

IN THE MATTER OF

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BEFORE THE

CONSOLIDATED HVAC, INC.

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**COMMISSIONER OF LABOR
AND INDUSTRY**

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MOSH CASE NO. S7556-022-02

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**OAH CASE NO. DLR-MOSH-
41-200200046**

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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 an accident inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”), issued a citation to Consolidated HVAC, Inc. (“Consolidated” or Employer”), alleging it violated 29 CFR §1926.652(a)(1) by failing to adequately protect employees from an excavation cave-in. On September 25, 2002, a hearing was held before Administrative Law Judge Lorraine Ebert Fraser, sitting as Hearing Examiner, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, the parties filed post-hearing briefs and the Hearing Examiner issued a Proposed Decision recommending that the citation be affirmed, and based on Employer’s affirmative defense of employee misconduct, the recommended penalty of \$2975 be dismissed.

The Commissioner of Labor and Industry exercised his authority pursuant to Labor and Employment Article, §5-214(e), and ordered review. On April 29, 2003, the Deputy Commissioner of Labor and Industry¹ held a review hearing and heard argument from the

¹ Dr. Keith L. Goddard, then Deputy Commissioner of Labor and Industry, is now the Commissioner of Labor and Industry.

parties. Employer filed a post hearing submission and MOSH filed a reply. 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 Hearing Examiner's recommendation to affirm the violation is adopted and the penalty is reinstated.²

DISCUSSION

Consolidated is a commercial and residential plumbing, heating, and air conditioning service contractor, performing installation and remodeling. On the morning of January 24, 2002, a three-man crew of Consolidated's employees set out to repair a broken water main that had been leaking water into a parking lot since the previous day. The crew did not take with them a trench box or any other materials to shore up the excavation. Upon their arrival, there was water bubbling out of the ground. T. at 53.

The supervisor, Eric Davis, left the job soon after his arrival due to illness. The backhoe operator Brian McCleaf and laborer Kevin Dubicki remained. While McCleaf dug the trench using a backhoe, Dubicki was in the shallow end of the trench locating the utility lines. A portable pump with a drain hose was set up to remove water accumulating in the trench. MOSH Ex. 7 and 8. When the two realized that the water main break was at the opposite end of the trench, McCleaf began to deepen the trench at the opposite end to expose the leak.

At about 2 p.m., Zone Manager, Patrick Wolfe, arrived. At this point, the trench was seven feet deep and, by Wolfe's admission, had "a lot of water coming out." T. at 163. Shortly

² In this Final Decision and Order, the transcript of the evidentiary hearing is referred to as "T. at ___"; MOSH's exhibits are referred to as "MOSH Ex. ___"; Employer's exhibits are referred to as "Er. Ex. ___"; the Hearing Examiner's Proposed Decision and Order as "Proposed Decision at ___"; and the Hearing Examiner's Findings of Fact as "FF ___."

after Wolfe's arrival, McCleaf left to pick up a load of gravel. In McCleaf's absence, Wolfe directed Dubicki to enter the trench, via a ladder, to install a clamp over the leaking pipe. FF 10 and 14. Following the instructions of his supervisor, Dubicki entered the seven-foot deep trench unprotected by any shoring or other device to prevent a cave-in or collapse. FF 11. Dubicki remained in these hazardous conditions for about 10 minutes while supervisor Dubicki looked on. *Id.*³

A "competent person" is one who has the knowledge and training in OSHA trenching standards to recognize safety hazards and the authority to take prompt corrective action. According to Consulate's "A-1 Excavation/Trenching Program,"⁴ this includes the ability to detect "conditions that could lead to cave-ins" and the authority to "eliminate existing and predictable hazards and to stop work when required." MOSH Ex. 9. This program mandates that a competent person be put in charge of all excavations. The competent person is required to conduct inspections daily, before the start of each shift, and when there is water seepage. Both a visual and at least one manual test are required to determine soil stability. *Id.*

Each employee at the site had completed the competent person course. FF 20; Er. Ex. 6. There is no evidence that a soil inspection was conducted at any point by any of the employees.

³ MOSH Inspector Serio testified that during his investigation, Zone Manager Wolfe said he instructed employee Dubicki to enter the trench and do the repair. At the hearing, Wolfe testified that it was he, rather than Dubicki, who went into the trench to perform the repair. T. at 164-65. The Hearing Examiner expressly discredited Wolfe's testimony, describing him as "a nervous and not very convincing witness" and credited Inspector Serio's testimony that employee Dubicki entered the trench at Wolfe's direction. The Commissioner adopts the Hearing Examiner's demeanor based credibility finding. *Anderson v. Department of Public Safety & Corrections Servs.*, 300 Md. 187, 216-17 (1993).

⁴ Consolidated is owned by Roto-Rooter and according to Employer's counsel has adopted Roto-Rooter's A-I Excavation/Trenching Program, evidenced in MOSH Ex. 9.

Nor is there evidence that work was stopped to assess the need to add a device to prevent a cave-in or collapse.⁵

Consolidated's "Employee Handbook" ("the Handbook"), issued to all new employees, sets forth "the basic rules and regulations for all employees." Er. Ex. 2, "Introduction" at 2. The introduction to the section entitled "Safety Policy Statement and Employee Regulations" states:

No one is to perform any duty, use any piece of equipment, take any action, follow any order given which in the mind of that person places them or others around them in an unsafe position risking personal injury or death.

Id. at 18. The Handbook's safety policy contains procedures for "Excavation." *Id.* at 25-27. Paragraph 5 of the excavation procedure states that as a ditch is excavated, "a decision must be made as to maintaining the excavation for the appropriate protection of those who are going to enter the ditch to work." Paragraph 5(a) goes on to state that Employer has its own equipment, that this equipment should be used by "those trained to use it," and if not trained to use it, employees "should ask." *Id.* at 26. Wolfe admitted that no call was made to determine if trenching equipment was available. T. at 183. Paragraph 6 of the excavation procedure addresses situations, such as the one in this case, where there is a continual accumulation of water in a ditch. It states, "adequate protection must be taken to protect employees from this hazard. Necessary additional supports or shield must be provided and water removal trough pumps to control the levels of accumulating water shall be necessary." (Emphasis added) *Id.* at 26, para. 6.

The Handbook also contains a progressive disciplinary procedure for noncompliance. *Id.* at 32. The first penalty is a written warning. The second is a written warning noting "second offense." The Handbook prescribes additional suspension days for the third through fifth

⁵MOSH Inspector Serio testified that the soil was Type C, the least stable condition, and looked "like pancake batter." T. at 65; MOSH Ex. 6.

offense, and termination for the sixth offense. *Id.* It mandates that managers who do not issue penalties for non-compliance be disciplined for failing to enforce compliance. It also requires that all records be maintained in individual company files. *Id.* The disciplinary procedure contains no provision for an oral reprimand.

The Hearing Examiner found that MOSH established a *prima facie* case that a violation occurred. Specifically, she found, as Employer conceded, that 29 C.F.R. §1926.652(a)(1) applies, that it failed to comply with the standard, and that an employee was exposed to the hazard. Based on the credited testimony of MOSH Inspector Serio, she found that a supervisor directed an employee to enter the unshored hole to accomplish the repair, exposing the employee to “the serious hazard of a possible trench collapse for a substantial period of time.” Proposed Decision at 8. The Hearing Examiner therefore found Employer had knowledge of the cited misconduct.

The Hearing Examiner next evaluated Employer’s affirmative defense of employee misconduct. She applied the criteria set forth in *P. Gioiso & Sons, Inc. v. O.S.H.C.*, 115 F.2d 100, 109 (1st Cir. 1997),⁶ and found merit to Employer’s claim that the violation was the result of unforeseeable and unpreventable employee misconduct. Specifically, she found that Employer had an established rule regarding cave-in protection and adequately communicated the rule to the employees, including those involved in this incident. The Hearing Examiner concluded that Employer fulfilled the third and fourth *Gioiso* criteria because it “took violations seriously” and effectively enforced its safety work rules. Proposed Decision at 10. She based this conclusion

⁶In *Cole Roofing*, 368 Md. 459, 796 A.2d 63 (2002), the Maryland Court of Appeals affirmed the criteria set forth in *Gioiso*, and found that to establish the affirmative defense of employee misconduct, an employer must show that it has (1) an established work rule to prevent the reckless behavior and/or unsafe condition from occurring; (2) adequately communicated the rules to its employees (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rule whenever employees transgressed it.

on her finding that Employer “regularly” conducted unannounced spot checks to ensure adherence to safety standards and disciplined those involved in this incident with loss of pay. Despite finding merit to Employer’s affirmative defense, the Hearing Examiner recommended affirming the citation and denying the proposed penalty.

MOSH excepts to the Hearing Examiner’s finding that there is sufficient evidence to establish employee misconduct, and to her recommendation not to affirm the penalty. MOSH asserts that the record does not support the finding that regular compliance inspections were conducted, and argues that the evidence is insufficient to establish that violations of the trenching rules were regularly sanctioned. Employer argues that the finding of employee misconduct should be sustained and that the citation and penalty should therefore be dismissed.

Employer presented evidence that, in the face of a MOSH investigation, it conducted an investigation and disciplined the employees most involved for violating its safety policy. While post-inspection actions may be evidence of a serious concern for safety, to establish a practice of compliance inspections and discipline of safety infractions under *Gioiso*, an employer must show that it has taken action to enforce its work rules prior to inspection by MOSH. *Precast Services Inc.*, 17 OSHC (BNA) 1454, 1455-56 (1995). In this case, the record regarding compliance inspections and past discipline for noncompliance is sparse, inconsistent, and unsubstantiated by documentary evidence. The Commissioner finds this evidence is not sufficient to support the Hearing Examiner’s finding that the third and fourth criteria of *Gioiso* have been satisfied.

Regarding inspections, on direct examination, Safety Coordinator Barbara Fiore testified that she, the Plumbing Department Manager, and the Plumbing Service Manager conduct “spot checks” based upon who is in the area. T. at 210-12. She explained that they stop by unannounced “to see what is going on” and issue an oral or written warning and suspensions

depending on the infraction. *Id.* at 213. When asked on cross-examination how often the spot checks occurred, Fiore answered, “[e]very maybe weekly, daily, monthly, generally every other day, every three days something like that depending on the location of myself or the other two individuals...” *Id.* at 233. When asked how these three individuals keep track of who is doing the checks and how often, Fiore testified that each manager took care of his own department and that in the morning she checks in with them to see if they have “digging or excavation going on or an real safety issues...” *Id.* at 234. Fiore, who testified that she is in charge of keeping records on safety training and discipline of safety infractions, presented no records showing the frequency or regularity of Employer’s site inspections.

The Commissioner finds that Fiore’s testimony regarding inspection frequency is inconsistent and insufficient, standing alone, to support the Hearing Examiner’s finding that Employer has a practice of regularly conducting unannounced safety inspections. Initially, Fiore suggested the inspections were scheduled. As she testified further, the frequency changed several times. When pressed for more specifics, her testimony changed from a practice of scheduled inspections to a practice based on the potential severity of safety issues. Based on this testimony, without records to substantiate that Employer has a regular inspection practice, the Commissioner concludes the evidence is insufficient to find Employer took steps to discover incidents of noncompliance with safety rules. *Compare Wright and Lopez, Inc.*, 8 OSHC (BNA) 1261, 1264 (1980) (in the absence of supporting evidence, general assertion by safety officer that employees were disciplined for infractions of safety rules not established). Accordingly, Employer has not met its burden of proving that it took adequate steps to discover incidents of noncompliance with its trenching safety rules.

Adequate enforcement is another critical element of the employee misconduct defense. *Precast Services Inc.*, 17 OSHC (BNA) 1454, 1455. The record in this case shows that three of the employees involved in the incident were issued written warnings and suspended for one or more days. Employer's past practice of discipline for violation of its trenching safety policy is not as clear. Safety Coordinator Fiore testified that Employer has a three step disciplinary procedure starting with oral warnings, then written warnings, and finally suspensions. She said that in the course of a single year, about 32 written safety warnings were issued among Employer's 125 employees, and that, for the four years preceding the incident in this case, there were no written warnings for trenching violations. *Id.* at 212-214; 236-37.

Fiore's testimony that safety infractions are disciplined with oral warnings is inconsistent with Employer's Handbook which contains no "oral warning" provision. Rather, the progressive disciplinary system starts with a written warning and progresses to suspensions and discharge from there. *Er. Ex. 2* at 32. Thus, oral warnings for trenching violations, if there had been any, would be inconsistent with Employer's written disciplinary policy. Further, oral warnings may suggest poor enforcement practices. *Precast Services Inc.*, 17 OSCH 1454, 1456; *Gem Industrial Inc.*, 17 OSHC (BNA) 1861, 1864 (1996).

With respect to the total absence of written trenching violations within the past four years, two explanations are plausible. The first is that Employer so effectively enforces its trenching safety rules that no disciplinary actions were necessary. The second is that inspections were too infrequent or inadequate to disclose violations. Based on the record in this case, the second explanation is more plausible. It is improbable that over the course of a four-year period, not one of Employer's 125 employees engaged in a trenching infraction regarding structural support that warranted discipline under Employer's progressive disciplinary system. This is

particularly true given Employer's claim that employees received written warnings for about 120 other safety violations during the same four-year period.

Further, the facts in this case reveal a total disregard for trenching safety, with the entire work crew participating in the violation.⁷ Initially, three employees with competent person training, including one supervisor, arrived at the excavation site without trenching equipment.

This is so, despite the fact that upon their arrival, water was seeping through the pavement.⁸ Once on site, there is no evidence that any of these employees conducted one of several soil tests mandated by Employer's trenching policy. When the first supervisor went home sick, there is no evidence that his replacement conducted a soil inspection or inquired why no trenching equipment was being used on a seven foot deep trench with soil the quality of pancake batter. Further, no one called to inquire about the availability of trenching equipment.

Employer's Handbook holds all employees responsible for adherence to safety policies. Resp. Ex. 2 at 18. Yet, not a single employee challenged the absence of a trench box or other material to shore up an excavation in conditions that could lead to a cave-in. Although the Handbook also mandates that employees decline an order that puts them in an "unsafe position risking personal injury or death," and Safety Coordinator Fiore conceded that Dubicki had a duty

⁷ Employer's claim that Wolfe engaged in an aberrant "poor decision" because of his testimony that he was under "personal duress" must fail for two reasons. First, it ignores the sophistication of the remainder of the work force. More importantly, it ignores the fact that Wolfe was generally discredited by the Hearing Examiner. Furthermore, even if Wolfe were solely responsible, as noted by MOSH, the proof of unpreventable employee misconduct is more rigorous since it is the supervisor's duty to protect the safety of employees under his supervision. *Secretary of Labor v. Daniel Construction Co.*, 10 OSHC (BNA) 1549, 1552 (1982).

⁸ While Employer contends that shoring materials or shielding could have been obtained from its shop or a rental company and that the employees were responsible for securing it, the fact remains there was no such equipment on the site and there is no evidence that employees were specifically instructed to use such equipment. *Compare, Horne Plumbing and Heating Co. v. OSHRC*, 3 OSHC (BNA) 2060, 528 F.2d 564 (5th Cir. 1976) (prior to excavation, employer provided shoring supplies and instructed employees to use it).

to work safely, there is no evidence that Dubicki protested Wolfe's instruction to enter the saturated seven-foot trench and make the repair. T. at 242. Nor did either supervisor exercise his authority as the designated competent person to stop the work. MOSH Ex.10. This silence extended to backhoe operator Brian McCleaf who, according to Safety Coordinator Fiore, "digs daily for Catons" and "is an extremely competent person..." T. at 226-27. The widespread disregard for trenching safety exhibited by the entire crew, all "competent person[s]", trained to recognize safety hazards and imbued with the authority to take prompt corrective action, casts further doubt on an employer's enforcement practices. *See Gem Industrial Inc.*, 17 OSHC (BNA) 1861, 1865 (unanimity of noncomplying conduct suggests ineffective enforcement of work rules).

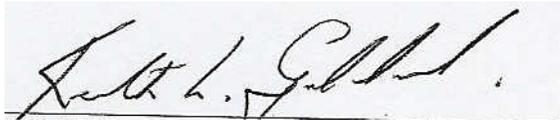
For all of the reasons set forth above, the Commissioner finds that Employer has failed to establish the affirmative defense of employee misconduct. Accordingly, the Commissioner affirms Citation 1, Item 1, alleging a serious violation of 29 CFR §1926.652(a)(1), with a penalty of \$2,975.00.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on the 25th day of March, 2004, hereby **ORDERS**:

1. Citation 1, Item 1, alleging a serious violation of 29 CFR §1926.652(a)(1), with a penalty of \$2,975.00 is **AFFIRMED**.

2. 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.



Dr. Keith L. Goddard
Commissioner of Labor and Industry