UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
FORT DEFIANCE CONSTRUCTION & SUPPLY
Respondent.

OSHRC DOCKET
NO. 92-2700

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 18, 1994. The decision of the Judge will become a final order of the Commission on April 18, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before April 8, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

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

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 18, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2700

NOTICE IS GIVEN TO THE FOLLOWING:

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

John H. Secaras
Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Roger Sabo, Esq.
Schottenstein, Zox & Dunn
41 South High Street
Columbus, OH 43215

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

00103377123:05

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR, Complainant, v. FORT DEFIANCE CONSTRUCTION SUPPLY, INC., Respondent.	:	Docket No. 92-2700

Appearances:

Benjamin T. Chinni, Esq.
Elizabeth R. Ashley, Esq.
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio
For the Secretary

Roger L. Sabo, Esq.
Schottenstein, Zox & Dunn
Columbus, Ohio
For the Respondent

BEFORE: Administrative Law Judge John H Frye, III

DECISION AND ORDER

This matter is before the Commission pursuant to §10(c) of the Occupational Safety and Health Act of 1970) 29 C.F.R. §651 et seq.), hereinafter referred to as the Act. Respondent is an employer engaged in a business affecting interstate commerce as defined by §3(5) of the Act and has employees as defined by §3(6) of the Act (Exhibit C-

1; Respondent's Proposed Conclusions of Law). Respondent is charged with violations of three OSHA standards relating to trenching.

On July 10 and 13, 1992, an Occupational Safety and Health Administration (OSHA) compliance officer inspected at Respondent's worksite at the intersection of North Fairfield and Ambassador Roads in Dayton, Ohio, where Respondent's employees were working in a single trench. Respondent was issued Serious Citation No. 1, alleging two separate violations. Item 1 alleges that Respondent violated 29 C.F.R. 1926.651(c)(2) by not providing a safe means of egress for employees working in a trench on July 10, 1992. Item 2 alleges that Respondent violated 29 C.F.R. 1926.651(k)(1) by failing to have a competent person within the meaning of the OSHA excavation requirements on site. Respondent was also issued Willful Citation No. 2, alleging that Respondent violated 29 C.F.R. 1926.652(a)(1) in that employees of respondent working in the trench were not protected from cave-ins by an adequate protective system. In his Complaint, the Secretary also alleged that Citation No. 2 was serious within the meaning of §17(k) of the Act.

I. BACKGROUND

Respondent Fort Defiance Construction & Supply, Inc. is engaged in the construction business.[1] Beginning in May of 1992, the Respondent was working on a

[1]Fort Defiance is a heavy and highway construction contractor (Tr. 203). The majority of its work involves bridges and roadways including excavation of trenches surrounding those roads (Tr. 204-213). The Company works throughout the State of Ohio and does work with state agencies that include the Ohio Department of Transportation with whom it has a certificate of prequalification to perform work (Tr. 213). The Company is certified as a Disadvantaged Business Enterprise because it is owned by American Indians (Tr. 213). The Company's employees are members of the Operating Engineers and Laborers Union (Tr. 176).

roadway improvement project at the intersection of North Fairfield and Ambassador Roads, where it was a subcontractor to the John R. Jurgensen Company, who in turn had a contract with the Ohio Department of Transportation for certain improvements (Tr. 62). Jurgensen was doing roadway work and Fort Defiance was installing sewers, catch basins, fire hydrants, and waterlines (Tr. 169, 176).

On July 10, 1992, OSHA Compliance Officer Richard Liston arrived at the project pursuant to the general inspection schedule which listed John R. Jurgensen as the general contractor (Tr. 8, 62). Prior to entering the site, Liston surreptitiously videotaped the activities of Respondent's employees from his car parked at locations on public streets from 75 to 150 yards from the work (Tr.9, 65).[2] After two hours of videotaping, he physically entered the work area, first going to the Fort Defiance trench (Tr. 70).[3]

Liston observed no trench boxes in the excavation. He testified that the west wall of the trench was cut virtually straight up and down and that the east wall of the trench was benched for about one-third of its length. (Tr. 36-37.) There was no ladder or other

---

[2]The videotape was introduced into evidence as Secretary's exhibit C-2. Respondent's counsel did not object to the admission of the graphic representations contained in the videotape, but did object to the admission of verbal statements contained in it on the grounds that they are hearsay and constitute an attempt to refresh Mr. Liston's recollection without having shown that to be necessary. (Tr. 9-18.) I ruled that I would not consider the verbal statements of others, but that I would consider Mr. Liston's statements recorded on the tape subject, however, to specific objections and to cross examination (Tr. 12).

A review of the tape reveals that none of the verbal statements contained on it are necessary to a decision in this case. Moreover, it is very difficult to correlate the questioning of Mr. Liston with the specific scenes and statements on the tape to which those questions were directed. Consequently, I have not relied on any of the verbal statements on the tape in reaching this decision.

In the future, if the Secretary intends to introduce a videotape containing graphic representations and/or verbal statements, he should furnish some means of providing the necessary correlation and should also be prepared to comply with Rule 1002, Federal Rules of Evidence.

[3]He had not at this time talked to any representative of the contractor, Jurgensen, nor had he conducted an opening conference (Tr. 70). He continued to videotape the Fort Defiance work area (Tr. 70), but he did not test the soil or measure the trench (Tr. 70-71).

means of egress provided which Mr. Liston considered to be safe. Employees exited the trench by stepping onto the bench at the south end and from there onto the street (Ex C-2 [videotape]). Mr. Liston testified that, when asked, Mr. Green, Respondent's competent person on site, stated that he did not know the type of soil in which the trench had been dug (Tr. 20).

The opening conference was held away from the jobsite. Upon his return to the jobsite, Liston discovered the trench had been closed and the employees were gone, leaving some equipment behind. (Tr. 19-20, 218-21.) Prior to leaving the site, Liston took some measurements of the backhoe used to dig the trench. On July 13, 1992, Liston held a closing conference at which time the apparent violations were discussed. Afterwards, Liston returned to the site, where he found that another contractor had begun excavating where the Respondent's trench had stopped, and made some more measurements. On July 30, 1992, OSHA issued citations to Respondent alleging willful and serious violations of the Act based on the CSHO's investigation. A valid notice of contest was filed by Respondent. Trial was held in Dayton, Ohio, on April 7, 1993.[4]

[4]On June 23, Respondent filed a motion to correct numerous errors in the transcript. On July 14, the Secretary responded, agreeing with the vast majority of Respondent's proposed corrections. Those corrections on which the parties agree are approved.

II. CITATION 1, ITEM 1 -- ALLEGED VIOLATION OF 29 C.F.R. 1926.651(c)(2) -- SAFE MEANS OF EGRESS FOR EMPLOYEES WORKING IN THE TRENCH.

The Secretary maintains that Respondent violated 29 C.F.R. 1926.651(c)(2) by not providing a safe means of egress for employees working in the trench on July 10, 1992. The cited standard provides:

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

It is uncontroverted that no ladder was provided for egress from the trench. Liston observed and videotaped employees exiting the trench by climbing up the east wall of the trench. Liston testified that the distance between the bench in the trench wall that the employees used in exiting and the bottom of the trench was about three feet. However, he also testified that the employees stepped first on the pipe, then the bench, and the videotape clearly shows that the height of the steps required was far less than three feet and posed no difficulty. (See Ex C-2; Tr. 37.) In fact, the videotape demonstrates that the employees were able to get out of the trench easily, that a safe means of egress was available.

The standard requires no more than twenty-five feet of lateral travel to reach a means of egress from the trench. Mr. Green, Respondent's foreman, estimated that about 25 feet of the trench was open when Mr. Liston arrived. (Tr. 180.) Mr. Liston observed three sections of eight-foot pipe were laid end to end along the length of the trench, from which Mr. Liston concluded that the length of the trench exceeded 24 feet. He estimated that the trench was 32 feet long on July 10 (Tr. 24-26). His estimate is an inadequate substitute for actual measurements. The Secretary has established only that

there is a possibility that it was necessary to travel more than twenty-five feet to reach a safe means of egress. That is insufficient to establish a violation of the standard. Citation 1, Item 1, is vacated.

III. CITATION 1, ITEM 2 -- ALLEGED VIOLATION OF 29 C.F.R. 1926.651(k)(1) -- COMPETENT PERSON ON SITE.

The Secretary takes the position that Melvin Green was not a competent person within the meaning of the OSHA excavation requirements.[5] Section 1926.650(b) defines a competent person as:

> one 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.

The preamble to the Final Rule provides guidance as to what constitutes a competent person. It states:

> In order to be a "competent person" for the purposes of this standard one must have had specific training in, and be knowledgeable about, soils analysis, the use of protective systems, and the requirements of this standard. One who does not have such training or knowledge cannot possibly be capable. 54 Fed. Reg. 45909 (1989).

The Secretary relies on the following in arguing that Green was not competent. First, when Liston arrived at the trench, he asked Green "what kinds of soil was in the trench." Mr. Green stated that he did not know. (Tr. 20.) The Secretary regards this

---

[5]The standard under which Respondent was cited, 1926.651(k)(1), provides in pertinent part, that:
> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions....

response as interesting for an individual who claims to have knowledge of soil classifications A, B, and C set forth in the Appendix A to Subpart P. However, given the wording of the question, the response is not surprising. Paragraph (b) of Appendix A defines some 11 different kinds of soils in addition to classifications A, B, and C.

Second, the Secretary urges that Green also testified that he knew there was backfilled soil in the area but still classified the soil as Type A (Tr. 180-81), pointing out that this conclusion is inconsistent with Appendix A, which provides that previously disturbed soil may not be classified as Type A. However, Green's testimony is not clear on this point. While he classified the soil as Type A, it is not clear that he applied this classification to the portion of the trench dug in backfill. It is clear that he treated this portion of the trench more carefully than he did the portion dug in undisturbed soil. Moreover, Respondent's expert, Mr. Krieger, confirmed that Green's assessment and treatment of the soil was conservative.[6]

Third, the Secretary points out that, in order to classify soil, Appendix A to Subpart P requires the competent person to perform at least one visual and one manual test. The Secretary incorrectly maintains that Green acknowledged that he performed only a visual test. Green testified that he visually inspected the soil and performed a thumb penetration test. (Tr. 180-81.)

Green has worked in the construction industry approximately twenty years. He has been a foreman for nine or ten of those years. He has received general safety training with his prior employers as well as trenching and excavating training at a course.

---

[6]Krieger made four borings, took samples, ran a series of tests, and found that the soil exceeded, by far, the strength requirement for Type A. (Tr. 232-36.)

(Tr. 170-174; R. Exh. G.) The Secretary has not demonstrated that he was incapable of identifying existing and predictable hazards or hazardous working conditions. Citation 1, Item 2, is vacated.

IV. CITATION 2, ITEM 1 – ALLEGED VIOLATION OF 29 C.F.R. 1926.652(a)(1) – EMPLOYEES NOT PROTECTED FROM CAVE-INS BY AN ADEQUATE PROTECTIVE SYSTEM.

The Secretary maintains that Respondent violated 29 C.F.R. 1926.652(a)(1) in that the trench in which it was working was five feet or more in depth and was not properly sloped or otherwise protected. There was considerable circumstantial evidence concerning the dimensions of the trench presented at trial. However, there was no evidence concerning its actual dimensions because the Compliance Officer did not make any measurements of the trench. He chose instead to spend some two hours surreptitiously videotaping the activity in the trench from considerable distances before officially commencing his inspection. (Tr. 65-66.) When he eventually set out to measure the trench after having conducted an opening conference, it had been closed because a buried telephone cable had forced the cessation of work. (Tr. 218-19.)

At the end of the opening conference, Liston indicated to Respondent's General Superintendent, Jeffrey F. Davy, that he wished to continue the inspection at the site of the trench. Davy told him that nothing was going on at the site, and Liston responded that he would inspect Fischel and finish his walk around on Monday. (Tr. 220-21.) Despite this, he returned to the site of the trench by himself on Friday afternoon, July 10. (Tr. 133-34.) Liston took some measurements of the backhoe used to dig the trench.

Because Liston believed that the backhoe had been straddling the width of the trench, he measured the distance between the tracks of the backhoe on the assumption that that distance would approximate the top width of the trench. The distance was sixty-two inches. (Tr. 23) Because the width of the bucket of the hoe would approximate the bottom width of the trench, he measured it and found it to be thirty-three inches. (22) Thus he estimated the width of the bottom of the trench to be three feet (Tr. 21-23).

On Monday, July 13, Davy looked for Liston from 10 AM until noon, but could not find him. Davy left, and was called back to site for a closing conference at 1 PM. Liston told him he was not through with the walk-around, but that he would do an informal closing because Davy could not be present on Tuesday. (Tr. 221-22.) Following this conference, Liston returned to the site where Fischel had begun excavating at the point where Fort Defiance's trench had stopped, apparently uncovering some of the same area where Respondent had worked on July 10. (Tr. 24, 103-04.)

Liston measured the distance between the top of the trench and the top of a pipe in the trench and found it to be 54.5 inches. (Tr. 25.) He never identified this pipe as one installed by Respondent, although he thinks it was laid by Respondent. (Tr. 24-27, 94.) Liston also measured some sewer pipe located on the site which appeared to be identical to the pipe which he had seen in the trench on July 10. The pipe measured 22.5 inches in outside diameter. (Tr. 27-28.) He also measured the width of the black top patch which covered the excavation and found it to be 105 inches. (Tr. 91-92.) Apparently, Fischel was the only contractor on site when these measurements were made. (Tr. 94-95, 103.)

Liston also testified that he reviewed the plans for the project at the State Engineer's office. According to Liston, these indicated that the drain line of the pipe was to be placed at a depth of 5.75 feet and that the pipe was to rest on six inches of gravel fill. Adding these figures and the thickness of the wall of the pipe (2.25 inches), Liston concluded the depth of the trench was approximately 6.5 feet.[7] (Tr. 27-29, 106-14.)

The Secretary argues that the best evidence of the dimensions of the trench is provided by the video. For example, he maintains that the video, taken from some distance away, clearly shows a white measuring rod moving back and forth in the trench, while the person in the trench who presumably is carrying the rod cannot be seen. Later, when Liston walked up to the trench with the recorder on, the Secretary urges that it is obvious from the tape that the trench walls are over the head of an employee in the trench, and that another employee illustrates the narrowness of the trench by virtue of the fact that his right hand rests on one bank while his left elbow is almost touching the other bank of the trench. (Secretary's brief, pp. 17-19.)

The videotape is of poor quality. While it might serve to illustrate the results of actual measurements of the trench, if those existed, it is simply not a substitute for them. The videotape creates conflicting impressions of the dimensions of the trench. At times it seems to show employees in the trench with their heads and shoulders above ground level, and at other times creates the inference that an employee is standing in the trench but is not visible above ground level. Camera angles and the focal length of the lens,

---

[7]Depth to drain line (5.75 feet) plus thickness (0.1875 feet) plus gravel fill (0.5 feet) equals 6.4375 feet. This compares with the depth of the trench based on Liston's measurement of the pipe he found in the Fischel excavation: 54.5 inches to the top of the pipe plus 22.5 inches outside diameter of the pipe plus 6 inches of gravel fill equals 83 inches or 6.9166 feet.

coupled with the failure to hold the camera steady and to properly focus, can well create inaccurate impressions of the dimensions of the trench, particularly when the scenes are taped from considerable distance in the absence of a representative of Respondent. In short, I find the videotape is not a reliable indication of the dimensions of the trench.

Nor are Mr. Liston's indirect measurements of the trench reliable. None of them were made in the presence of a representative of Respondent. All require certain assumptions, some of which appear to be more valid than others. Thus, while there can be little doubt that the trench was at least as wide as the bucket of the backhoe, there is considerable doubt that it could not be wider than the distance between the tracks of the backhoe. While the distance between the tracks might serve to limit the width of the trench closest to the backhoe, it would not limit the operator's ability to widen the trench in front of, rather than beneath the backhoe. While Liston's measurement of the blacktop patch would seem to provide an upper limit to the width of the trench, he did not make that measurement in Respondent's presence, nor did he indicate whether he measured the widest or narrowest portion of the patch, or whether the patch was of uniform width. His testimony with regard to the depth of the trench is both inconsistent and disputed by Respondent. Both Green and Davy testified that the depth, according to the drawings governing the work, was essentially five feet.[8] (Tr. 185-88, 198, 216; Respondent's Ex E.)

In short, the Secretary has not established that this trench violated the provisions of § 1926.652(a)(1). Had Mr. Liston taken a few minutes out of the time he spent

[8]Their testimony indicates that the plans called for a depth which was a fraction of an inch over five feet.

videotaping in order to measure the open trench in the presence of Respondent's representative, he might have established a violation. The Secretary has advanced no reason for his failure to take this straightforward step. His indirect measurements and videotape are unreliable and an insufficient substitute for direct measurement of the trench. Citation 2 is vacated.[9]

V. CONCLUSIONS OF LAW

A. Respondent Fort Defiance Construction & Supply, Inc., was at all times pertinent hereto an employer within the meaning of Section 3(5) of the Occupational Safety & Health Act of 1970, 29 U.S.C. Section 651-678 (1970).

B. The Occupational Safety & Health Review Commission has jurisdiction of the parties and the subject matter.

C. Respondent Fort Defiance Construction & Supply, Inc., was not in violation of the standard set out at 29 CFR § 1926.651(c)(2) as charged in Citation 1, Item 1.

D. Respondent Fort Defiance Construction & Supply, Inc., was not in violation of the standard set out at 29 CFR § 1926.651(k)(1) as charged in Citation 1, Item 2.

---

[9]Citing *Secretary v. Concrete Construction Co.*, 15 BNA OSHC 1614, 1621-22 (Rev. Com. 1992), Respondent takes the position that any violation of § 1926.652(a)(1) was *de minimis*. Respondent bases this position on the uncontradicted testimony of its expert, Mr. Krieger, who testified that in his opinion, there was no danger that the walls of this trench, even though vertical, might collapse at a depth of six to seven feet. (Tr. 248-52.) Specifically, Mr. Krieger testified that the soil samples which he analyzed had a safety factor of 13 for a 0.5 horizontal to 1 vertical slope and 9.5 for a vertical face in a trench six to seven feet deep, compared with an OSHA safety factor of 5 for a 1.5 horizontal to 1 vertical slope in a trench twelve feet deep and an Army Corps of Engineers safety factor of 1.5 for earthen dams. (Tr. 245-48.)

While *Concrete Construction* lends support to Respondent's position, I would be reluctant to conclude that any violation of the trenching standards is *de minimis* based on an expert's after-the-fact analysis. Trenching is dangerous. Employers should not be encouraged to deviate from applicable standards based on a less than adequate on-site analysis in the hope that, if a citation is issued, that analysis will be confirmed by an after-the-fact expert examination and analysis.

E. Respondent Fort Defiance Construction & Supply, Inc., was not in violation of the standard set out at 29 CFR § 1910.652(a)(1) as charged in the Citation 2, Item 1.

I. ORDER

Citation 1, Items 1 and 2, and Citation 2 are vacated.

JOHN H. FRYE, III
Judge, OSHRC

Dated: MAR 17 1994
Washington, D.C.