SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket Nos. 97-0353 & 97-0462
HONEY CREEK CONTRACTING COMPANY,	:	
Respondent.	:	

ORDER

The Respondent filed a petition for discretionary review in the above-captioned cases on February 24, 1998, and the cases were directed for review on March 6, 1998. The Commission issued a briefing notice on April 20, 1998, after which the Respondent was required to file a brief or a letter in lieu of a brief within 40 days of the briefing notice under the provisions of Commission Rule 93(a) and (b), 29 C.F.R. ' 2200.93(a) and (b). The Respondent failed to respond to the briefing notice, and the Secretary subsequently filed a motion to vacate the direction for review. The Respondent did not respond to the motion either.

Commission Rule 93(d), 29 C.F.R. ' 2200.93(d), provides that if a party fails to respond to a briefing notice the Commission may vacate the direction for review. In view of the

Respondent=s failure to respond to the briefing notice or the Secretary=s motion, we vacate the direction for review. The administrative law judge=s decision is a final order.

So ordered.

Date: November 16, 1998

/Signed/

Stuart E. Weisberg, Chairman

/Signed/

Thomasina V. Rogers, Commissioner

97-0353
97-0462

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Counsel for Regional Trial Litigation
Peter J. Vassalo, Attorney
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Richard N. Selby, Attorney
Henderson, Covington, Messenger,
Newman & Thomas Co., L.P.A.
34 Federal Plaza W.
600 Wick Building
Youngstown, OH 44503-1473

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v. Docket No. 97-0353

HONEY CREEK CONTRACTING COMPANY, INC.,

Respondent.

Appearances: Mark V.Swirsky, Esq.
Office of the solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For Complainant

Richard N. Selby, Esq.
Henderson, Covington, Messenger, Newman & Thomas, Co., LPA
Youngstown, Ohio
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. ' ' 651 - 678 (1970) ("the Act").

Having had its worksite inspected three times by a Compliance Officer of the Occupational

Safety and Health Administration, Honey Creek Construction Company, ("Respondent")(AHoney Creek@) was issued citations on January 28, 1997 (Docket No. 97-0353) and February 25, 1997 (Docket No. 97-0462), alleging serious and willful violations of the Act relating to its excavating operations in Homer City, Pennsylvania.

Respondent timely contested both citations. Following the filing of complaints and answers and pursuant to a notice of hearing, the cases came on to be heard in Pittsburgh, Pennsylvania. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

As a preliminary matter, Respondent=s claim that the inspections were invalid either because the inspection was an invalid search or because the Compliance Officer saw and cited violative conditions prior to presenting her identification, are rejected. The worksite, while spread out over a considerable area, was nonetheless in a location from which the public was not barred. [1] Moreover, in approaching Respondent=s work areas, the excavations were in plain sight of all who passed by either by car or by entering or leaving the residential neighborhood. There was no reasonable expectation of privacy in conducting excavating, pipe laying and backfilling operations in the middle of the streets of a municipality. Nor did Respondent show any prejudice which might have resulted from the Compliance Officer=s observation of violative conditions prior to contacting Respondent=s representative at the site.

Jurisdiction

Complainant alleges and Respondent does not deny that it is a construction contractor specializing in excavation work. It is undisputed that at the time of these inspections Respondent was engaged in installing sewer lines in Homer City, Pennsylvania. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning

..... Page Three

[1] The contrary testimony of another individual is rejected for the reasons given later in this opinion regarding his general credibility.

of ' 3(5) of the Act.[2] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Citation 1 Item 1a
29 C.F.R. ' 1926.21(b)(2)

Item 1(a) alleges that Respondent failed to instruct its employees in the recognition and avoidance of hazards.[3]

The Secretary=s case is built primarily on the Compliance Officer=s testimony that the conditions she believed to be violations of various standards existed at the worksite and that some of those conditions or actions occurred in the presence of supervisors. (Sec. Brief, Pp. 9 - 11). The Secretary=s claim that Athere is no evidence that the employer did anything to instruct its employees how to recognize and avoid such conditions@ places the shoe on the wrong foot. It is the Secretary=s burden to show that there was a lack of training or that the training provided was insufficient. The mere existence of violative conditions at a worksite is, by itself, insufficient to show that employees were not trained properly. See, *Daniel A. Mickelsen,* No. 96-1788, 1997 (ALJ). Thus, where the record is silent at to what, if any, training was afforded the employees, the Secretary=s allegation of a violation of this standard must fail because the Secretary has not fulfilled her burden of proof. The Secretary=s further claim that Respondent=s employees had been interviewed and Anone indicated that they had been trained....@ (Sec. brief, p. 10) is insufficient evidence to carry the Secretary=s burden of proof. A more careful examination of the sole transcript reference to interviewing employees regarding the training they received (Tr. 247-48) gives cause to find the statement

[2] Title 29 U.S.C. ' 652(5).

[3] The cited standard, 29 C.F.R. ' 1926.21 (b)(2), provides:

> (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

unreliable and not particularly probative of the proposition that Respondent=s employees were insufficiently trained. The Compliance Officer claimed to have interviewed only three out of approximately 19 employees at the site, hardly a fair representation upon which to base a conclusion that employees were not properly trained. Further, and more importantly, the above testimony does not show the existence of the violation by a preponderance of the evidence which is the burden the Secretary must fulfill to sustain the allegation. The Compliance Officer=s description of her conversation with the three employees lacks any detail whatsoever. It tells virtually nothing about the nature of their training or why that training was inadequate. None of the employees Ainterviewed@ were called as witnesses. Broad, sweeping factual claims, such as those made by the Compliance Officer here, are not relevant evidence, they remain simply factual allegations. Accordingly, Citation 1, Item 1a is VACATED.

Citation 1, Item 1b
29 C.F.R. ' 1926.20(b)(2)

It is alleged that Respondent failed to comply with the cited standard because employees who were admittedly qualified and designated to serve as Acompetent persons@ Afailed to note and deal with clear and significant safety hazards.@[4] Once again, as with item 1a, the Secretary=s theory of the violation is that hazards existed therefore the standard was violated. The theory is rejected. First, it is noted that the citation, parroting the wording of the standard, charges Respondent with failing to initiate a program providing for frequent and regular inspections by a competent person. In her post-hearing brief, the Secretary concedes that there were designated competent persons on the site (Brief, p. 11) but now claims that the Aregulation=s requirement of frequent and regular inspections implies inspections that are meaningful and identify serious hazards that are obvious....@ (*Id.*) The standard is clear and unambiguous and Aimplies@ no such thing. As a standard which deals with requiring employers to have safety programs as part of the AGeneral safety and health provisions,@ it requires the formulation of an employee safety program and identifies requirements

[4] The cited standard requires that an employer Ainitiate and maintain@ a safety program which, *inter alia*, provides for Afrequent and regular inspections...to be made by competent persons designated by the employer.@

of an acceptable program, no more and no less.

Lastly, even if the Secretary=s interpretation were to be applied here, Complainant failed to offer specific evidence as to the frequency or nature of the inspections conducted by Respondent=s personnel or the degree of competence of the Acompetent persons.@[5] Thus, there is no record on which a finding of inadequate inspection or incompetence of inspecting personnel could be made. The item is VACATED.

Citation 1, Items 2 and 4.
29 C.F.R. ' ' 1926.416(a)(1) and 1926.651(d).

These items were withdrawn by the Secretary at the hearing. (Tr. 5, 182)

Citation 1, Item 3
29 C.F.R. 1926.651(b)(3)

This alleged violation charges that Respondent failed to use appropriate methods to identify and locate underground installations in the areas in which it was excavating.[6]

Complainant maintains that the record shows Amany incidents@ in which Respondent, in the course of excavating, Astruck and damaged@ underground utility lines including water, telephone and natural gas lines. (Brief, p. 12).

Mr. David Sugar, the operator of David Sugar, Inc., an excavation contractor which had been declared bankrupt and the father of Dave Sugar, Jr., the principal of Honey Creek Contracting, testified that he was at the site perhaps ten percent of the time but never ran the day-to-day operations at the site (Tr. 418). He expressed familiarity with the APA1 Call System.@ Under the system, the utility marks its lines at a construction site. When a line is broken during the course of construction, a contractor settles disputes with the utility regarding responsibility for line breakages Page Six If the broken line had been marked correctly by the owner utility, the contractor would have to

[5] The Secretary conceded that the persons designated are Acompetent.@

[6] The cited standard, 29 C.F.R. ' 1926.651(b)(3), provides;

> (3) When excavation operations approach the estimated location of underground installations, the exact location of the installations shall be determined by safe and acceptable means.

assume the cost of repairing broken lines while if mis-marked, the utility would pay. (Tr. 422-23). While claiming ignorance as to the dates of the incidents, Mr. Sugar indicated that there were gas lines broken for which the responsibility was laid on Respondent. (*Id.*)

The Secretary=s rationale in support of this alleged violation demonstrates a basic misunderstanding of the facts. In her post-hearing brief, the Secretary states A[c]learly, when a sewer contractor breaks a water main and is held responsible by the water company, it has failed to determine the exact location of the water line by safe and acceptable means.@ (Brief, p. 12). This statement supposes that it is the contractor who marked the locations of the lines. The supposition is incorrect. It is the owner utility who marked the location of the lines. (Tr. 368-69 and 422-23.)

The only evidence on this record regarding the means used to determine the location of the underground installations is that Respondent called the utilities to come out to the site and mark their lines. Having done so, Respondent has met the requirements of the standard. The fact that some lines were broken, whether correctly marked or mismarked by the owner utilities, is virtually irrelevant to the question of whether Respondent, the contractor, availed itself of a Asafe and acceptable means@ to locate the underground lines.

The Secretary has thus not shown that Respondent failed to use a safe and acceptable means to locate the lines. This item is VACATED.

Citation 1, Item 5
29 C.F.R. ' 1926.651(j)(2)

It is alleged in item 5 that piles of excavated materials (Aspoils piles@) were within 2 feet of the edge of the excavation in which Respondent=s men were working.[7]

[7] The cited standard, 1926.651(j)(2), provides:

> (2) 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, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

It is clear that material which had been unearthed had been placed within 2' of the vertical edge of the excavation.[8] I so find despite Mr. Benton=s contrary contention because spoils would most likely not have to be Araked,@ as claimed by Mr. Burton, unless they were, at some time, at least close to the edge of the trench. Such placement alone, does not however, constitute a violation of the cited standard.

The Secretary acknowledges in her post-hearing brief that A[t]he language of the regulation makes it clear that the purpose of the regulation is to protect employees from loose rock or soil falling from an excavation face@ (Sec. Brief, p. 15) and points out that employees had been working in the trench. Respondent cites the Compliance Officer=s testimony that the hazards she was concerned about were materials from the spoils pile falling into the trench on top of men working there and additional stress and likelihood of trench collapse because of the added weight the excavated materials placed near the excavation=s edge. Respondent relies on the decision in *Columbia Gas of Ohio, Inc.*, 17 BNA OSHC 1510 (No. 93-3232, 1995)(ALJ)(Digest), vacating a similar citation where there was observed to be only a small amount of material from the spoil pile trickling into the excavation. Respondent correctly points out that since the hazard sought to be prevented by the standard is the danger of materials Afalling or rolling into excavations@ the Secretary, to show a violation, must show that Aenough material from the spoil piles could fall into the excavation so as to cause some injury to those in the trench.@ *Id.*, at p. 1512. In this case, the Secretary failed to show that the amount or nature of materials[9] which could fall or roll into the excavation were such that would pose a hazard to those working there. In the absence of such

[8] The Compliance Officer=s testimony that she based her conclusion that excavated materials were within 2' of the edge solely on her Aeyeball@ estimate of the distance is highly illustrative of her atrabilious, combative, equivocal manner of testifying in general. Initially, she stated, without any basis, that the materials were Adirectly on the vertical face of the trench wall@ (Tr. 32) despite the physical impossibility of such a situation. On cross-examination, she then claimed to have measured the distance from the edge of the spoil pile to the edge of the trench and moments later stated that she did not do so. (Tr. 259). After several minutes of slow, indeed agonizing, examination she eventually surrendered by conceding that she decided the distance was 2' or less Avisually.@ (Tr. 262)

[9] See, *P.A. Landers, Inc.*, 17 BNA OSHC 1458 (No. 93-2992) (Soils pile which included bricks and cement blocks sufficient for violation without quantity of spillage mentioned.)

evidence, the item is VACATED.

Citation 1, Item 6.
29 C.F.R. ' 1926.651(l)(1).

The standard requires, in pertinent part that A[w]alkways shall pe provided where employees or equipment are required to permitted to cross over excavations.@

This alleged violation is based on the Compliance Officer=s observation of an employee exiting from a pre-cast concrete manhole which had been placed into the excavation and then Ajump[ing]@ from the edge of the manhole across an opening to the edge of the excavation. No walkway was present. (Tr. 63-4, GX 31 (Tape) 11:36, 11:40).

Respondent describes the area over which the employee stepped as Asmall crevice@ and takes issue with describing the employees crossing as a Ajump=@ preferring to call it a step. (Resp. brief, p. 13) Respondent makes the distinction because it maintains that the Compliance Officer=s interpretation of the standard, implicit in her testimony, that a bridge was required regardless of the width of area to be crossed (Tr. 265), is inappropriate. Respondent=s reliance on the decision of the administrative law judge in *Flint Engineering & Construction Co.*, 15 BNA OSHC 1946 (No. 91-2619, 1992), is misplaced in that the violation held to be Atechnical@ there was a lack of a guardrail on an existing bridge over a two-foot wide, four-foot deep trench. In this case, there was no measurement of the width of the opening over which the employee stepped, but it is clear from the photographs and videotape that the employee took a step, not a leap or jump. Based upon the videotape, I find that Respondent is not correct that Athe employee in question could not have even fit into the excavation at the point where he was crossing it.@ (Resp. brief, p. 14). By all appearances, the Compliance Officer correctly considered the hazard to be a Afall of at least 8 feet.@ (Tr. 66). Given the size and depth of the gap between the manhole edge and the edge of the excavation over which the employee stepped and which the Secretary maintains must be protected by a bridge, I find that the lack of a bridge or some such simple device exposed the employee to a hazard of falling as much as 8 feet to the bottom of the trench. Thus, the conditions which constituted a violative condition existed as alleged.

Inasmuch as the violative condition was in plain sight at a location where foremen were

present, Respondent=s knowledge is, in the absence of any rebuttal evidence, established. The Secretary has also established that the violation is serious as alleged.

Under section 17(k) of the Act, 29 U.S.C. ' 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident rather than the likelihood of the accident occurring which is considered in determining whether a violation is serious. *Dravo Corp.*, 7 BNA OSHC 2095, 2101, (No. 16317, 1980), *pet. for review denied*, 639 F.2d 772 (3d Cir. 1980). In is not necessary for the occurrence of the accident itself to be probable. It is sufficient if the accident is possible, and its probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Div.*, 8 BNA OSHC 1055, 1060 (No. 76-3942, 1980). The Commission has held serious violations to have been demonstrated under circumstances where the hazard was a fall of ten to fifteen feet. *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980); *P.P.G. Industries, Inc.*, 6 BNA OSHC 1050 (No. 15426, 1977). A fall of 8 feet to the bottom of a trench is serious within the meaning of the Act.

The short distance between the manhole edge and the edge of the trench makes the likelihood of an accident occurring very low. Only one employee was shown to be exposed and then only for a short time. I thus find that while serious, the penalty factors mitigate against a significant penalty. Accordingly, I find that a civil penalty of $100 is appropriate.

Citation 1, item 7
29C.F.R. ' 1926.652(a)(1)

The cited standard states, in relevant part;

> (a) Protection of employees in excavations.
> (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section 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.

Despite much post-hearing posturing, red herrings and specious argument, the facts relevant

to this alleged violation are, on this record, rather straight forward and undisputed.

There is no question that the trench was more than 5 feet deep. Nor is there any question that the excavation was not, in the words of subsection (ii), Amade entirely in stable rock.@ (Emphasis added.)[10] Consequently, the standard applies and neither exception applies. The employees in the excavation thus had to be protected by some appropriate means. No attempt at sloping, shoring or sheeting and bracing was made. The sole method of protection used was the insertion of a trench box. The trench box had a steel plate, about the same height as the box walls, welded to one side of the box which, in effect, lengthened the wall on one side of the trench box but not the other. On at least one occasion while the trench box was in place in the trench, the Compliance Officer witnessed two employees entering the trench by using a step ladder placed up against the metal plate. Thus, the area of the trench into which the employees entered via ladder was not protected as required by the cited standard. The fact that the employees might have moved quickly into the area protected by the trench box does not eliminate the violation but goes to degree of exposure. Gaining ingress and egress via a portion of the trench which was only partially protected (the steel plate on only one side of the trench) exposes those employees to the danger of cave-in, at least for the time in the unprotected area.[11] The ladder used for ingress and egress in an unprotected area of the trench was clearly visible at the work site as was the activity of the employees using the ladder. As such, knowledge of the violative condition on the part of Respondent is found. Item 7 of Citation 1 is AFFIRMED.

It can hardly be doubted that the collapse of a trench over 5' in depth would likely result in

serious injury or death. On those facts alone, I find the violation to be serious.

---

[10] The nature of the soil, according to Respondent=s competent persons, varied somewhat from location to location. Compare exhibits RX-N and RX-M with RX-O. Respondent=s reliance on its Daily Soil Classification Log reports indicating that the soil was AType A@ (Tr. 385-85, RX-M) at the time of this alleged violation misplaced. It is inconsistent with the simple act of viewing of the videotape and photographs to call this soil rock or solid rock. The videotape and photographs show quite clearly that the soil was not solid rock.

[11] Respondent=s argument and request that item 7 be vacated as duplicative of items 8a, 8b and 8c is denied. Using a defective trench box as alleged in item 8 is far different than allowing employees in an unprotected area of the trench as alleged in item 7. Item 7 is not based upon deficiencies of the trench box but rather is derived from the unprotected area of the excavation.

The aspect of penalty calculations related to the history of Respondent is discussed, *infra.* and will not be repeated here. Suffice it to say that Respondent, Honey Creek Contracting, as an employing entity, has no history of prior violations of the Act. Its size is small but the gravity is high. Having at least two foremen on this work site who had been on construction jobs which had previously been cited for inadequate trenching protection[12] should have raised Respondent=s awareness and degree of care regarding trenching and excavation safety. Indeed, foremen Lyda and Berton were both foremen for Dave Sugar, Inc. for years (Tr. 431). As foremen for another company specializing in trenching operations which itself received numerous citations for trenching violations, they should have had a heightened awareness of the need to assure that the employees working in the trench were properly protected at all times. On this basis, I find that a penalty of $1,000 is appropriate.

Citation 1, Items 8a, b and c
29 C.F.R. ' 1926.652(d)(1), (2) and (3)

Each of these items relate to Respondent=s use of trench boxes which the Secretary claims were damaged to the degree that their function might have been impaired. The Secretary alleges that the trench boxes were used, modified or maintained improperly or were not examined and approved by an engineer as required by the three standards cited.[13]

---

[12] Frank Lyda (Tr. 410) and Berton (Tr. 431).

[13] Item 8a, citing the standard at 19 C.F.R. ' 1926.652(d)(1) which provides A[m]aterials and equipment used for protective systems shall be free from damage or defects that might impair their proper function.@ Item 8b cites '1926.652(d)(2) which provides:

> (2) Manufactured materials and equipment used for protective systems shall be used and maintained in a manner that is consistent with the recommendations of the manufacturer, and in a manner that will prevent employee exposure to hazards.

Item 8c, cites ' 1926.652(d)(3), which states:

> (3) When material or equipment that is used for protective systems is damaged, a competent person shall examine the material or equipment and evaluate its suitability for continued use. If the competent person cannot assure the material or equipment is able to support the intended loads or is otherwise suitable for safe use, then such material or equipment shall be removed from service, and shall be evaluated and approved by a registered professional engineer before being returned to service.

There is virtually no dispute about the condition of the trench box. Both the Compliance Officer and Mr. Tomb, the registered engineer, examined the box and found missing pins, a steel plate welded on to one side at one end and some cracks, cuts and gouges in the outer skin. The difference between the parties is whether the evidence demonstrates that the particular defects were such that they Amight impair [the] proper function@ of the box. The Secretary=s evidence is outweighed by that presented by Respondent as to this issue.

The Secretary relies on the testimony of the Compliance Officer to establish that the condition of the trench box which Respondent used was such that its ability to function might have been impaired. First, the Compliance Officer had no engineering or technical background, nor did she have significant experience in any area in which she could have developed a knowledge or skill in formulating valid opinions as to whether certain conditions found in a trench box would or would not impair its functioning. The Secretary did not seek to qualify her as an expert in any technical or scientific field but only as a compliance officer (Tr. 22-23). The Secretary=s post-hearing brief merely points to the factual testimony regarding the condition of the trench box and Acontends that the totality of these damages or defects impaired the proper functioning of the trench box.@ The phrase used by counsel at the hearing, with which the Compliance Officer agreed, was that the trench box was Anot adequate.@ (Tr. 48) It points to no evidence that the defects rendered the box unsafe. The Secretary=s conclusion is rejected. That is not to say that there could not be a case in which the physical damage to a trench box is so great that the inability of the box to function would be apparent. Such is not the case here. The testimony of Respondent=s expert in structural integrity of trench boxes does not, by itself, resolve the issue either. Although Mr. Toomb=s examination and certification of the condition of the trench boxes was made some time before the inspection, he testified during his cross- examination, that, based on the photographs taken at the time of the inspection, the condition of the trench box was substantially similar to its condition when he had

inspected it. (Tr.338). Accordingly, Item 8a is VACATED.

Item 8b is similarly vacated because the Secretary simply did not show that the trench box was maintained or used in a manner inconsistent with the manufacturer=s recommendations as required by the standard. Although the standard states the requirement that trench boxes must be

Aused and maintained in a manner that is consistent with the recommendations of the manufacturer,@ the clear meaning of what is required to show a violation of the standard is that the box was either used or maintained in a manner which was inconsistent with the manufacturer=s recommendations. In this case, the secretary showed, at most, that the manufacturer had made no recommendations whatsoever regarding the welding of a metal plate on to the end of one side of the box.[14] As stated by the Secretary Athe manual contained no mention or approval of the metal plate extension.@ (Brief, p. 19). Moreover, the Secretary could point to no general instruction or warning regarding the modification of the trench box. In the absence of any general admonition against or more specific recommendation regarding the welding of steel plates to one side of the box, Respondent=s having done so can hardly be found to be inconsistent with the recommendations of the manufacturer. accordingly Item 8b is VACATED.

The Secretary acknowledges that the trench boxes were examined by a professional engineer some two months before the inspection in this case. While the engineer could not be sure that one particular gouge was present when he inspected the trench boxes (Tr. 354), he clearly stated that nothing on the videotape of the inspection of the boxes showed him Aanything that was significantly different that when [he] did his inspection@ of the boxes before the job began. (*Id.*) The Secretary seems to argue that since Mr. Tomb did not evaluate whether the boxes would later be used under circumstances which might violate other standards (gaps between box and trench walls, employees working outside the box) he could not have certified them as suitable for continued use. The Secretary=s argument is rejected. The cited standard requires that when a trench box is damaged, it must be examined by an appropriate person and certified as suitable for safe use. The essence of the requirement is the physical condition of the equipment. The Secretary would read into the

standard a requirement that the examining competent person consider, indeed predict, that the equipment might, in the future, be used improperly. Such a requirement is not justified by the clear wording of the standard. Improper use of any equipment is a function of employee and supervisory behavior not the condition of the equipment. One can only reasonably expect that equipment be considered in light of its suitability for its expected and anticipated use not its potential misuse. In this case, the Secretary did not show that the boxes were improperly examined or certified for

[14] Quite a separate violation has been found in allowing employees to access and egress the trench via a ladder placed up against the steel plate when the box was in place.

continued use. Item 8c is VACATED.

Citation 1, Item 9a
C.F.R. ' 1926.652(g)(1)(ii)

According to the Secretary, the cited standard[15] was applicable because Respondent had placed a trench box in a trench leaving more than 2' between the bottom of the trench and the bottom of the trench box. The Compliance Officer described and photographed a situation at the work site at which there was more than two feet of unprotected area below the bottom of the trench box after it had been in place. (Tr. 38-41, RX-13). Respondent=s first reply is to the effect that since the pleadings refer to the trench as 9 feet deep and the trench box as 8 feet high, that there could not have been 2' of exposed unprotected earth between the bottom of the trench box and the floor of the trench wall. (Brief, p. 21). In addition, Respondent notes that its Daily Soil Classification Log for December 12, 1996, the date of the inspection was completed by its supervisor, Mr. Lyda, who was a competent person within the meaning of the regulations. He classified the soil on the date in question as AType A@, meaning Asolid rock.@ (RX - M; Tr. 385). Since the soil was Asolid rock@ reasons Respondent, there was no need for a protective system below the trench box. Respondent=s

rationale has been and is once again rejected on the basis of the clear videotape and photographic evidence that the soil was simply not solid rock. Moreover, as discussed in regard to item 7, the exemption dealing with rock , 29 C.F.R. ' 1925.652(a)(I), exempts excavations Amade entirely in stable rock.@ This was not such an excavation. Finally, even if Respondent could have shown that Athe side walls at that point (below the coverage of the trench box) were of solid rock, it has nowhere even attempted to prove that the shield Awas designed to resist the forces calculated for the full depth of the trench...@ Such would be Respondent=s burden if it sought to avail itself of an exception

[15] The standard at 20 C.F.R. ' 1926.652(g)(2) provides:

> (2) Additional requirement for shield systems used in trench excavations. Excavations of earth material to a level not greater than 2 feet (.61 m) below the bottom of a shield shall be permitted, but only if the shield is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the shield

contained within a standard. *Stanbest, Inc.*, 11 BNA OSHC 1222, 1226 (No. 76-4355, 1983). Accordingly, the alleged violation in Item 9a is AFFIRMED.

This violation is serious in that the gap between the bottom of the trench box and the bottom of the trench side walls could contribute to the chances of a cave-in or accelerate the speed of a cave-in. Mistakes in trenches are likely to cause death or serious injuries and factors contributing to the likelihood of trench collapse are perforce serious within the meaning of the Act.

On this record the degree and length of employee exposure of the number of employees is not shown. Given the other penalty factors as well, a modest penalty for a serious violation, $100 is appropriate.

Citation 1, Item 9b
29 C.F.R. ' 1926.652(g)(1)(ii)

Item 9b[16] alleges, based on the Compliance Officer=s opinion testimony, that the trench box had been installed in such a manner that lateral or hazardous movement was not restricted.

The Secretary looks to the Compliance Officer=s testimony (and photographs) showing that there were gaps between the outside of the trench box and the wall of the trench(Tr. 41-44. RX-1, RX- 18). The presence of some degree of a gap was acknowledged by Respondent=s expert, Mr.

Tomb (Tr. 360-61). The Secretary=s claim that merely by showing that some gap existed, she has made out a *prima facie* case is rejected. The Secretary has failed to show that the nature of the trench box installation was such that the box was subject to movement Ain the event of sudden lateral loads=@ as required by the standard. The evidence, while showing some gaps, does not in any way connect the gaps as shown to exist upon inspection to the likelihood of movement of the trench box. There is no showing here that there could have been less area or fewer gaps. The Compliance Officer has no demonstrated expertise nor was she proffered as an expert. The extent and effect of the gaps shown in the photographs was disputed by Respondent=s expert engineer (359-60). Without reliable evidence relating the degree of gapping with the likelihood of unexpected trench box

[16] The cited standard, 29 C.F.R. ' 1926.651(g)(1)(ii) provides:

> (ii) Shields shall be installed in a manner to restrict lateral or other haphazard movement of the shield in the event of the application of sudden lateral force.

movement a violation of this standard cannot be found. The alleged violation of Item 9b is VACATED.

Other Than Serious Citation
Item 1 29 C.F.R. ' 1926.1052(c)(1)

The Secretary points to no evidence that the violative condition existed. The allegation that the stairway to the worksite trailer lacked hand rails remains just that, an allegation. The item is VACATED.

Penalty Factors

The Commission has often held that in determining appropriate penalties for violations, including those classified as willful, Adue consideration@ must be given to the four criteria under section 17(j) of the Act, 29 U.S.C. ' 666(j). Those factors include; the size of the employer=s business, gravity of the violation, good faith and prior history. While the Commission has noted that the gravity of the violation is generally Athe primary element in the penalty assessment,@ it also recognizes that the factors Aare not necessarily accorded equal weight.@ *J.A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993)

Contrary to the request of the Secretary, in consideration of the Ahistory@ factor for penalty purposes, as well as for other purposes, the Respondent in this case, Honey Creek Contracting Company, Inc., has been considered to be the employer and the only employer. It has no history of

any prior violations.

The Secretary, in her post-hearing brief, acknowledges that Acomplainant has relied on the OSHA history of Dave Sugar, Inc., d/b/a Dave Sugar Contracting, Inc. (ADave Sugar@), as part of its case regarding employer knowledge of the violations and of OSHA standards and regulations.@ (Brief, p. 33). Complainant failed to present sufficient witnesses or evidence to support its claim of unity of identity despite having been on notice of the issue for many months and despite have been granted leave to file extensive interrogatories and having had the full panoply of discovery tools available. In this case, the Secretary has not supported such a position either factually or legally. Indeed, the Secretary presents no legal argument or authority for such a position.

Under Section 17(j) of the Act it is the history of Athe employer@ which the Commission must consider in assessing civil penalties.[17] AThe term >employer= means a person engaged in a business affecting commerce who has employees....@ Act, Section 3(5), 29 U.S.C. 3(5). There is no dispute in this case that the employer of all the exposed workers at the site was Honey Creek. Nor is there any claim that Honey Creek had received any prior OSHA citations. While the interrelationship might be such that there was a degree of commonality of interest or perhaps subterfuge in the bankruptcy of Dave Sugar Contracting, and the creation and incorporation of Honey Creek, the Secretary apparently did not investigate or present such facts here. The Secretary presents no evidence and no convincing rationale that the Commonwealth of Pennsylvania=s recognition of two separate and distinct corporate Apersons@ should be set aside or Apierced.@ The claim that a Apivotal role...in the operations of Honey Creek@ was played by Mr. David Sugar is nowhere supported on this record. It is pure innuendo. The fact that Mr. David Sugar acted as the representative of Honey Creek in various stages of this proceeding does not render his history as an employer[18] attributable to Honey Creek without some further rationale. Indeed, in this case, Mr. David Sugar denied,

---

[17] Section 17(j), 29 U.S.C. ' 666 (j), states;

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to 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.

[18] Again, Ahistory@ under the Act is not that of an individual but rather that of an Aemployer.@

without rebuttal of any kind, that he had control over conditions at the work site. (Tr. 418). In the presence of two distinct corporate entities, the burden of proving such circumstances as would warrant piercing the identity of apparently legitimate corporate entities falls heavily on the Secretary. It has not been accomplished here.

The other Apenalty factors@ are clear. Respondent is a small employer, with 13 employees at the site (Tr. 5). The gravity of each violation is discussed individually.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. ' ' 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. ' 1926.651(l)(1) as alleged in Citation 1, Item 6. The violation was serious within the meaning of the Act. A civil penalty of $100 is appropriate.

4. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. ' 1926.652(a)(1) as alleged in Citation 1, Item 7. The violation was serious within the meaning of the Act. A civil penalty of $1,000 is appropriate therefor.

5. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. ' 1926.652(g)(2) as alleged in Citation 1, Item 9a. The violation was

serious within the meaning of the Act. A civil penalty of $100 is appropriate therefor.

6. Respondent was not in violation of section 5(a)(2) of the Act as alleged in Items 1a, 1b, 3, 5, 8a, 8b, 8c or 9b of Citation 1 or of Item 1 of Citation 2.

7. Items 2 and 4 of Citation 1 were withdrawn by the Secretary.

ORDER

1. Citation 1, Items 1a, 1b, 2, 3, 4, 5, 8a, 8b, 8c and 9a are VACATED. Citation 2, Item 1 is VACATED.
2. Citation 1, Item 6 is AFFIRMED. A civil penalty of $100 is imposed.
3. Citation 1, Item 7 is AFFIRMED. A civil penalty of $1,000 is imposed.
4. Citation 1, Item 9a is AFFIRMED. A civil penalty of $100 is imposed.
5. Citation 2, Item 1 is VACATED. A civil penalty of $0 is imposed.

Michael H. Schoenfeld
Judge, OSHRC

Dated:

Washington, D.C.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v. Docket No. 97-0462

HONEY CREEK CONTRACTING COMPANY, INC.,

Respondent.

Appearances: Mark V.Swirsky, Esq.
Office of the solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For Complainant

Richard N. Selby, Esq.
Henderson, Covington, Messenger, Newman & Thomas, Co., LPA
Youngstown, Ohio
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. '' 651 - 678 (1970) ("the Act").

Having had its worksite inspected three times by a Compliance Officer of the Occupational

Safety and Health Administration, Honey Creek Construction Company, ("Respondent")(AHoney Creek@) was issued citations on January 28, 1997 (Docket No. 97-0353) and February 25, 1997 (Docket No. 97-0462), alleging serious and willful violations of the Act relating to its excavating operations in Homer City, Pennsylvania.

Respondent timely contested both citations. Following the filing of complaints and answers and pursuant to a notice of hearing, the cases came on to be heard in Pittsburgh, Pennsylvania. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

As a preliminary matter, Respondent=s claim that the inspections were invalid either because the inspection was an invalid search or because the Compliance Officer saw and cited violative conditions prior to presenting her identification, are rejected. The worksite, while spread out over a considerable area, was nonetheless in a location from which the public was not barred. [19] Moreover, in approaching Respondent=s work areas, the excavations were in plain sight of all who passed by either by car or by entering or leaving the residential neighborhood. There was no reasonable expectation of privacy in conducting excavating, pipe laying and backfilling operations in the middle of the streets of a municipality. Nor did Respondent show any prejudice which might have resulted from the Compliance Officer=s observation of violative conditions prior to contacting Respondent=s representative at the site.

Jurisdiction

Complainant alleges and Respondent does not deny that it is a construction contractor specializing in excavation work. It is undisputed that at the time of these inspections Respondent was engaged in installing sewer lines in Homer City, Pennsylvania. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning

[19] The contrary testimony of another individual is rejected for the reasons given later in this opinion regarding his general credibility.

of ' 3(5) of the Act.[20] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Citation 1, Items 1a and 1b
29 C.F.R. ' 1926.21(b)(2) and 1926.20(b)(2)

As in Citation 1, Items 1a and 1b in Docket No. 97-0353, the Secretary again points to violative conditions and maintains that their existence is evidence that Respondent did not have program of inspection and that it=s employees were not properly instructed regarding hazards at the worksite.

These items are vacated for the same reasons set forth regarding Item 1a and 1b of Citation 1 in Docket No. 97-0353.

Citation 1, Items 1c and 1d
29 C.F.R. ' 1926.54(d) and 1926.54(g)

The cited standards require that A[a]reas in which lasers are used shall be posted with standard laser warning placards,@ and that A[t]he laser beam shall not be directed at employees.@

The Secretary relies on the testimony of the Compliance Officer to the effect that she could locate no warning placard at the site during this inspection. Respondent=s witness, Mr. Lyda stated that there is a warning placard which is on the box in which the laser is stored and that the box is generally in the same area in which the laser is used (Tr. 387). The Compliance Officer was not asked whether the laser case or box was in the area nor did Mr. Lyda testify that the box was in the area at the time of this inspection. Mr. Berton maintained that he generally posted the sign (warning placard) on the barrel he uses as the base for the laser when sighting it. (Tr. 374).

Respondent, citing the decision in *Jordan Excavating, Inc.*, 12 BNA OSHC 1711 (No. 85-0140, 1986)(ALJ), maintains that having the laser placard in the same general area is sufficient to meet the requirements of the standard. The decision of Judge Salyers in *Jordan*, as an unreviewed

[20] Title 29 U.S.C. ' 652(5).

administrative law judge=s decision, is not binding precedent, *Leone Construction Co.,* 3 BNA OSHC 1979 (No. 4090, 1976). Even if it were, I would find it inapplicable here because there is no specific testimony that the placard was anywhere in the area. Mr. Lyda=s and Mr. Berton=s testimony, at best, described a claimed general practice. The Compliance Officer=s testimony is thus unrebutted. Accordingly, Item 1c is affirmed.

The Compliance Officer also testified that she witnessed an employee using the laser, point the beam of laser light directly on to his hand. The video tape demonstrates that the employee operating the laser placed his gloved hand directly into the beam of laser light. The Compliance Officer=s factual testimony stands unrebutted. A violation of the standard is thus established.

Respondent defends, however, by maintaining that no evidence was presented which showed that a hazard was present. Respondent maintains that the output of its laser was insufficient to cause skin burns as demonstrated by the operator=s passing his hand through the beam. While conceding that this might be a Atechnical violation@ of the standard, it also notes that the evidence of the employee laser operator putting his hand in to the beam fails to establish any other hazard, such as to the eyesight of others on the site.

Both conditions existed in clear view of supervisors at the site thus Respondent knew or could have known of the circumstances. There is, however, no sufficient evidence that the violations are serious as alleged. The Compliance Officer=s opinion that a burn hazard was presented is not tenable in light of the circumstances of the violation - - an employee placed his hand directly into the light beam with no apparent of specifically alleged ill effects. In addition, there is virtually no evidence of a hazard created by the lack of placards. Accordingly, I find that the violation was other than serious. Giving consideration to the penalty factors as discussed elsewhere, but emphasizing the failure to show any hazard arising from these violative conditions, I find that a penalty of $0 is appropriate for each.

Citation 1, Item 2
29 C.F.R. ' 1926.602(a)(9)(ii)

The Secretary claims that Respondent operated equipment on the site which did not have a

required back-up alarm.[21]

The Compliance Officer=s testimony as to her proximity to the equipment when it was backing up is fraught with equivocation. She testified on cross-examination;

> Q ...With respect to citation 1, item 2 in this Docket, which relates to the Fiat-Allis excavator not having a back-up alarm, is that correct?
> A Yes. I am there.
> Q Okay.
> A It was actually a Fiat-Allis front-end loader, and a Number 12 excavator. Neither had back-up alarms.
> Q There were two pieces of equipment?
> A That did not have back-up alarms.
> Q Okay. How close to these pieces of equipment were you?
> A Right beside them.
> Q How far?
> A Foot, foot and a half.
> Q While they were backing up?
> A While they were in service.
> Q While they were backing up?
> A While they were in service.
> Q Okay, my question is: How far were you from them when they were backing up?
> A Further than a foot and a half.
> Q How far?
> A I was on the sidewalk.
> Q How far was the sidewalk? In feet?
> A Approximately 3.
> Q So you were 3 feet from this while it was backing up?
> A I am not sure. I am just not sure

(Tr. 272-273) Her memory seemed to improve greatly on re-direct examination. She stated;

> Q Okay. You were asked about a lack of a back-up alarm on two pieces of earth-moving equipment, is that correct?
> A That is correct.

[21] The standard cited, 29 C.F.R. ' 1926.602(a)(9)(ii), provides;

> No employer shall permit earthmoving or compacting equipment which has an obstructed view to the rear to be used in reverse gear unless the equipment has in operation a reverse signal alarm distinguishable from the surrounding noise level or an employee signals that it is safe to do so.

Q And you were asked how far away you were from the equipment when you made the observation that there was no back-up alarm. Correct?
A That is correct.

Q Now, I believe you answered the question, you "weren't sure." Can you estimate the distance that you were away from those two pieces of equipment when you made the observation that there was no back-up alarm?
A 2 feet.

(Tr. 290).

This evidence, even if uncontradicted, is insufficient to prove the violation. The Compliance Officer=s equivocation followed by restored memory casts a pall of unreliability on her testimony as to the alleged missing lack of back-up alarms. Such evidence cannot constitute a preponderance of the reliable evidence so as to support a finding of a violation.

Respondent points to testimony by both Mr. Lyda and Mr. Berton who stated that the alarms on all machinery were kept in working order. Their testimony was directed at the machinery at the site in general (Tr. 373, 387-88) thus does not directly contradict that of the Compliance Officer.

Moreover, I find that the evidence is insufficient to show that the standard is applicable. The standard applies to machinery Awhich has an obstructed view to the rear.@ The Secretary=s argument that Athe Compliance Officer provided a sound basis for her conclusion that the operators of said machines had obstructed rear views, A (Brief, Pp. 26-7) is rejected. She testified as follows:

Q But my question is: How do you know that these pieces of equipment had obstructed views? Whether there are employees there doesn't tell you that the view was obstructed.
A Because of the extreme weather conditions the visibility was lacking for the obs - for the view to the rear, in that it was raining very hard. And because of the way that these machines are manufactured, some of them, it makes it extremely difficult, the closer an employee is to the back of some of these large pieces of equipment, for them to always know where that employee is. It is extremely difficult.
Q Did you personally view the view that a operator has from these particular vehicles?
A I have.
Q These two vehicles?
A Not these two, no.

(Tr. 276)

The Compliance Officer=s testimony as to the basis for her conclusion that the particular equipment cited had obstructed views to the rear is insufficient, it is mere speculation. As such it cannot, by itself, support a finding of a violation.

For the above reasons, Citation 1, Item 2 is VACATED.

Citation 1, Item 3
29 C.F.R. ' 1926.651(b)(3)

This item was withdrawn at the hearing (Tr. 182).

Citation 1, Item 4
29 C.F.R. ' 1926.651(c)(2)

It is alleged in this item that the excavation in which Respondent=s employees were working did not have an appropriate means of egress.[22]

According to the Secretary, the Compliance Officer came upon an excavation in which Respondent=s employees were working. The excavation measured seven feet, five inches deep. There was no ladder into the excavation. After being ordered out of the trench by their foreman, the employees traveled to the end of the excavation and up a pile of loose soil, not a constructed ramp at the end of the trench. (Tr. 138-39, RX-31 [videotape]).

Respondent views the facts somewhat differently, maintaining that the egress used by the employees and shown on the Compliance Officer=s own videotape is a Agradual decrease in the depth of the trench [which] qualified as a ramp.@ (Brief, p. 27, citation omitted.). Respondent claims that the videotape shows the employees Ahad no difficulty whatsoever exiting the trench.@

Respondent=s arguments are rejected. First, the standard requires that there be a means of egress which requires employees to travel no more than 25 feet. In this case, the excavation was 30

[22] The cited standard, 29 C.F.R. ' 1926.651(c)(2), provides;

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

feet long and had only one means of egress, if any at all. Second, the soil which formed the exit used by the employees, even if a ramp because the employees actually used it to egress,[23] was not a Asafe@ means of egress. Based upon a review of the best evidence, the videotape, I find that the slope was not a safe means of egress. There was much loose soil and sloughing and the footing does not appear to be reliable. The tape shows that the employees appeared to have little difficulty getting out of the trench. Ease of exit does not necessarily mean that the mode of exit is safe. Moreover, it appears that the presence and the angle of the slope was more fortuitous than planned. The alleged violation of Citation 1, Item 4 is AFFIRMED.

The violation is serious in that the lack of an available safe means of access increases the chances of death or serious injury should there be a collapse or partial collapse of the trench. Even if the likelihood of collapse were shown to have been very low, the resulting injury was most likely to be death or serious injury.

Considering the other penalty factors described elsewhere, as well as the fact that there were only two employees in the trench, apparently for a short period of time, the degree of risk was not particularly high. Under these circumstances, a civil penalty of $250 is appropriate.

Citation 1, Item 5
29 C.F.R. ' 1926.651(d)

This item was withdrawn at the hearing. (Tr. 5)

Citation 1, Item 6
29 C.F.R. ' 1926.651(e)

The Secretary maintains that the Compliance Officer=s testimony and the videotape establish that a tamping machine and a bucket loaded with gravel were lifted directly over the head of an employee in violation of the standard=s prohibition.[24] Respondent describes the videotape as Aan

[23] ARamp@ is defined by 29 C.F.R. ' 1926.650(b) as Aan inclined walking or working surface that is used to gain access to one point from another, and is constructed from earth....@

[24] The cited standard, 29 C.F.R. ' 1926.651(e), provides, in pertinent part, ANo employee shall be permitted underneath loads handled by lifting or digging equipment.@

optical illusion.@ (Brief, p. 29) and points to the testimony of Mr. Lyda to the effect that neither Aload@ passed Adirectly over@ the employee. (Tr. 389-90). Respondent also claims that the angle from which the videotape was take is deceiving, that the lack of concern of the employees involved and the failure of the Compliance Officer to warn the employees support its position.

Once again, the matter is left to the finder of fact to review the videotape. Neither the CO nor Mr. Lyda were shown to be in any better position to observe the two incidents than was the video camera. Their testimony is thus not convincing. A review of the videotape, however, seems to support the Compliance Officer. Moreover, the nature of the operation underway at the time is more consistent with the description of the Compliance Officer than that of Mr. Lyda. The employee was working on the installation of a manhole. At that time gravel was being placed in that area and the area was being tamped down. The videotape shows a loaded bucket passing over the head of an employee whose head is bent down and is, as Respondent suggests, showing no concern. He appears to be concentrating on his work. He could hardly be Aconcerned@ about something about which he was unaware. Given the activities of the employees on the ground and the state of the work, it is more likely than not that the bucket of gravel and the tamper were in that area. On this basis, I find that the employee was working underneath loads being handled by lifting or digging equipment. Item 6 of Citation 1 is AFFIRMED.

The condition took place and repeated itself within the view of a supervisor whose knowledge of the situation is attributable to Respondent. Thus, Respondent knew of the violative condition.

Working underneath a load the size of a tamper or bucket of gravel presents a serious hazard in that even a slight Anudge: by a piece of equipment of that size and weight could well result in a serious injury. The criteria for finding a violation serious have thus been met.

The penalty discussion elsewhere applies here. This is a serious violation involving the exposure of one employee to two delineated instances of hazard. A penalty of $500 is appropriate.

Citation 1, Item 7
29 C.F.R.' 1926.651(j)(2)

Item 7 is a reprise of Citation 1, Item 5 in Docket No. 97-0353 and alleges that Respondent

allowed spoils piles to be within 2 feet of the edge of the excavation.

The Compliance Officer testified that the spoils piles were Adirectly on the vertical face...directly, directly on the vertical face.@ (Tr. 148). The videotape (RX-31), it is claimed, supports the factual allegation.

Respondent maintains that the citation cannot stand because, on its face, it identifies the hazard as trench collapse not materials falling on to personnel working in the trench. Respondent=s argument is rejected. It is clear from the wording of the standard that the hazard sought to be prevented is that of materials falling on top of employees in a trench. The wording of the citation does not seal in cement any particular theory of liability where, as here, the standard is clear.

In this instance, as in Docket No. 97-0353, Complainant presented no evidence whatsoever that the amount or nature of material which could fall or roll into the excavation were such that would pose a hazard to those working there. In the absence of such evidence, the item cannot be sustained. Thus, Item 7 of Citation 1 is VACATED.

Citation 2, Item 1
29 C.F.R. ' 1926.651(a)(1)

As with Citation 1, Item 7 in Docket No. 97-0353, this item alleges that Respondent=s employees worked in an excavation which lacked appropriate protection against cave-ins.

As with the previous citation item under this standard, there is virtually no disagreement that the excavation in question was over 5 feet deep. Similarly, there is no question that the excavation was not, in the words of 29 C.F.R. ' 1926.651(a)(1)(ii), Amade entirely in stable rock.@ (Emphasis added.) Consequently, the standard applies and neither exception applies. Respondent was thus required to protect the employees by some appropriate means. No attempt at shoring or sheeting sloping or bracing was made. Nor was the trench box in place. The violation is thus established. Knowledge of the condition is perforce imputed to Respondent inasmuch as one of its supervisory personnel, Mr. Lyda, was present.

The testimony of Mr. Lyda insisting that the employees seen by the Compliance Officer leaving the excavation had been there for only 15 seconds (Tr. 402) is rejected as lacking credibility. It is directly contradicted by Mr. Smith (Tr. 126-27) who places the employees in the trench for at

least 15 to 30 minutes. Second, a viewing of the videotape as well as a consideration of the description of the activities of the employees while in the excavation (Tr. 409) makes it highly implausible that such actions, including time to access and egress from the location in the excavation at which they were working, could have been accomplished in 15 seconds. Finally, I find as fact that, as testified to by the Compliance Officer (Tr. 138), Mr. Lyda instructed the employees to get out of the trench as the Compliance Officer approached. Employee exposure is established for a significant period of time. There is no question that working in an unprotected trench exposes an employee to the hazard of a cave-in. As such, it is a serious violation of the Act.

The Secretary also alleges this violation to have been willful. A willful violation is committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *A.C. Dellovade,Inc.*, 13 BNA 0SHC 1019 (1987); Asbestos Textile Co., 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). A willful violation is differentiated from a non-willful violation by a heightened awareness that can be considered a conscious disregard or plain indifference to the standard, i.e., *General Motors Corp., Electro-Motive Div*., 14 BNA OSHC 2064, 2068 (No. 82-630, 1991) (consolidated); *Williams Enterprises Inc.*, 13 BNA 0SHC at 1256-57. This standard describes misconduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. *Georgia Electric Co.*, 595 F.2d 309, 318-319 (5th Cir. 1979); *Ensign - Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983). The evidence in this case, without any consideration of any evidence regarding the Ahistory@ of Dave Sugar, Inc., establishes that Honey Creek, through its supervisors, had the requisite heightened awareness of the need to use cave-in protection and demonstrated a particularly high degree of indifference to employee safety so as to find the failure to do so willful.

The Compliance Officer=s previous visits to the site inspection the excavating operation, her two earlier discussions with Honey Creek personnel regarding the importance of trench protection (Tr. 152) and the specific warning given to Mr. Lyda by Mr. Smith, the inspector employed by the engineering company to oversee the excavation work (Tr. 119), all served specific notice on Respondent that others who were familiar with trenching operations thought their operations to be less than safe. Finally, Mr. Lyda, who claimed to have much experience and training in trenching and OSHA related matters, had the employees in the trench directly in front of him as

the Compliance Officer arrived. His instruction to them to leave the trench as well as their hurried exit are indicia of a state of mind entirely consistent with a knowing and willful violation of the excavation safety requirements. Accordingly, I find that the violation alleged in Citation 2, Item 1 issued on February 25, 1997, was a willful violation of the Act as alleged.

In addition to the penalty factors as discussed elsewhere, it has been shown that two employees were exposed for some time to the very hazardous condition of a possible cave-in. Considering the penalty factors as well as the range of possible penalties, up to $70,000, I find that a penalty of $23,000 (approximately one-third of the maximum) is appropriate.

Penalty Factors

The Commission has often held that in determining appropriate penalties for violations, including those classified as willful, Adue consideration@ must be given to the four criteria under section 17(j) of the Act, 29 U.S.C. ' 666(j). Those factors include; the size of the employer=s business, gravity of the violation, good faith and prior history. While the Commission has noted that the gravity of the violation is generally Athe primary element in the penalty assessment,@ it also recognizes that the factors Aare not necessarily accorded equal weight.@ *J.A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993)

Contrary to the request of the Secretary, in consideration of the Ahistory@ factor for penalty purposes, as well as for other purposes, the Respondent in this case, Honey Creek Contracting Company, Inc., has been considered to be the employer and the only employer. It has no history of any prior violations.

The Secretary, in her post-hearing brief, acknowledges that Acomplainant has relied on the OSHA history of Dave Sugar, Inc., d/b/a Dave Sugar Contracting, Inc.(ADave Sugar@), as part of its case regarding employer knowledge of the violations and of OSHA standards and regulations.@ (Brief, p. 33). Complainant has failed to present sufficient witnesses or evidence to support its claim of unity of identity despite having been on notice of the issue for many months and despite have been granted leave to file extensive interrogatories and having had the full panoply of discovery tools available. In this case, the Secretary has not supported such a position either factually or legally. Indeed, the Secretary presents no legal argument or authority for such a position.

Under Section 17(j) of the Act it is the history of Athe employer@ which the Commission must consider in assessing civil penalties.[25] AThe term >employer= means a person engaged in a business affecting commerce who has employees....@ Act, Section 3(5), 29 U.S.C. 3(5). There is no dispute in this case that the employer of all the relevant workers at the site was Honey Creek. Nor is there any claim that Honey Creek had received any prior OSHA citations. While the interrelationship might be such that there was a degree of commonality of interest or perhaps subterfuge in the bankruptcy of Dave Sugar Contracting, and the creation and incorporation of Honey Creek, the Secretary did not bother to investigate or present such facts here. The Secretary presents no evidence and no convincing rational that the Commonwealth of Pennsylvania=s recognition of two separate and distinct corporate Apersons@ should be set aside or Apierced.@ The claim that a Apivotal role...in the operations of Honey Creek@ was played by David Sugar is nowhere supported on this record. It is pure innuendo. The fact that Mr. David Sugar acted as the representative of Honey Creek in various stages of this proceeding does not render his history as an employer[26] attributable to Honey Creek without some further rationale. Indeed, in this case, Mr. David Sugar denies, without rebuttal of any kind, that he had any control over conditions at the work site. (Tr. 418). In the presence of two distinct corporate entities, the burden of proving such circumstances as would warrant piercing the identity of apparently legitimate corporate entities and a bankruptcy proceeding falls heavily on the Secretary. It has not been accomplished here.

The other Apenalty factors@ are clear. Respondent is a small employer, with 13 employees at the site (Tr. 5). The gravity of each violation is discussed individually.

---

[25] Section 17(j), 29 U.S.C. ' 666 (j), states;

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to 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.

[26] Again, Ahistory@ under the Act is not that of an individual but rather that of an Aemployer.@

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. ' ' 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. ' ' 1926.54(d) and 1926.54(g) as alleged in Citation 1, Items 1c and 1d. The violations were other-than-serious for which a penalty of $0 is appropriate.

4. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. ' 1926.651(c)(2) as alleged in Citation 1, Item 4. The violation was serious within the meaning of the Act. A civil penalty of $250 is appropriate therefor.

5. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. ' 1926.651(e) as alleged in Citation 1, Item 6. The violation was serious within the meaning of the Act. A civil penalty of $500 is appropriate therefor.

6. Respondent was in violation of section 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. ' 1926.652(a)(1) as alleged in Citation 1, Item 1. The violation was willful within the meaning of the Act. A civil penalty of $23,000 is appropriate therefor.

7. Respondent was not in violation of section 5(a)(2) the Act as alleged in Citation 1, Items 1a, 1b, 2 or 7.

8. Items 3 and 5 of Citation 1 were withdrawn by the Secretary.

ORDER

1. Citation 1, Items 1a, 1b, 2, 3, and 7 are VACATED.
2. Citation 1, Items 1c and 1d are MODIFIED and AFFIRMED as other-than-serious violations of the Act. A civil penalty of $0 is imposed.
3. Citation 1, Item 4 is AFFIRMED. A civil penalty of $250 is imposed.
4. Citation 1,Item 6 is AFFIRMED. A civil penalty of $500 is imposed.
5. Citation 2, Item 1 is AFFIRMED. A civil penalty of $23,000 is imposed.

Michael H. Schoenfeld
Judge, OSHRC

Dated:

Washington, D.C.