IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
The Matricciani Co. Inc.	*	**AND INDUSTRY**
	*	**MOSH CASE NO. U2506-050-04**
	*	**OAH CASE NO. DLR-MOSH-41-04-43772**

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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*. On July 6, 2004 the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued a citation to The Matricciani Company, Inc. (hereinafter "Employer"), alleging serious violations of the Maryland Occupational Safety and Health Act. A hearing was held on December 7, 2004, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, T. Austin Murphy, Hearing Examiner ("HE"), issued a Proposed Decision recommending that the citation 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 16, 2005, the Commissioner of Labor and Industry held a review hearing and heard 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.

DISCUSSION

On May 5, 2004, pursuant to a contract with the State to install water lines throughout the grounds of Sykesville Hospital Center, the Employer was excavating a ditch to lay water pipes by the Warfield Service Building on hospital grounds. (FF 1,2). An inspector from the Fire Department contacted MOSH after observing the Employer excavating a ditch without cave-in protection. (FF 3). Subsequently, MOSH Inspector Lee Durfee arrived at the cite and began his safety and health inspection, which resulted in the issuing of one citation, containing three parts and a penalty amount of $750.00. To uphold the citation, the Commissioner must find that MOSH has demonstrated by a preponderance of the evidence that (1) the standard at issue applies; (2) the Employer failed to comply with the standard; (3) employees were exposed to violative conditions and (4) the Employer knew or with the exercise of reasonable diligence should have known of the condition. *See e.g. Astra Pharmaceutical Products, Inc.,* 9 O.S.H. Cas. (BNA) 2126 (R.C. 1981), *aff'd in part* 681 F.2d 69 (1st Cir. 1982).

Citation 1(a):

MOSH cited the Employer with a serious violation of 29 C.F.R. § 1926.651(J)(2), which provides:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavation, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The record supports the finding that the spoil pile was in violation of the standard. The MOSH inspector testified that, when he arrived at the cite at 11 a.m. on May 5, 2004, an employee was using a Bobcat to move the spoil pile, which was by that time

approximately 3-4 feet high and less than two feet from the edge of the trench. (Tr. 28, 143, 147). Photographic evidence clearly shows a spoil pile at the edge of the trench. (MOSH Ex. 6, # 1, 3, 4, and 5). The Employer did not contest that the pile was located within two feet of the trench. In fact, Mr. Nichols, the Employer's general superintendent testified that the spoil pile was 3-4 feet high and "very close" to the trench. (Tr. 209). The MOSH Inspector further testified that the citation was classified as serious due to the risk of serious injury if the spoil pile had caused a cave-in while an employee was working in the trench, but that the penalty was reduced from $3000.00 to $750.00 due to the quick abatement. (Tr. 80-84, 100, 174).

While the Employer did not contest the finding that the spoil pile was within two feet of the trench, it argued that there was no room for the pile to be farther away because of the close proximity of a tree on one side and a road on the other side of the trench. (Tr. 147-8, 362, 378). The Commissioner finds no merit to this argument because the spoil pile could have been placed on alternate sides of the trench, making the piles smaller and less dangerous, or the debris could have simply been hauled away. (Tr. 149, 174). The Commissioner affirms Citation 1(a).

Citations 1(b) and 1(c):

MOSH also cited the Employer with a serious violation of 29 C.F.R. § § 1926.651(k)(2) and 1926.652(a)(1), which provide:

(k)(2) Where a competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

(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 challenged these citations by objecting to MOSH's factual findings regarding the soil type and by asserting that the citations are duplicative. The Commissioner affirms Citation 1(c) and dismisses Citation 1(b) as duplicative of 1(c).

Soil Type:

The Employer alleges that MOSH wrongly concluded that the soil was Type C and thus held the Employer to the incorrect standard regarding trench style. In support of its argument, the Employer called an expert witness, Richard Hillis, who testified that, based on his tests of nearby soil in December, 2004, he determined the soil to be Type A. (Tr. 251, 288). The Employer also presented testimony from Don Stike, the Employer's foreman, that he did not agree with the MOSH Inspector's assessment that the soil was Type C. (Tr. 373). This testimony, however, was in direct conflict with that of the MOSH Inspector, who repeatedly testified that on the day of the inspection Mr. Stike agreed with him that the soil was Type C. This testimony is also contradicted by other evidence in the record. (Tr. 73, 167, 208; MOSH Ex. 8).

The HE, when presented with the conflicting testimony and the evidence in the record, made a finding of fact that the soil at issue was Type C. (FF 10; Proposed Decision, p. 8.) The Commissioner finds that the record supports this finding. MOSH introduced into evidence a Soil Analysis Worksheet on which the MOSH Inspector recorded the tests performed and the bases for his conclusion that the soil was Type C. (MOSH Ex. 4; Tr. 40). In addition, the MOSH Inspector testified that, while at the site on May 5, 2004, he observed loose rocks in the side of the trench and, by using the thumb test on soil from the spoil pile, he found that he could not roll or compress the soil. (Tr.

154-166).[1] Finally, when asked what Mr. Stike had indicated regarding the soil type, the MOSH Inspector testified that "[h]e indicated it was [Type] C." (Tr. 73). This testimony is supported by Mr. Stike's signature on the MOSH Competent Person Interview,[2] which the MOSH Inspector and Mr. Stike filled out at the site on the day of the inspection and which lists the soil as "Type C" with a note, added by Mr. Stike, stating "sandy clay and loose stones." (MOSH Ex. 8; Tr. 72). The testimony is also supported by the fact that there was a trench box on site, indicating that someone had thought it necessary. (Tr. 392, 438). Given the strength of the evidence supporting MOSH's finding that the soil was Type C, the Commissioner adopts the HE's finding of fact that such was the case. The Commissioner also adopts the HE's finding of fact that the trench was more than five feet deep, as both photographic and testimonial evidence in the record support such a finding and this fact was not contested by the Employer on appeal. (FF 5; Tr. 32, 76, 141, 175; MOSH Ex. 6, #1).

Section 652(a)(1) requires that a trench over five feet deep in Type C soil must be dug according to § 1926 Subpart P, Appendix B, which requires at least a 34 degree slope. The record supports the HE's finding of fact that the trench was not dug to these specifications, and was "not protected by shoring or sloping of any manner." (FF 8). The MOSH Inspector testified that one side was "near vertical" and the other was "not sloped appropriately". (Tr. 69). This testimony is further supported by the Inspector's drawing

[1]While these tests were not as extensive or "fancy" as those performed six months later by Mr. Hillis, they were in conformity with those required by OSHA standards. (Rev. Tr. 33; 29 CFR § 1926, Subpart P, Appendix A (d)(1) and (2)).

[2] The record is clear that Mr. Stike was the Competent Person on site. (Tr. 73, 75, 105, 377).

and photographs. (MOSH Ex. 6, 8).[3] The record also supports the conclusion that an employee was working in the trench, and was thus exposed to the violative condition. The MOSH Inspector testified that Jerry Miller, an employee, told him that he had been in the trench on the morning of the inspection, and that this fact was confirmed by Mr. Stike. (FF 5, 12; Tr. 83). The record also demonstrates that the Employer had knowledge of the violative conditions because Mr. Stike, the foreman, actually dug the trench. (Tr. 83). Therefore MOSH has met its burden of proof, and the citations are affirmed.

Duplicity:

The Employer argued at the Review Hearing that Citation 1(c) (violation of 29 CFR § 1926.652(a)(1)) must be dismissed because it is duplicative of and subsumed by Citation 1(b) (violation of 29 CFR § 1926.651(k)(2)). (Rev. Tr. 19). MOSH responded that both citations are appropriate because Citation 1(b) is based upon the finding that the Employer required an employee (Mr. Miller) to get back into the trench after being made aware by the volunteer firefighter that the trench was unsafe, while Citation 1(c) is premised on the initial failure by the Employer to provide a safe work place. (Rev. Tr. 27).

Similar arguments were made in *Secretary of Labor v. Globe Contractors, Inc.*, 17 O.S.H.C. (BNA) 2165 (1996), in which an employer was cited for serious violations of 29 CFR § 1926.651(k)(2) and CFR § 1926.652(a)(1) for allowing employees in an

[3] The Commissioner notes that a vertical wall on a trench is permitted only when digging in "stable rock", not in Type A soil. 29 CFR § 1926 Subpart P, Appendix B. Therefore, even if the Employer were to succeed with its argument that the soil was Type A, the trench would still violate the standards.

unprotected excavation. In that case, the Federal Review Commission held that the intent of Section 651(k)(2) "is to require interim inspections to address changing conditions in a trench which may require the removal of employees working therein." *Globe*, at 9. The Commission found Section 651(k)(2) inapplicable because the Secretary did not allege that "previously undetected hazardous conditions were found or developed during the course of work in the excavation." *Globe*, at 10. Instead the Employer was cited for allowing employees to enter a trench that was already known to require a protective system under § 1926.652(a)(1). As in this case, "[t]he exposure of Globe's employees, and the knowledge of Globe's supervisory personnel are elements of the substantive violation of § 1926.652(a)(1), rather than a separate violation of § 1926.651(k)(2)." *Id.* The Commission also pointed out that both Citations required the same abatement conduct. *Globe*, at 10, *citing J. A. Jones Construction Co.*, 16 O.S.H.C. (BNA) 1497 (1993).

The Commissioner concludes that the reasoning in *Globe* applies to this case as well. If MOSH intends to allege that the Employer violated Section 651(k)(2) by failing to remove employees after being warned of the violative situation by the fireman, then that would imply that the Employer did not have knowledge of the dangerous situation prior to that time. The evidence in the record does not support this. On the contrary, MOSH has demonstrated that the Employer knew of the dangerous condition, and yet had employees working in the trench without adequate protection, in violation of (a)(1). Therefore Citation 1(b) is dismissed as duplicative of Citation 1(c).[4]

[4] The penalty for Citation 1 remains $750.00, as the parties agreed at the Review Hearing that this penalty was assessed for the citation as a whole. (Rev. Tr. 26, 37).

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on the 11th day of August, 2005, hereby **ORDERS**:

1. Citation 1, Item 1(a) for a serious violation of 29 CFR § 1926.651(j)(2) is **AFFIRMED**.

2. Citation 1, Item 1(b) for a serious violation of 29 CFR § 1926.651(k)(2) is **DISMISSED** as duplicative of Citation 1, Item 1(c).

3. Citation 1, Item 1(c) for a serious violation of 29 CFR § 1926.652(a)(1) is **AFFIRMED**.

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, § 5-215, *Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.

Robert L. Lawson
Commissioner of Labor and Industry