, the reviewing agency must give "appropriate deference to the opportunity of the examiner to observe the demeanor of the witnesses." *Anderson v. Dep't of Public Works*, 330 Md. 187, 216 (1993). "The presiding officer's findings as to credibility have almost conclusive force... [and] the reviewing authority has the power to reject credibility assessments only if it gives strong reasons for doing so." *Id.* Finding no reason to contest this credibility determination, and considering the other evidence in the record, the Commissioner finds that the Employer violated 29 CFR § 1926.651(k)(1) by failing to perform an inspection once the trench reached five feet deep. The Commissioner also finds, based upon the HE's credibility determinations as well as testimony regarding the depth of the pipe being excavated, that the Employer had knowledge of the violation. Tr. 51, 54, 296-9; Rev. Tr. 79.

The Employer also challenges MOSH's characterization of Citation 1, Item 1 as a repeat citation. In order to establish a repeat violation, MOSH must prove that "the *same*

standard has been violated more than once, there is a substantial similarity of violative elements between the current and prior violations, and the prior citation on which the repeat violation is based has become the final order of the Commissioner.” *Maryland Commissioner of Labor and Industry v. Cole Roofing Co., Inc.*, 368 Md. 459, 479 (2002). In July of 2003 the Employer was cited for a violation of 29 CFR § 1926.651(k) (1), the same standard cited in this case. The Employer asserts that this citation is not substantially similar because, while the first citation was based upon a finding that there was no competent person on site, this citation was based upon a finding that the competent person failed to do a required inspection. Tr. 80-83; Rev. Tr. 53. The Commissioner finds that the violative elements of each citation present the same hazard and are substantially similar. Regardless of whether the lack of inspection was a result of not having a competent person on site to do an inspection or of the competent person’s failure to do an inspection, an employee in each circumstance was put at risk of being injured in a trench collapse because an excavation was not properly inspected by a competent person. Therefore the citation was properly categorized as a repeat violation.

Citation 1, Item 2

MOSH cited the Employer with a repeat serious violation of 29 CFR § 1926.652(a) (1), which provides:

(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).

On review, the Employer challenges MOSH’s factual determinations regarding the soil type, trench depth and design and also alleges that MOSH failed to prove the presence of an employee in the trench. MOSH asserts that these factual findings are correct and supported by the evidence in the record.

Soil Type

The Employer alleges that MOSH wrongly concluded that the soil was Type B, and thus held the Employer to the incorrect standard regarding trench style. In support of its argument that the soil was Type A, the Employer points to photographs showing tooth marks in the trench and to Mr. Palandrani's testimony that he thought it was both Type A and Type B, but was confused when he told the MOSH Inspector that the soil was Type B. Rev. Tr. 42, 55; Tr. 241, 308, 329-31. However, the MOSH Inspector testified that he reasonably relied on a visual analysis of the soil and that he received reliable confirmation from Mr. Palandrani that the soil was Type B. Rev. Tr. 42, 86; Tr. 36. MOSH also admitted into evidence a copy of the MOSH Soil Analysis Worksheet, on which the MOSH Inspector noted evidence of "granular cohesive" soil that was "subject to vibration" and thus appropriately classified as Type B. MOSH Ex. 6; Tr. 40. The HE, when presented with the conflicting testimony and the evidence in the record, determined that Mr. Palandrani's testimony regarding his confusion was not as credible as that of the MOSH Inspector. Proposed Decision at 5, 11. Therefore he made a finding of fact that the soil at issue was Type B. FF 12. Considering the strength of the evidence supporting MOSH's finding that the soil was Type B and giving the appropriate deference to the HE's determinations regarding the relative credibility of the testimony, the Commissioner finds that the soil was Type B.

Depth and Design of Trench

As noted above, both photographic and testimonial evidence in the record support a finding that the trench was more than five feet deep. FF 5; Tr. 32, 76, 141, 175; MOSH Ex. 6, No. 1. Section 652(a)(1) requires that a trench over five feet deep in Type B soil

must be dug according to § 1926 Subpart P, Appendix B, which requires either a slope ratio of no more than 1:1, appropriate benching, or the use of a trench box. While it is uncontested that a trench box was not in use, the Employer argues that there was adequate benching in the trench and that a pipe in the side of the trench served as a substitute for a bench. Tr. 247, 297. However, the MOSH Investigator testified that the benching was inadequate and that “the fact that there is a pipe indicates right away that there’s previously disturbed soil, which compounds the problems of the lack of sloping and benching.” Tr. 55, 338. In addition, MOSH’s photographs demonstrate that the trench contained a bench approximately 2 feet from the bottom and then a vertical wall of approximately 5 feet to the surface, which does not comply with 29 CFR § 1926 Subpart P Appendix B. MOSH Ex. 8, No.’s 6 and 7; Tr. 55. Finally, Mr. Palandrani testified that installing a trench box or benching the trench further would have taken extra time and that time was of the essence because the crew was supposed to have the road opened by 3 p.m. on the day of the inspection. Tr. 333-34. Thus, the Commissioner finds that the trench was not designed in compliance with 29 CFR §1926 Subpart P, Appendix B, as required by Section 652(a) (1).

Presence of an employee in the trench

The Employer has challenged MOSH’s proof that an employee was in the trench. However, as noted above, the MOSH Inspector testified that he observed an employee working in the trench and that Mr. Green acknowledged being in the trench. Tr. 24-25, 59, 176. This testimony is collaborated by testimony of Mr. Howard, the Employer’s safety manager, who acknowledged that Mr. Green had been in the trench. Tr. 222, 226, 231, 256. In addition, the record contains photographic evidence showing footprints in

the trench. MOSH Ex. 8, No.'s 2, 3 and 10. The Commissioner finds that this is sufficient proof that an employee was in the trench. Based on this and the evidence regarding the trench design and soil type, the Commissioner finds that the Employer subjected its employee to a potential cave-in by failing to dig the trench in compliance with 29 CFR §1926 Subpart P, Appendix B.

The Commissioner further finds that this citation was properly determined to be a repeat serious citation. The MOSH Inspector's testimony regarding the potential for serious injuries, or even death, in a trench collapse resulting from improper design support the serious categorization of this citation. Tr. 74-76. Furthermore, this is a repeat violation because on July 1, 2003 the Employer was cited with a serious violation of 29 CFR § 1926.652(a) (1) for allowing employees to work in a trench that was, just like the trench in this citation, "not protected by sloping, shoring or other protective systems." MOSH Ex. 14, Tr. 79-81. The Commissioner affirms Citation 1, Item 2.

Citation 2, Item 1

MOSH cited the Employer with a repeat other than serious violation of § 1926.651(c) (2), which requires that a "stairway, ladder, ramp or other safe means of egress" shall be located in the trench excavation. The Employer challenges this citation by asserting that the benching plus the pipe in the side of the trench constituted an "other safe means of egress." Rev. Tr. 38; Tr. 27. MOSH asserts that neither the bench nor the pipe could be considered an "other safe means of egress" because neither was close enough to the top of the trench to provide a safe and fast means for getting out of the trench in an emergency. Rev. Tr. 88; Tr. 340. As noted by the MOSH Inspector, an employee would "have to have awful long legs to step on to [the attempted bench] and

get out.” Tr. 340. In addition, the MOSH Inspector testified that the use of the pipe for egress could actually increase the possibility of a cave-in due to the previously disturbed soil around the pipe. Tr. 338, 355. Based on this testimony and the evidence in the record, the Commissioner affirms this citation. The Commissioner further finds that this citation is appropriately characterized as a repeat citation because, on August 4, 2003, the Employer received a citation for violation of the same standard, 29 CFR § 1926.651(c)(2), for failure to provide a safe means of egress from a trench four feet or more in depth. MOSH Ex. 14. Accordingly, the Commissioner affirms Citation 2.

Citation 3

MOSH cited the Employer with an other than serious violation of Labor and Employment Article, § 5-405(b) (2) for failure to add a hazardous chemical to its chemical information list within 30 days following the chemical’s introduction to the workplace. MOSH Ex. 1. The Employer admits that the chemical at issue, “Harvey’s Pipe Joint Lubricant,” was in use on the worksite and was not added to the chemical information list, but challenges this citation by asserting that the chemical is not hazardous because it is listed as non-hazardous on the Material Safety Data Sheet (MSDS). Rev. Tr. 7-8; Tr. 212. A hazardous chemical is defined as “any chemical which is a physical hazard or health hazard.” 29 CFR § 1910.1200(d). There is no requirement that a chemical be listed as hazardous on the MSDS in order to be considered “hazardous” under the standard. Furthermore, a “health hazard” is defined in 29 CFR § 1910.1200, Appendix A (4) to include chemicals that are irritants to the skin or eyes. Rev. Tr. 10. The Commissioner finds that MOSH correctly determined that “Harvey’s Pipe Joint Lubricant” is a hazardous chemical because the warning label’s statement that

Pipe Joint Lubricant" is a hazardous chemical because the warning label's statement that it is a skin and eye irritant demonstrates that it poses a health hazard. MOSH Ex. 13, Tr. 117-118. Therefore the Commissioner affirms Citation 3.

Penalty Calculations

Other than contesting the categorization of Citations 1 and 2 as repeat citations, the Employer has not contested the penalty calculations. Therefore, finding that MOSH appropriately used approved formulas, derived from COMAR 09.12.20.12, to compute the penalties; the Commissioner upholds the penalty calculations for all Citations.

For the foregoing reasons, the Commissioner of Labor and Industry on the 28th day of April, 2006, hereby **ORDERS**:

1. Citation 1, Item 1 for a repeat serious violation of 29 CFR § 1926.651(k) (1) and its accompanying penalty of \$3,600, is **AFFIRMED**.
2. Citation 1, Item 2 for a repeat serious violation of 29 CFR § 1926.652(a) (1) and its accompanying penalty of \$3,600, is **AFFIRMED**.
3. Citation 2, Item 1 for a repeat other than serious violation of 29 CFR § 1926.651(c) (2) with its accompanying penalty of \$1,200 is **AFFIRMED**.
4. Citation 3, Item 1 for an other than serious violation of Labor and Employment Article, § 5-405(b) (2), *Annotated Code of Maryland* with its accompanying penalty of \$00 is **AFFIRMED**.

and Employment Article, § 5-215, *Annotated Code of Maryland*, and the Maryland Rules,
Title 7, Chapter 200.

A handwritten signature in cursive script, reading "Robert L. Lawson".

Robert L. Lawson
Commissioner of Labor and Industry