United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 05-0693
	:	
D.R.B. BORING & DRILLING COMPANY,	:	
	:	
Respondent.	:	

Appearances:

Scott Glabman, Esquire U.S. Department of Labor Washington, D.C. For the Complainant.	Anthony R. Sosso, Jr., Esquire Law Offices of Anthony R. Sosso, Jr. Pittsburgh, Pennsylvania For the Respondent.

Before: William C. Cregar
Administrative Law Judge

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent, D.R.B. Boring & Drilling Company ("D.R.B."), on March 31 and April 1, 2005; the work site was located in Cranberry Township, Pennsylvania, and D.R.B. was engaged in working in an excavation at the site. As a result of the inspection, OSHA issued to D.R.B. a six-item serious citation alleging five violations of OSHA's excavations standard and one violation

of the OSHA standard requiring the use of protective helmets.[1] D.R.B. filed a timely notice of contest with respect to the citation items and the proposed penalties,[2] bringing this matter before the Commission.[3] The hearing in this case took place in Pittsburgh, Pennsylvania, on November 1, 2005.[4] Both parties have filed post-hearing briefs.

The OSHA Inspection

Michael Laughlin is the OSHA compliance officer ("CO") who conducted the inspection. He testified he was driving by the site on March 31, 2005, that he saw trenching activity, and that he stopped to inspect the trench pursuant to OSHA's national emphasis program on trenching and excavations.[5] He also testified that as he approached the trench he saw a worker, who he later learned was Frank Gannon, exit the trench via a ladder. When the CO reached the trench, he observed that its walls were vertical and unprotected. He also observed an operating boring machine inside the trench and an individual who was shoveling soil away from machine; the CO recognized the individual as Donald Beyerl, who he had met before in a previous inspection. The CO took C-3 and C-4, two photos showing Mr. Beyerl in the trench. He then spoke to Mr. Beyerl, explaining why he was there, and Mr. Beyerl, in response to the CO's questions, told the CO that his company at the site was D.R.B. The CO recommended that Mr. Beyerl get out of the trench, as it was very unsafe, and Mr. Beyerl did so. Mr. Beyerl then began directing Mr. Gannon to put the generator and the tools

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[1]In her complaint, the Secretary withdrew Item 3 of the citation, which alleged a violation of 29 C.F.R. 1926.651(g)(1)(i), leaving five items for resolution.

[2]In its notice of contest, D.R.B. inadvertently failed to include Item 6; however, in my order of September 28, 2005, I found the failure to contest Item 6 was due to excusable neglect.

[3]This case was initially designated for the Commission's E-Z Trial procedures, now referred to as "Simplified Proceedings." The Secretary moved to discontinue the E-Z Trial procedures and to allow the case to proceed under conventional rules. The motion was granted.

[4]Before the hearing, the Secretary filed a motion to amend her complaint to withdraw her allegation that D.R.B. was a corporation; she also sought to modify the number of employees of D.R.B. to one employee, not including Donald Beyerl, the company's owner, rather than the six employees alleged in the complaint. The motion was granted at the hearing. (Tr. 4).

[5]CO Laughlin explained that the program requires OSHA CO's to stop and inspect any trenching activities they observe due to the hazardous nature of such work. (Tr. 12).

onto the truck at the site, and C-1 and C-2 are photos the CO took of Mr. Gannon doing as Mr. Beyerl told him. (Tr. 12, 16, 21-23, 30-34, 37-40, 43, 55-58, 61-62, 72-73).

The CO further testified that the boring machine was being used to bore underneath the road at the site in order to install a water or sewer line, and he discussed C-6, his drawing of the trench. The CO measured the trench and, as shown in C-6, it was 25 feet long and 14 feet wide and the depth varied from 8 feet 9 inches to 9 feet 7 inches. There was an exposed gas line at the south end of the trench and an exposed water line at the north end; both lines were operating under pressure, and the boring machine had already bored underneath the water line. There were shovels and other tools in the trench, and there was also an extension ladder leaning against the wall near the northeast corner of the trench. Excavated soil was piled along the edges of the trench, and the boring machine's operation was causing loose soil and rocks to fall in the trench.[6] (Tr. 13-17, 20-22, 34-35, 45, 50, 54).

The CO observed a number of hazards at the site, any of which could have caused serious injuries or death.[7] First, neither Mr. Beyerl nor Mr. Gannon was wearing head protection, and either could have been struck by rocks, soil or tools falling into the trench.[8] Second, the water and gas lines were not protected or supported; if the water line had broken water could have filled the trench and caused a cave-in, and if the gas line had broken a fire or explosion could have resulted. Third, rocks and loose soil could have fallen from the piles of excavated dirt along the edges and onto workers in the trench; there were also tools at the trench edges that could have fallen onto workers. Fourth, there was no appropriate inspection by a competent person to determine the hazards in the trench, and any employees would have been allowed to work in the trench without the necessary precautions being taken. Fifth, any workers in the trench would not be protected from cave-ins by an adequate protective system such as benching or sloping the trench walls. (Tr. 20-21, 34-36, 40-41, 44-58).

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[6]There was also water in the trench, and the CO observed that Mr. Gannon's boots were wet, that the soil above ground was dry, and that it had not been raining. (Tr. 20, 36, 53-54).

[7]The CO returned to the site the next day and saw the same hazards, and he advised Mr. Beyerl that he would be recommending the issuance of a citation. (Tr. 50-52, 57-59, 74).

[8]The CO noted that Mr. Beyerl was bent over and working with loose soil and rocks just above his head; he was also working right below the water pipe, which had tools laying on it, as shown in C-3 and C-4. (Tr. 34-35, 38-40).

Whether D.R.B. was an Employer under the Act

D.R.B. contends it was not an employer within the meaning of the Act because it was a sole proprietorship and had no employees at the site. It asserts that Mr. Gannon was working as an independent contractor, not as an employee of D.R.B., and that in any case Mr. Gannon had not been working in the trench. The Secretary contends Mr. Gannon was working in trench. She also contends that the working relationship between Mr. Beyerl and Mr. Gannon was an employer-employee relationship and not a sole proprietor-independent contractor relationship. The Secretary contends that D.R.B. was an employer covered by the Act because it created and controlled the conditions at the site and Mr. Gannon and Mr. Beyerl were exposed to those conditions.

As to whether Mr. Gannon was an employee of D.R.B., I note the CO's testimony, set out above, that Mr. Beyerl directed Mr. Gannon to put the tools and the generator onto the truck at the site and that Mr. Gannon did as he was told; based on what he heard and observed, the CO concluded Mr. Beyerl controlled the work site and created the conditions at the site. (Tr. 30-33, 72-73). I also note the CO's further testimony that Mr. Gannon told him that he worked for "D.R.B. Construction," another company owned by Mr. Beyerl, and that he (the CO) wrote down this information on C-5, a statement the CO obtained from Mr. Gannon on March 1, 2005.[9] (Tr. 23-29, 62, 76).

Mr. Beyerl testified that the three companies he owned were D.R.B. Construction, Glenshaw Steel Supply and Hampton Supply Yard; he described D.R.B. as a "separate little business" he ran himself, and he noted that D.R.B.'s business consisted of his digging about 150 holes a year and working in them and that D.R.B. had no employees but himself.[10] Mr. Beyerl said D.R.B. was the company at the subject site and that none of his other companies was involved. He also said he dug

[9]The CO testified he had met Mr. Beyerl in a previous inspection and that that inspection had involved D.R.B. Construction. (Tr. 61). The CO also testified he wrote down Mr. Gannon's statements to him on C-5 and then had him review C-5 before signing it. (Tr. 23-29). C-5 was admitted as a record of a regularly conducted activity, but it is also admissible as an admission of a party opponent pursuant to Federal Rule of Evidence 802(d)(2)(D). *See also Regina Constr. Co.*, 15 BNA OSHC 1044 (No. 87-1309, 1991), which discusses the rule and why employee statements made to a CO during the course of an OSHA inspection are admissible.

[10]Mr. Beyerl also described D.R.B. as a sole proprietorship. He noted that it was not incorporated but that his other businesses were. (Tr. 87, 92).

the trench at the site and controlled access to it; he was also the one who determined whether the trench was safe and the one with the authority to abate any hazards. Mr. Beyerl noted that the truck and all of the other equipment and tools at the site belonged to him. (Tr. 85-99).

Mr. Beyerl further testified that he was the only one who worked in the subject trench and that Mr. Gannon's job was to get equipment and tools off of the truck and to put the tools around the trench and hand them to him when he needed them. Mr. Beyerl said that Mr. Gannon worked as an independent contractor at the site and that he was not an employee of D.R.B. or D.R.B. Construction. He also said he "asked" Mr. Gannon to do things and did not "instruct" him, that Mr. Gannon was free to do or not do what was requested, and that he set his own hours for working at the site and could leave anytime he wanted; Mr. Beyerl conceded, however, that Mr. Gannon had never rejected or refused any of the tasks he had been asked to perform.[11] According to Mr. Beyerl, Mr. Gannon had done work for D.R.B. for a few years, off and on, and he had worked at the subject site for two days; there was no written contract, and Mr. Beyerl had paid Mr. Gannon a flat fee in cash for his work. Mr. Beyerl kept no records of amounts paid to Mr. Gannon and other independent contractors, and while he reported the income from work like the subject job he claimed no expenses for workers like Mr. Gannon.[12] Mr. Beyerl stated that he operated D.R.B. as a sole proprietorship because OSHA had advised him three years before that if he had no employees he was exempt from complying with the OSHA excavation requirements. (Tr. 92-93, 96-109, 113, 116, 121-24).

The Commission has long used the "economic realities test" to determine whether an employer-employee relationship exists. *See Loomis Cabinet Co.*, 15 BNA OSHC 1635 (No. 88-2012, 1992), and cases cited therein. The economic realities test consists of the following factors:

1. Whom do the workers consider their employer?
2. Who pays the workers' wages?
3. Who has the responsibility to control the workers?
4. Does the alleged employer have the power to control the workers?
5. Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?

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[11]Mr. Beyerl first said Mr. Gannon went to the site in his own vehicle but then agreed "he might have" ridden with him (Mr. Beyerl) on some occasions. (Tr. 116-17, 120).

[12]Mr. Beyerl indicated he had had many such workers. (Tr. 104-05).

6. Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
7. How are the workers' wages established?

Id. at 1637 (citations omitted). In ascertaining whether there is an employment relationship under the Act, the Commission has primarily relied upon its determination of "who has control over the work environment such that abatement of hazards can be obtained." *Id*. at 1638 (citations omitted).

Based on his own testimony, Mr. Beyerl paid Mr. Gannon for his work at the site; Mr. Beyerl also dug the trench and controlled access to it, determined whether it was safe, and had the authority to abate any hazards in it. (Tr. 94-95, 102-04). Moreover, the CO testified he heard Mr. Beyerl direct Mr. Gannon to put the generator and tools onto his truck, and the CO watched (and took photos) as Mr. Gannon did so. (Tr. 30-33, 72-73). Finally, Mr. Gannon told the CO he was employed by D.R.B. Construction, another company owned by Mr. Beyerl, and Mr. Gannon signed C-5, which contained this same statement. (Tr. 23-29). I have considered Mr. Beyerl's testimony that Mr. Gannon was not an employee of either D.R.B. or D.R.B. Construction. (Tr. 93, 98-99, 103-05). However, his testimony is contrary to that of the CO and to C-5. In addition, I observed the demeanors of the CO and Mr. Beyerl on the witness stand, and I found the CO to be the more reliable witness and thus credit his testimony over of that of Mr. Beyerl. I have also considered Mr. Beyerl's testimony that he "asked" and did not "instruct" Mr. Gannon, that Mr. Gannon was free to do or not do what was requested, and that Mr. Gannon set his own hours for working at the site and could leave anytime he wanted. (Tr. 100, 113, 116-17, 120). This testimony is unconvincing and is also inconsistent with that of the CO, and I do not credit it. In view of the evidence of record and the Commission's economic realities test, I find that Mr. Gannon was an employee of Mr. Beyerl, d/b/a D.R.B., at the site.[13] I further find that Mr. Beyerl was also an employee of D.R.B. at the site and that the Act applies in this case.

As to whether Mr. Gannon worked in the trench, the CO testified that, as he approached the trench on March 31, 2005, he saw Mr. Gannon exiting the trench via the ladder. The CO said Mr.

[13]In so finding, I note that, as the Secretary points out, another Commission judge found Mr. Gannon to be an employee of Mr. Beyerl's boring and drilling business in a case decided in 2002; the judge there also found that, contrary to Mr. Beyerl's assertion, Mr. Gannon had been working in the trench. *See D.R.B. Boring & Drilling Constr. Co.* (No. 02-0246, 2002) (ALJ).

Gannon was on the third rung down of the ladder, which meant he was about 3 feet down into the trench, and he agreed OSHA's excavations standard does not apply until a worker is at least 5 feet down into a trench. However, he pointed out that there was water in the trench and that he observed that Mr. Gannon's boots were wet; he also pointed out that the soil above ground was dry and that it had not been raining. Finally, the CO noted that in C-5, the written statement of Mr. Gannon, Mr. Gannon admitted that he had been picking up tools in the trench on March 31 and the previous day.[14] (Tr. 16, 20, 26, 32-37, 53-54, 63-64, 73, 76-82). I have considered Mr. Beyerl's testimony that Mr. Gannon did not work in the trench and that he never saw him in the trench. (Tr. 107-08, 121-23). This testimony is unpersuasive, in light of the CO's testimony and my credibility findings *supra*. I therefore credit the testimony of the CO over that of Mr. Beyerl, and I find as fact that Mr. Gannon was working in the trench at the site.

The Secretary's Burden of Proof

As indicated above, at issue are four alleged violations of OSHA's excavations standard and one violation of OSHA's personal protective equipment standard. To prove a violation of a specific standard, the Secretary has the burden of proving by a preponderance of the evidence that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Citation 1, Item 1

This item alleges a violation of 29 C.F.R. 1926.95(a), which states as follows:

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[14]The CO said that although C-5 stated that "I was the trench yesterday and today picking up tools," Mr. Gannon had actually stated that he was "in the trench." The CO explained he had written out the statement based on what Mr. Gannon told him and that while he and Mr. Gannon both reviewed C-5 before signing it neither had noticed the missing word. (Tr. 24-26, 73, 76). The CO also said that Mr. Gannon told him that he had been picking up tools on the water pipe and that he had reached the pipe by jumping from the ladder and onto the pipe; according to the CO, the water pipe was about 32 inches below ground level. CO said he had not believed this particular statement, which is also set out in C-5, as it was about 7 feet from the ladder to the water pipe. (Tr. 63-64, 77-80). C-3, which shows the water pipe to be some distance from the ladder, supports the CO's testimony. In addition, I have already found the CO to be a credible and convincing witness, and I credit his testimony about C-5.

> [P]ersonal protective equipment for ... head ... shall be provided, used and maintained ... wherever it is necessary by reason of hazards ... encountered in a manner capable of causing injury or impairment ... through physical contact.

The foregoing shows that both Mr. Beyerl and Mr. Gannon were working in the trench at the site. The CO testified that neither individual was wearing head protection and that he saw tools and piles of excavated soil along the edges of the trench; the CO also testified he saw loose rocks and soil from the piles fall into the trench, due to the vibration of the boring machine, and that rocks and soil or tools could have struck Mr. Beyerl or Mr. Gannon in the head and caused serious injuries.[15] (Tr. 20-22, 34-40, 50-51, 54). Mr. Beyerl admitted he did not wear any protective headgear in the trench at the site. (Tr. 97). He testified that he had 45 years of experience, that he had visually inspected the trench every day for evidence of possible cave-ins, and that he had worked in the trench for 15 days and there had been no problems (such as cracks in the walls or loose soil) and no cave-ins. (Tr. 91, 111, 114-115, 119). However, Mr. Beyerl did not rebut the CO's testimony about the excavated soil at the edges and his having seen rocks and soil fall into the trench. The Secretary has shown the alleged violation, in view of the record, and Item 1 is affirmed as a serious violation.[16]

The Secretary has proposed a penalty of $750.00 for this item. In assessing penalties, the Commission is required to give due consideration to the gravity of the violation and to the employer's size, history and good faith. *See* 29 U.S.C. § 666(j). The CO testified that the gravity of this item was low, based on the probability of an accident occurring, and that the severity was lesser, based on the kinds of injuries that could have resulted. He also testified that D.R.B. received a 60 percent reduction, because of the small number of employees it had, but that no reduction for good faith or history was given in light of D.R.B.'s failure to abate the hazards and the fact that D.R.B. had had a serious violation within the previous three years. (Tr. 41-44). I find the proposed penalty of $750.00 appropriate. The proposed penalty is accordingly assessed.

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[15]*See* footnote 8, *supra,* for the CO's testimony about how Mr. Beyerl could have been struck by tools falling into the trench; in this regard, the CO testified about C-3 and C-4, his photos of Mr. Beyerl, and what they depicted.

[16]In affirming this item, I note that D.R.B. has not asserted any defenses in its brief in regard to any of the alleged violations, except for its assertion that it was not an employer and that Mr. Gannon did not work in the trench in the site.

Citation 1, Item 2

Item 2 alleges a violation of 29 C.F.R. 1926.651(b)(4), which provides that:

> While the excavation is open, underground installations shall be protected, supported or removed as necessary to safeguard employees.

The CO testified that the exposed water and gas lines in the trench, which were both operating under pressure, had not been protected or supported as required. The CO also testified that the lack of support or protection could have caused a line to break or rupture if, for example, a large rock had fallen on a line or an employee had stood on a line, as Mr. Gannon said he had; if the water line had ruptured, water could have filled the trench and caused a cave-in, and if the gas line had ruptured, a fire or explosion could have resulted. (Tr. 10, 44-47). Mr. Beyerl admitted he had not complied with the standard; he also admitted he had operated the boring machine "within a fraction of an inch" of the gas line and about a foot from the water line. Mr. Beyerl stated there was "no other way" of doing the job and that shoring up the lines was "just near impossible." (Tr. 95-96, 109-10).

The CO's testimony establishes, and Mr. Beyerl admitted, that there was a violation of the cited standard. Mr. Beyerl's unsupported statements that there was "no other way" to do the work and that it was "just near impossible" to shore up the lines do not constitute a defense. Moreover, Mr. Beyerl's admission that he was operating the boring machine "within a fraction of an inch" of the gas line and about a foot from the water line supports the CO's testimony that the lines could have ruptured or been broken. Finally, it is apparent that if either line had broken, serious injuries or death could have resulted. This item is affirmed as a serious violation.

The Secretary has proposed a penalty of $1,050.00 for this item. The CO testified the gravity of the violation was medium, due to the likelihood an accident would occur, and that the severity was greater, due to the types of injuries that could result. The CO further testified that the same reduction was given for size as in Item 1 and that no reduction for good faith or history was given. (Tr. 49-50). I conclude the proposed penalty is appropriate. A penalty of $1,050.00 is therefore assessed.

Citation 1, Item 4

This item alleges a violation of 29 C.F.R. 1926.651(j)(2), which provides as follows:

> 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 excavations....

In Item 1, I found that the CO's testimony demonstrated that there were tools and piles of excavated soil along the edges of the trench, that he saw loose rocks and soil from the piles fall into the trench, due to the vibration of the boring machine, and that the rocks and soil or tools could have struck Mr. Beyerl or Mr. Gannon in the head and caused serious injuries.[17] I further found that Mr. Beyerl's testimony about his inspections of the trench, and his working in the trench for 15 days without incident, did not rebut the CO's testimony. I conclude that the record establishes the alleged violation. Item 4 is affirmed as a serious violation.

The Secretary has proposed a penalty of $600.00 for this item. The CO testified that the gravity of the cited condition was low, due to the likelihood of an accident occurring, and that the severity was greater, due to the kinds of injuries that could have resulted. A reduction for size was given, but no reduction was given for good faith or history. (Tr. 52-53). I find that the proposed penalty is appropriate. A penalty of $600.00 is consequently assessed.

Citation 1, Item 5

Item 5 alleges a violation of 29 C.F.R. 1926.651(k)(2), which states that:

> Where the 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.

Item 2, *supra*, shows there were water and gas lines in the trench that were operating under pressure; the lines were not supported or protected as required and were subject to breaking or rupturing. Item 4, set out above, shows there were piles of excavated soil along the trench edges, that the piles were not set back 2 feet from the edges as required, and that loose rocks and soil from the piles were falling into the trench. Item 6, *infra*, shows that the walls of the trench were vertical and were not benched or sloped as required. All of these conditions exposed the two employees who were working in the trench to hazards that could have resulted in serious injury or death.

[17]The CO specifically testified that the materials should have been moved back at least 2 feet from the edges of the trench. (Tr. 51, 54).

The CO testified that there was no appropriate inspection of the trench by a competent person because of the hazards he saw in the trench and the fact that employees were allowed to work in the trench without the necessary precautions being taken. (Tr. 53-55). Mr. Beyerl, as noted above, testified he had 45 years of experience, that he visually inspected the trench daily for evidence of possible cave-ins, and that he worked in the trench for 15 days and there were no problems (such as cracks in the walls or loose soil) and no cave-ins. (Tr. 91, 111, 114-115, 119). However, the record plainly shows the conditions cited in Items 2, 4 and 6; it also shows the conditions could have caused serious injuries or death. Further, Mr. Beyerl has been found to be a less than reliable witness, and, even if he did inspect the trench, it is clear he chose to overlook the hazards and to continue working in the trench. Based on the record, there was no appropriate inspection of the trench and employees were not removed from the trench as required. This item is affirmed as a serious violation.

The Secretary has proposed a penalty of $1,050.00 for this item. The CO testified that the gravity of this item was medium, based on the likelihood of an accident occurring, and that the severity was greater, based on the types of injuries that could have resulted. D.R.B. received a reduction for size, but it received no reduction for good faith or history. (Tr. 56-57). I conclude that the proposed penalty is appropriate, and a penalty of $1,050.00 is accordingly assessed.

Citation 1, Item 6

Item 6 alleges a violation of 29 C.F.R. 1926.652(a)(1), which provides that:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) except when:
> (i) Excavations are made entirely in stable rock; or
> (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The CO's testimony, which I credit, was that the trench depth varied from 8 feet 9 inches to 9 feet 7 inches; he also testified that the walls of the trench were vertical and that, because the walls were not benched or sloped as required, the employees in the trench were exposed to the hazard of a cave-in.[18] (Tr. 15, 23, 50, 53-54, 57-58, 68-72,). Moreover, Mr. Beyerl conceded that the trench's

[18]The standard defines three soil types, that is, A, B and C. *See* Appendix A to the standard. The record indicates the soil in the cited trench was Type B, in that it was previously disturbed soil; it was also subject to vibration from the boring machine's operation. (Tr. 20-22, 54, 70, 117-18). *See also* Appendix A. The sloping and benching requirements for the soil types

depth was over 5 feet and that the trench was not made entirely in solid rock; rather, it was in a "shalish" material. (Tr. 94-95). Finally, it is clear that both Mr. Gannon and Mr. Beyerl were exposed to the danger of the trench walls collapsing.

In defense of this item, Mr. Beyerl testified that he could not bench or slope the trench walls; he said he only had room for a "little bit of a bench" on the left side and that benching the right side, where his excavator was sitting, would have weakened the bank and everything could have caved in. (Tr. 110, 114-15). The CO, however, testified that Mr. Beyerl could have sloped or benched the trench when he initially dug it; he also testified that the condition could have been corrected by the employees exiting the trench and an operator using a backhoe to bench the sides of the trench. (Tr. 70, 83-84). In weighing this conflicting testimony, I note that I have already found the CO to be a credible witness and Mr. Beyerl to be less than candid. I also note the CO's many years' experience in industrial safety and his many construction site inspections, at least 300 of which have involved trenching. Finally, I note that D.R.B. has not raised the defenses of infeasibility of compliance or greater hazard in its brief, and that, in any case, the record does not support these defenses.[19] I find that the Secretary has established the alleged violation. Item 6 is affirmed as a serious violation.

The Secretary has proposed a penalty of $1,500.00. The CO testified that the gravity of the violation was high, due to the probability of an accident occurring, and that the severity was greater, due to the types of injuries that could have resulted. D.R.B. was given a reduction for size, but no reduction for good faith or history was given. (Tr. 58-59). I find the proposed penalty appropriate, and a penalty of $1,500.00 is therefore assessed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.95(a), is affirmed, and a penalty of $750.00 is assessed.

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are in Appendix B to the standard.

[19]I agree with the Secretary that, based upon the relevant case law and the facts of this case, D.R.B. has not met its burden of demonstrating either of these affirmative defenses. *See* Secretary's brief, pp. 27-31

2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.651(b)(4), is affirmed, and a penalty of $1,050.00 is assessed.

3. Item 3 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.651(g)(1)(i), is vacated.

4. Item 4 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.651(j)(2), is affirmed, and a penalty of $600.00 is assessed.

5. Item 5 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.651(k)(2), is affirmed, and a penalty of $1,050.00 is assessed.

6. Item 6 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.652(a)(1), is affirmed, and a penalty of $1,500.00 is assessed.

/s/

William C. Cregar
Judge, OSHRC

Dated: December 29, 2005
Washington, D.C.