



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. 06-0834

J.E. AMORELLO, INC.

Respondents.

APPEARANCES:

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For the Department of Labor

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For the Employer

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

Procedural History

This proceeding 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”). On April 6, 2006, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of J.E. Amorello’s (“respondent”) work site near 166-177 Southwest Cutoff in Worcester, Massachusetts where it was engaged in installing a

new water line service. As a result of that inspection, OSHA issued to respondent two citations. Citation 1 alleged a serious violation of 29 C.F.R §1926.651(c)(2) for failure to provide an adequate means of egress for a trench. A penalty of \$625.00 was proposed for the violation. Citation 2 alleged a repeat violation of 29 C.F.R. §1926.652(a)(1) for failure to provide adequate protection against cave-ins for employees working in a trench measured over 5 feet deep A penalty of \$5600 was proposed for this violation. Respondent timely contested the citations and an administrative hearing was held on March 6, 2007 in Worcester, Massachusetts. Both parties have filed post-hearing briefs.

Having considered the evidence and the arguments of the parties, I affirm the citations as issued by the Secretary and assess the proposed penalties.

The OSHA Inspection

On the morning of April 6, 2006, four OSHA officials, compliance officers Lance Berry, Michael Grover, Ameer Patel, and assistant area director Maria-Lisa Abundo were on their way to a seminar when they stopped at a Dunkin' Donuts for coffee. (Tr. 11-12) As they pulled into the parking lot, Mr. Berry noticed that construction was going on by a nearby car wash. Under the National Emphasis Program on Trenching and Excavations, compliance officers are directed to inspect every trench. Therefore, as the other compliance officers went for coffee, Mr. Berry walked over to an open trench. (Tr. 13) As he neared the trench, he noticed that there were two men inside. The trench walls were vertical and there was no trench box on the site. (Tr. 16, 31) The employees were tying a three-inch copper water line into an existing line to service the car wash. The trench was approximately 10 feet from Route 20. (Tr. 16)

Upon the request of Mr. Berry, the two employees exited the trench. (Tr. 26) One of the employees identified himself as Kevin Sherry, the foreman. The compliance officer asked Mr. Sherry if he was the "competent person"¹ on the site. The foreman replied that he was not. Mr. Berry then asked Mr. Sherry to contact the "competent person" at which time the foreman placed a phone call. (Tr. 28) When asked, the foreman responded that he did not know the depth of the trench. (Tr. 28) Mr. Berry measured the depth at 5 feet, 4 inches. (Tr. 30, 34).

¹ Under 29 C.F.R. §1926.650, a "competent person" is a person "who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

A truck pulled up carrying John Amorello and his son Edward. Edward Amorello identified himself as the “competent person” and told the compliance officer that the trench was only 4 feet 10 inches deep. (Tr. 33-34) After discussing the depth of the trench and the classification of the soil, Ed Amorello excitedly asked the compliance officer “are you going to cite me for 4 inches.” (Tr. 37, 136, 213) He ordered his employees not to talk to Mr. Berry and directed them to leave the site. (Tr. 39, 138, 175) Mr. Amorello claimed harassment (Tr. 114) and informed the compliance officer that he recently had a relative killed in a trench accident and knew about trench safety. (Tr. 115). Discussion between the men became heated. (Tr. 40) While waiting by the car, Assistant area director Abundo noticed the situation was escalating and feared physical violence. (Tr. 108-109) She stepped into the group to try and deescalate the situation (Tr. 109). The OSHA officials told the Amorellos that a citation would issue from the Springfield office² and Edward Amorello told them that he would see them in court. (Tr. 115) The OSHA officials then left the site.

After their seminar, the compliance officers returned to the site. They found the trench closed and a trench box on the site. They considered the hazard abated. (Tr. 117, 118)

Testimony

Lance Justin Berry

Lance Berry has been an OSHA compliance officer for 5 years. During that time he has conducted 347 inspections, 100 of which were trenches. (Tr. 8)

The compliance officer testified that the soil was Type “C,” and was comprised of loose granular fill. (Tr. 20). He testified that there were larger rocks in the soil, that it was sandy and that there was evidence of it having been previously disturbed. (Tr. 19-20) He noted that the trench was in close proximity to Route 20, that there was pavement adjacent to the trench, and that the land had recently been cleared and worked on to build the Dunkin’ Donuts and a nearby car wash. (Tr. 20)

There was no ladder inside the trench. (Tr. 27) There was a ramp on one end of the trench. (Tr. 27) However, the compliance officer testified that a backhoe was positioned across the trench, between the ramp and the employees, barring access to the ramp. (Tr. 19, 27) Mr. Berry

² These OSHA officials were from the Braintree office and this site was in the Springfield territory. (Tr. 116)

testified that after taking pictures, he asked the two men to exit the trench, which they did by putting their hands on the side of the trench and climbing out. (Tr, 27) He testified that, if the men wanted to get to the ramp, they would have had to tunnel underneath the backhoe or jump out of the trench and run around the backhoe. (Tr. 92) One of the men, Kevin Sherry, identified himself as the foreman, but denied that he was the “competent person” at the site. The compliance officer asked Mr. Sherry to summon the “competent person” to the site. (Tr. 26-28) Compliance officer Berry testified that he measured the trench and determined it to be 5 feet, 4 inches deep. (Tr. 30)

Shortly, John Amorello and his son, Edward arrived at the site. (Tr. 33-34) Edward Amorello identified himself as the “competent person” at the site. (Tr. 34) Mr. Berry testified that when asked about the depth of the trench, Edward Amorello stated that “I guess it to be 4’10”. (Tr. 34) Mr. Berry informed Mr. Amorello that he had measured the trench at 5 feet, 4 inches deep. (Tr. 34-35). Mr. Amorello told him that he was wrong (Tr. 35) According to Mr. Berry, he then walked over to a spot approximately eight feet further back from the initial point where Mr. Sherry was working and, using a steel tape, took a second measurement. Again, he measured the depth of the trench at 5 feet, 4 inches and asked Edward Amorello to verify the measurement. (Tr. 36) The compliance officer further testified that when asked about the classification of the soil, Edward Amorello told him that it was Type “C.” (Tr. 34-35, 37, 74)

Mr. Berry testified that the situation “had reached the point where it was getting a little heated.” (Tr. 40) At this point, Ms. Abundo had joined the conversation. (Tr. 40) Believing that the situation was becoming combative, ended the matter by holding a closing conference with the Amorellos where he explained their rights and told them that they had the right to contest any possible citations. (Tr. 40) The compliance officers then entered their cars and went to their scheduled seminar. (Tr. 40)

The compliance officer stated that, in his opinion, the violations were serious. (Tr. 45) Regarding the alleged lack of proper egress, he noted that the availability of an immediate form of egress is vital in the event of a cave-in because cave-ins give no prior warning. (Tr. 46) He testified that an employee caught in a cave-in could get trapped in the collapsing soil, resulting in death or serious injury. (Tr. 46) Similarly, Mr. Berry considered the failure to provide a trench box to be serious because, if the trench collapsed, the weight of the soil could cause serious injury

or death. (Tr. 48) Mr. Berry stated that he was particularly concerned by the classification of the soil, the close proximity to the heavily traveled Route 20, the depth of the trench, the lack of protective cave-in measures, the vertical side walls, and the lack of a means of egress. (Tr. 49)

On cross-examination, Mr. Berry testified that the ramp was not depicted in any of his photos because the view was blocked by the “tractor” (Tr. 61-62) He stated that he did not take a specific picture of the ramp because, in his view, it was unimportant. (Tr. 63) Similarly, he testified that it was not important to take a picture of the measuring tape in the trench. (Tr. 63, 66-67) The compliance officer stated that, besides experience, there were several tests available to determine the classification of soil. He admitted that he did not use any of those tests in determining that the soil was Type “C.” (Tr. 74-76)

On redirect, Mr. Berry clarified that it was not important to take a picture of the ramp because you couldn’t get to it. (Tr. 92) He also stated that he did not take a photo of the measuring tape inside the trench because Mr. Sherry witnessed the first measurement, while the second measurement was observed by both Edward Amorello and Mike Grover. (Tr. 93-94) He also testified that he could have taken a photo of himself holding the tape “with some difficulty.” (Tr. 93)

Maria-Lisa Abundo

Maria-Lisa Abundo is an OSHA assistant area director (AAD). Her job requires her to supervise a team of compliance officers, assign and review cases, attend informal conferences and settle cases. (Tr. 103) She has been with OSHA since 1994, and has been an AAD since 2003. (Tr. 103) She has conducted approximately 200 inspections, two of which involved trenches. (Tr. 104) This was her third trench inspection. (Tr. 103)

Ms. Abundo testified that, in response to Mr. Berry’s question, Edward Amorello replied that the soil was Type “C.” (Tr. 109) Ms. Abundo asked Edward Amorello what Type “C” meant, and he replied that there was a trench box on the site that broke, and that it was taken away to get fixed. (Tr. 110) Ms. Abundo also recalled hearing Mr. Berry repeat that the trench was 5’ 4” (Tr. 110) However, she never actually observed any of the measurements being made. (Tr. 131) Ms. Abundo testified that she received Edward Amorello’s assurance that no employees enter the trench until protection was provided. (Tr. 118, 129)

They then held a brief closing conference, after which the compliance officers drove off to their seminar. (Tr. 116) At the seminar, Ms. Abundo ran into Mary Hoye, the area director of the Springfield territory to tell her that they conducted an inspection in her jurisdiction. (Tr. 117) According to Ms. Abundo, after the seminar, they returned to the site to find a trench box on location and the trench closed. (Tr. 117-118, 130) She then talked to her area director and wrote down her notes. A history search was done where they learned that Amorello had prior inspections. She took her notes, bundled them with Mr. Berry's notes and sent them to the Springfield office. (Tr. 119)

Michael Grover

Michael Grover testified that he had been a compliance officer for only 2.5 weeks at the time of the inspection. Prior to that, he had been in the construction field for 15 years, including five years active duty in the United States Army Corps of Engineers. (Tr. 134)

Mr. Grover saw Mr. Berry measure the trench. He testified that, to his knowledge, this was the only measurement taken. (Tr. 138) Mr. Grover stated that he was going to interview employees when he heard Edward Amorello direct employees not to speak to Mr. Berry. (Tr. 138)

Mary Gayle

Mary Gayle is the compliance officer in the Springfield office who received the package of material from compliance officer Berry. (Tr. 142-144) She testified that Mr. Berry did not provide any formal narrative, but sent in his narrative in an email. (Tr. 144) Ms. Gayle testified that, upon receipt of the materials, she cut and pasted it into the official narrative that goes into the case file. (Tr. 144) She wrote up the citation and had it signed by the area director. (T. 145) Ms. Gayle testified that following procedure, she researched the company's history back three years and found that it was previously cited in August 2005 for failing to shore or use a trench box in a trench, in violation of §1926.652. Coincidentally, she was the compliance officer in that case. (Tr. 147) That case was settled at an informal conference at the area office level. (tr. 148-149) Based on this information, Ms. Gayle testified that she recommended that the company be cited for a repeat violation of §1926.652(a)(1). (Tr. 150)

Ms. Gayle stated that when determining the proposed penalty for the §1926.652(a)(1) violation, she considered that the violation was repeated, the serious nature of the violation and its gravity. (Tr. 150) Ms. Gayle testified that she found the violation to be of high gravity because the soil was Type “C” which is gravely and has a tendency to crumble. Because this was a repeated violation, no reduction was given for history or good faith. However, a reduction was given for the small size of the company. (Tr. 152) After all adjustments, the final proposed penalty was \$5600.

The repeated multiplier was not used on the egress violation because they had not previously been cited for this violation. (Tr. 152) However, Ms. Gayle testified that, because of the previous violation, no credit could be given for history. Credit was also given on this citation for good faith and for the company’s small size. She considered the gravity of the violation to be “higher-lesser” meaning that if the trench failed, employees could die, however, there was a lower probability of injury because the trench was only 25 feet long, and in the even of a cave-in might have an opportunity to get out. (Tr. 155) The base penalty was reduced 60% for history and 15% for good faith, resulting in a final penalty of \$625. (Tr. 155)

Dan Osis

Dan Osis, an employee of J.E. Amorello, was respondent’s first witness. Mr. Osis testified that on April 6, 2006, he was working on Route 20 in Worcester, Massachusetts, trenching for a water line. (Tr. 167) This was their second day on the job. (Tr. 168). According to Mr. Osis, the job entailed digging a trench approximately 4 feet deep for relocation of a water service. (Tr. 168) Mr. Osis stated that, when OSHA showed up, he was in the trench with Kevin Sherry. Mr. Sherry bent over, making a connection and he was observing. He could not remember if anyone else from the company was at the site at the time. (Tr. 169) When the compliance officer showed up, he asked them what they were doing. (Tr. 169-170) He could not remember if the compliance officer asked them to exit the trench. (Tr. 170) On direct examination, he recalled that he and Mr. Sherry exited the trench by walking up to the end of the trench to a ramp that he built and exiting. (Tr. 170) However, on cross-examination, Mr. Osis could not recall if he climbed out the sides of the trench when asked to exit by the compliance officer. (Tr. 189) Mr. Osis testified that the ramp

was provided to make for easy access in tight quarters and is something he has done for 20 years. (Tr. 170)

Mr. Osis recalled observing Mr. Berry taking a measurement from the end of the trench that they had already back filled to where the water line was located. (Tr. 173) He recalled Mr. Berry “fumbling” with a tape measure, but could not recall the measurement. (Tr. 175) He estimated that the inspection took five minutes. (T. 176) On cross-examination, Mr. Osis testified that he estimated the trench to be 4 feet deep, but never measured it. (Tr. 176-177)

Mr. Osis testified that they took their own measurements and that the depth of the trench was “exactly” 4 feet, 10 inches (Tr. 185) He also testified that the connection he was working on with Mr. Sherry was 12-15 feet from the ramp. (Tr. 186) He stated that M. Amorello “absolutely” measured the trench before the inspection. However, when told that Mr. Amorello stated that he didn’t measure the trench, he became flustered and stated that the trench is measured frequently and that he was not exactly sure when it was measured, but that it was measured during the day. (Tr. 190) He also testified that the trench was measured several times by Mr. Sherry, but couldn’t remember when that occurred. (Tr. 191)

Edward Charles Amorello

Edward Amorello testified that he is the treasurer of J.E. Amorello and runs the company for his 83 year old father, John Amorello, who is the owner and president of the company. (Tr. 196) The number of employees in the company varies, but averages about 10. (Tr. 197) The company headquarters is in Worcester, Massachusetts, only about 1/8 mile from the worksite at issue. (Tr. 198)

Mr. Amorello testified that the company belongs to the Utility Contractors Association of Massachusetts and the national organization. He stated that these organizations have put on different seminars over the years and that he has attended to their safety and training seminars, many of which are run by OSHA. (Tr. 199) He is licensed as a drain layer and as a sewer and water contractor. (Tr. 199)

Explaining the nature of the project in question, Mr. Amorello testified that he was hired by the Shore Management Oil Company to install a new 2-inch water service to their building. He testified that when contacted about the job, to help in his bid, he went down to the water

department to look up the records regarding the location of pipes and the depth of water lines. (Tr. 202) Also, when taking out the water installation permits, he learned that the line was only 4 feet 6 inches deep. (Tr. 204-205) He also learned that the water access boxes, which are a standard five feet high, were sticking out of the ground 6-12 inches. (Tr. 205-206) Upon my questioning the witness, Mr. Amorello testified that, when getting the permit for the work, he was provided with all the information of their records of the area. (Tr. 253)

Mr. Amorello further testified that, in connection with the initial trenching, he determined that the soil was Type “A,” composed of hardpan clay. (Tr. 207) He opined that if the soil were Types “B” or “C” the trench walls would not have been able to stand up vertically. That they held their vertical position confirmed to him that the soil was Type “A.” (Tr. 207)

Mr. Amorello testified that, when the inspection started, he told the compliance officer that he believed the trench to be no deeper than 4 feet 10 inches, but admitted that he had not personally measured the trench up to that time. (Tr. 246) He recalled the compliance officer telling him that the trench was 5 feet 2 inches deep³. He explained that the difference between the compliance officer’s measurement and his belief that the depth was 4 feet 10 inches was the basis for him saying that he was being cited over 4 inches. (Tr. 213) Mr. Amorello denied ever observing the compliance officer or any other OSHA official taking a measurement of the depth of the trench. (Tr. 215) After the inspection, he measured the depth of the trench as 4 feet 10 inches. (Tr. 218-221, Exhibits R(d) and R(e))

Discussion

Citation 1: alleged a serious violation of 29 C.F.R §1926.651(c)(2)⁴

The cited standard provides:

§1926.651 Specific excavation requirements.

* * *

(c) Access and egress

* * *

(2) Means of egress from trench excavations. A stairway, ladder, ramp or other

³ Mr. Amorello originally stated that the compliance officer told him the trench was 5 feet 4 inches deep. He later changed that to 5 feet 2 inches, explaining that he gave the other measurement since that what everybody else stated was the measured depth 5 feet 4 inches, his recollection was that the measurement was 5 feet 2 inches. (Tr. 213)

⁴ The citation states “177 Southwest Cutoff, Worcester, MA: A means of egress was not provided in a trench measuring 5 ft, 4 inches in depth.”

safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

The record clearly establishes that the trench was more than 4 feet in depth, that there was no ladder in the trench, and that there was a ramp located within 25 feet of the employees working within it. The dispute, however, revolves around whether Amorello's backhoe was placed in a manner that blocked employee access to the ramp, forcing them to exit by climbing up the sides of the trench.

Compliance officer Berry testified that the backhoe was positioned across the trench, between the ramp and the employees, barring employee access to the ramp. (Tr. 19, 27) When he asked the two employees to exit the trench, they had to put their hands on the side of the trench and climb out. (Tr. 27) On the other hand, Dan Osis, one of the two employees in the trench, testified that he and his foreman exited the trench by walking to the end of the trench and up the ramp. (Tr. 170) On cross examination, however, he stated "I don't recall" when asked whether he climbed over the sides of the trench. (Tr. 189) None of the other witnesses testified that they observed either Mr. Osis, or the foreman, Mr. Sherry, exit the trench. Photographs provided by the compliance officer are inconclusive. Exhibit C-2 shows the backhoe spanning the trench, but does not clearly depict whether it was located in a manner which rendered the ramp inaccessible.

The testimony of the compliance officer and Mr. Osis are in clear conflict. To resolve this conflict, I must consider the credibility of the witnesses. *C. Kaufman, Inc.* 6 BNA OSHC 1295, 1297 (No. 14249, 1978) I find the testimony of compliance officer Berry to be credible. Throughout the proceeding, his testimony was direct, certain and consistent. On the other hand, Mr. Osis's testimony was not credible. He was plagued with memory lapses that call into question the validity of his recollection. Despite his initial testimony that he exited the trench by walking up the ramp, he later stated that he couldn't recall whether he actually climbed up the walls. Moreover, Mr. Osis could not remember whether or not he exited the trench upon the compliance officer's request. (Tr. 170) He could not remember if, besides Mr. Sherry, anyone else from the company was with them when the inspection began. (Tr. 169) He also expressed substantial confusion regarding when Mr. Amorello or Mr. Sherry measured the depth of the trench. (Tr. 191)

Accordingly, I credit the testimony of compliance officer Berry and find that the employee passage to the ramp was blocked by the backhoe. Therefore, contrary to the requirements of the standard, a proper means of egress was not provided in violation of the cited standard.

To establish that an employer violated a standard, the Secretary must prove 1) the standard applies to the cited conditions; 2) the terms of the standard were violated; 3) one or more of the employer's employees had access to the cited conditions; and 4) the employer knew or with the exercise of reasonable diligence, could have known of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 2135 (No. 85-0531, 1991); *North Berry Concrete Corp.*, 13 BNA OSHC 2055, 2056 (No. 86-0163, 1989).

Respondent's foreman, Kevin Sherry was in the trench and knew or should have known that access to the ramp was barred by the backhoe. The foreman's knowledge is imputable to respondent. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-0369, 1991) Moreover, two employees were working in the trench and were exposed to the hazard. In the event of a trench collapse the failure to provide a proper method of exit for employees could result in death or serious physical injury.

The Secretary proposed a penalty of \$625.00 for the violation. Under section 17(j) of the Act, when assessing a penalty the Commission must "consider the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." As noted supra, compliance officer Mary Gayle testified that these factors were considered when proposing the penalty. (Tr. 115) Considering the statutory factors, I find the proposed penalty to be appropriate.

Citation 2- Repeat violation of 29 C.F.R. §1926.652(a)(1)⁵.

A

The cited standard states:

§1926.652 Requirements for protective systems.

(a) *Protection of employees in excavations.* (1) Each employee in an excavation

⁵ The citation states: "177 Southwest Cutoff, Worcester, MA: Employees were working in a trench measured at 5 ft, 4 inches without proper protection from cave-ins.

The citation also sets forth the basis for the repeat charge: "The J.E. Amorello, Inc. was previously cited for violation of this Occupational Safety and Health Standard, or its equivalent standard, CFR 1926.652(a)(1), which was contained in OSHA Inspection No. 308349323, Citation No.01, Item No. 0001, issued on 08/18/05."

shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

- (i) Excavations are made entirely in stable rock; or
- (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of potential cave-in.

The standard requires that all excavations be protected against cave in *except when* the excavation is either dug in stable rock or where the excavation is less than 5 feet in depth, “examination of the ground by a competent person provides no indication of a potential cave-in.”

Accordingly, if as alleged by the Secretary, the unshored, unsloped trench was over 5 feet in depth, the violation was established, regardless of the type of soil involved⁶.

Compliance officer Berry testified that he twice measured the trench, at different locations within the trench, as 5 feet 4 inches deep; once with Mr. Sherry and once with Mr. Amorello. (Tr. 30, 36) His testimony was supported by AAD Abundo. Although she did not actually witness the measurement, she recalled Mr. Berry tell the Amorellos that the trench was 5 feet 4 inches deep. (Tr. 110) On the other hand, Edward Amorello testified that he believed the trench to be only 4 feet 10 inches deep. (Tr. 213) Although he did not measure the trench before the inspection (Tr. 246), he testified that measurements taken after the inspection confirmed that the trench was under 5 feet in depth. (Tr. 221).

Edward Amorello testified that, even without taking measurements, he knew that the trench was under 5 feet deep because city records he reviewed when getting his permits showed that the pipe they had to expose was only 4 feet 6 inches deep and it is not the practice to dig deeper than the “main.” (Tr. 204-205, 229) He also testified that the water access boxes, which are a standard five feet high, were sticking out of the ground 6-12 inches. (Tr. 205-206). Respondent also introduced exhibits R(d) and R(e) which show a tape measure inserted into the trench and purport to demonstrate that the depth of the trench was less than 5 feet.

Finally, employee Dan Osis could not remember the results of the measurements taken by the compliance officer. (Tr. 173, 175) However, he testified that while he couldn’t recall when the measurement was made, his own measurement showed the trench to be only 4 feet 10 inches in depth. (Tr. 185)

⁶ It is not disputed that the trench was not dug in stable rock.

I find the testimony of compliance officer Berry to be the more credible than the testimony of Edward Amorello. As noted *supra*, his testimony was clear, direct, certain, consistent, and supported by the testimony of other witnesses. Mr. Amorello's testimony was problematical. He remembered Mr. Berry telling him that the trench was 5 feet 2 inches deep, directly contradicting both Mr. Berry and Ms. Abundo, both of whom testified that Mr. Berry told him that the trench being measured at 5 feet 4 inches⁷. Moreover, while Mr. Berry testified that he actually asked Mr. Amorello to verify his measurement (Tr. 36), Mr. Amorello denied even witnessing Mr. Berry measure the trench. (Tr. 215). This testimony was contradicted by compliance officer Grover who heard Mr. Berry ask Mr. Amorello to recite the tape measurement (Tr. 135-136), and by Mr. Osis who, after Mr. Amorello arrived, saw Mr. Berry take a measurement with three other people close around him. (Tr. 175-176)

The photos introduced by respondent to establish the depth of the trench are inconclusive. On photo exhibit R(d), the numbers on the tape measure are indiscernible. On photo exhibit R(e), the five foot mark is visible and marked on the tape measure as is the 4 foot 10 inch mark, which purports to show where the tape measure reaches the top of the trench. The problem is that the bottom of the tape measure is not visible. Therefore, it is impossible to see whether the tape measure is sitting on the lowest level of the trench, or on a bump or rock on the trench bottom.

Also, Mr. Amorello's assumption that the trench was 4 feet 10 inches deep was predicated on Worcester, Massachusetts city records that, allegedly, indicated that the existing water pipes were 4 feet 6 inches below ground. Since it is not normal practice to dig below the exposed pipes, Mr. Amorello assumed that the trench was only 4 feet 10 inches deep. (Tr. 228-229). Although respondent relies heavily on the Worcester records to establish that the water lines were only 4 feet 6 inches deep, those records were never introduced into the record or produced pursuant to the Secretary's Subpoena Duces Tecum, even though Mr. Amorello testified that he was given copies of these city records when he received his permits. (Tr. 253).

In sum, what we have in contradiction of Mr. Berry's measurements is testimony by Mr. Amorello which was contradicted by other witnesses, including his own employee; fuzzy and

⁷ He explained that his belief that the trench was 4 foot 10 inches constituted the basis for his insistence that he was "being cited for 4 inches." In either event, Amorello did concede that the compliance officer claimed to have measured the depth of the trench at over 5 feet.

inconclusive photographs and a reliance on records that respondent failed to produce even though it was subpoenaed. On this record, I credit the testimony of Mr. Berry over that of Mr. Amorello and find that the trench was 5 feet 4 inches deep. At that depth, respondent was required to provide cave-in protection unless it was dug in rock. It is undisputed that the trench was (1) not dug in rock and (2) neither sloped, shored, or otherwise protected against collapse. As noted with citation 1, Amorello had, at a minimum, imputed knowledge of the violation through its foreman and both the foreman and another worker were in the trench and, therefore, exposed to the serious hazard of trench collapse. Accordingly, the violation was established.

B

Assuming *arguendo* that the trench was not 5 feet deep, the Secretary still established a violation of the cited standard. As noted *supra*, a trench under 5 feet deep must still be protected unless it is dug in stable rock or “examination of the ground by a competent person provides no indication of potential cave-in.” It is respondent’s position that there was no potential for cave-in because the trench was dug in Type “A” soil.

Edward Amorello identified himself as the “competent person” at the jobsite. (Tr. 33-34) At the hearing, Mr. Amorello testified that the trench was dug in hardpan clay soil that qualified as Type “A.” (Tr. 207) He stated that he determined the classification of the soil by clenching it in his hands and squeezing it into a ball. That the soil stayed together in a compressed form demonstrated that it was Type “A.” (Tr. 232) He also testified that the fact that the trench walls held their vertical position confirmed that the soil was Type “A.” (Tr. 208) According to Mr. Amorello, a Worcester city inspector was on the site twice and confirmed that the soil was clay. (Tr. 208) However, respondent neither called this inspector to testify nor produced any documentation to support its assertion. Mr. Amorello’s testimony was contradicted by the compliance officers. Compliance officer Berry testified that the trench was comprised of loose granular fill. He stated that there were large rocks in the soil, and that the soil was sandy (Tr. 19-20) Moreover, both Mr. Barry and Ms. Abundo testified that when he asked Mr. Amorello about the soil classification, he replied that it was type “C.” (Tr. 34-35, 37, 74, 109)

Appendix A to Subpart P of Part 1926-Soil Classification states in pertinent part that no soil is Type A if *inter alia*: “The soil is subject to vibration from heavy traffic, pile driving or

similar effects” or “The soil has been previously disturbed.” Although the trench was located approximately 10 feet away from Route 20 (Tr. 16), Mr. Amorello downplayed the vibrations the trench was subject to from the road. Although he admitted that the traffic was heavy on Route 20 during the morning rush hour, he asserted that it was not heavily traveled during the day. (Tr. 239) Moreover, he testified that when they began work on the day of the inspection, the traffic had already abated. (Tr. 239) Nonetheless, he admitted that large trucks sometimes travel Route 20 and that such trucks can create a lot of vibration. (Tr. 239)

Mr. Amorello also testified that the trench was dug in previously undisturbed soil. (Tr. 240) He stated that they tapped into the old water main on the previous day and that, at the time of the inspection they were connecting to new pipe that was being laid in the trench. (Tr. 241) He also testified that the trench was originally covered by pavement, but stated that the pavement disturbed only the top six inches to one foot of soil. (Tr. 242)

On the other hand, Mr. Berry noticed that there was pavement adjacent to the trench, and that the land had recently been cleared and worked on to build the Dunkin’ Donuts and a nearby car wash and that there was evidence of the soil having been previously disturbed. (Tr. 19-20) The compliance officer further testified that he was concerned about the close proximity of the trench to Route 20. Mr. Berry described Route 20 as a “heavily traveled” two lane road, lined by many businesses, with truck and other vehicular traffic. (Tr. 17, 20, 49)

I find that the evidence establishes that the soil in the trench was Type “C.” First, I note that the standard requires that all trenches be protected against cave-in, *except when* the excavation is either dug in stable rock or, where the excavation is less than 5 feet in depth, “examination of the ground by a competent person provides no indication of a potential cave-in.” Explicitly written as an exception to the standard, respondent has the burden of establishing either that the excavation was dug in stable rock or that there was no indication of a potential cave-in. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522 (No. 90-2866, 1993).

As with his testimony regarding the depth of the trench, I find Edward Amorello’s recollection regarding the classification of the soil to be noncredible. Though he claims to have told the compliance officers that the soil was Type “A” the recollections of both Mr. Berry and Ms. Abundo establish that Mr. Amorello told Mr. Berry that the soil was Type “C.” This recollection was consistent with the compliance officer’s own inspection of the soil which

indicated that it was properly classified as type “C.” It is also consistent with the photos placed in evidence, all of which show substantial amounts of rock and loose material in the trench walls⁸.

I also find that the record fails to demonstrate that the soil was undisturbed. Although the trench contained new pipe (respondent having attached the new pipe to the old water main on the first day of the job in a section of the trench now closed), the trench was dug in a heavily developed area, with substantial new construction, covered by pavement, and only 10 feet from a heavily traveled road.

Finally, the evidence clearly establishes that the trench was subject to substantial vibrations from autos and from heavy trucks driving along Route 20. Respondent seeks to minimize the importance of this evidence by alleging that the traffic was heavy only during the morning rush hour and that, at the time of the inspection, traffic had abated. This is a distinction without substance. While, as one would suspect, traffic lightens after rush hour, the evidence still demonstrates that the trench remained subject to vibrations throughout the day. Furthermore, the inspection began at approximately 9:30 a.m. (Tr. 104), shortly after the morning rush hour would have ended. By this time, the trench was opened and two employees were working within. It is likely, therefore, that the trench was opened during the rush hour where it was subject to the greatest vibration. This could have weakened the trench and sent forces into motion which could have led to a later trench collapse. I note that nothing in the *Appendix A to Subpart P of Part 1926-Soil Classification* suggests either that soil may be classified as Type “A” if it is subject to only periodic vibration or that it is not considered Type “A” only when immediately subject to vibration. I am also not impressed by Mr. Amorello’s conclusion that the fact that the trench walls maintained a vertical orientation establishes that the soil was Type “A.” First, I note that the trench had just been recently opened. Second, suffice it to say that all trenches retain their desired orientation—until they collapse.

Accordingly, I find that the evidence demonstrates that the excavation was dug in Type “C” soil and that, even if less than 5 feet in depth, was required to be protected against the possibility of cave-in.

⁸ Mr. Amorello testified that the city inspector agreed with him that the soil was clay. However, as with his testimony regarding the city records, respondent produced neither witnesses or documents to corroborate his recollections. Moreover, even if as Mr. Amorello testified, the Worcester city inspector told him that the soil was clay, that alone is not sufficient to establish that the soil was Type “A” since clay soil may not qualify as Type “A” if

C

The record establishes that the violation was serious. As with the failure to have an accessible means of exit, had employees been caught in a trench collapse, the result could have been death or serious physical harm.

The record also establishes that respondent was cited for a violation of the same standard in August 2005. Accordingly, the violation is properly classified as repeated.

The Secretary proposed a penalty of \$5600 for this repeated violation. Compliance officer Mary Gayle testified that in determining this proposed penalty, she considered the seriousness and gravity of the violation. (Tr. 150) She determined the violation to be of high gravity because the soil was Type "C" which has a tendency to crumble. (Tr. 151) The compliance officer arrived at an unadjusted penalty of \$7000, which was doubled because this was a first time repeat violation. (Tr. 151) From \$14,000 penalty, a 60% deduction was given for respondent's small size. Because this was a repeat violation, no reduction was given for history or good faith. (Tr. 152) After all adjustments, she arrived at a penalty of \$5600. Considering the statutory factors set forth at section 17(j) of the Act, I find this proposed penalty to be appropriate.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, item 1 alleging a serious violation of 29 C.F.R. §1926.651(c)(2) is AFFIRMED and a penalty of \$625 is ASSESSED. It is further ORDERED that Citation 2 item 1 for a Repeat serious violation of 29 C.F.R. §1926.652(a)(1) is AFFIRMED and a penalty of \$5600 is ASSESSED.

/s/

G. MARVIN BOBER
Judge, OSHRC

Dated: August 30, 2007
Washington, D.C.