UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. REDLINE PIPELINE, LLC., Respondent.	DOCKET NO. 11-2059

Appearances:

Dana M. Shannon, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Rodney L. Smith, Esq., Sherman & Howard L.L.C., Denver, Colorado
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). On May 2, 2011, the Occupational Safety and Health Administration ("OSHA") inspected a Redline Pipeline, LLC. ("Respondent") jobsite located at the northeast corner of Rampart Range and Village Circle in Littleton, Colorado ("worksite"). As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging five serious violations of the Act with total proposed penalties of $4,800.00. Respondent timely contested the Citation. A trial was conducted in Denver, Colorado on July 24, 2012. The parties submitted post-trial briefs for consideration.

Stipulations

1. Jurisdiction of this proceeding is conferred upon the Commission by Section 10(c) of the Act. (Tr. 14).
2. Respondent is a Colorado corporation with an office and a place of business located at 19126 Shadowood Drive, Monument, Colorado 80132. (Tr. 14).
3. At all relevant times, Respondent was engaged in a business affecting commerce. (Tr. 14).
4. Respondent utilizes goods, equipment, and materials shipped from outside the State of Colorado.
5. Respondent is a construction contractor specializing in water and sewer lines and related structures. (Tr. 14).
6. On or about May 2, 2011, Respondent was the general contractor for a project involving removal of old pipe and installation of a new water pipeline at the northeast corner of Rampart Range and Village Circle in Littleton, Colorado 80125. (Tr. 14–15).
7. Respondent was an employer within the meaning of the Act. (Tr. 15).
8. The parties stipulated to the admission of all exhibits with the exception of Respondent's Exhibit No. 2.[1] (Tr. 12–13).

Jurisdiction

Jurisdiction is conferred upon the Commission pursuant to Section 10(c) of the Act. Based on the parties' stipulations and the record, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

1. Respondent's Ex. 2 was subsequently admitted into evidence during the trial. (Tr. 227).

Background

Five witnesses testified at trial: (1) John Olaechea, OSHA Compliance Safety and Health Officer ("CSHO"); (2) Jerry Jasso, Respondent's excavator operator; (3) John Conley, president and owner of Respondent; (4) Mike Woods, superintendent for Respondent; (5) Rudy Alvarado, owner of Quetzal Environmental. (Tr. 17, 135, 173, 189, 250). Based on their testimony and discussion of evidentiary exhibits, the Court makes the following findings.

Respondent was hired by Roxborough Water and Sanitation ("Roxborough") to replace over 12,000 feet of water and sewer pipelines, which were breaking due to roadways that had been heaving in paved areas of the Roxborough subdivision. (Tr. 186–188). The contract between Roxborough and Respondent indicated that the existing pipe likely contained asbestos. (Tr. 192, 195, 236–238). Respondent subcontracted with ECOS Environmental ("ECOS") to prepare the preliminary plan, gather permits, and perform asbestos abatement for the project. (Tr. 191–192). ECOS, in turn, subcontracted with Quetzal Environmental ("Quetzal") to perform the actual asbestos abatement work at the site. (Tr. 173). ECOS also subcontracted with D.S. Consulting to perform air monitoring and to provide asbestos-related training. (Tr. 193).

The work at issue in this case involved a small portion of the project, at the northeast corner of Rampart Range and Village Circle in Littleton, Colorado. (Tr. 14–15). Respondent excavated a trench at that location a week before the OSHA inspection, on April 26, 2011, to expose a portion of the water pipeline and a valve. (Tr. 188–189). After the initial excavation was created, Respondent's employees installed a concrete anchor, or "dead man", which enabled the water line to continue operating while they worked. (Tr. 189, 198). Mr. Conley testified that a trench box was installed and used while the anchor was being installed. (Tr. 189–190).

On May 2, 2011, CSHO Olaechea and CSHO Lisa Bennett[2] visited the worksite to conduct an inspection pursuant to an Asbestos Local Emphasis Program ("LEP"). (Tr. 18–19). Complainant had received information from the State of Colorado indicating that Quetzal was involved in asbestos abatement at this location. (Tr. 18–19). When CSHO Olaechea arrived at the worksite, he observed several individuals standing at the edge of a trench looking inside the excavation. (Tr. 21–22, 26, Ex. C-1). As CSHO Olaechea approached the trench on foot, he saw two Quetzal employees dressed in white suits exiting the trench by ladder. (Tr. 25, 29, 31, 185, Ex. C-1). The trench box was not in the trench at the time. (Tr. 31, 42, Ex. C-1). After making his initial observations, CSHO Olaechea conducted an opening conference with management of Respondent, ECOS, and Quetzal. (Tr. 29–30). Based upon his interviews, observations, and measurements, CSHO Olaechea issued the citations that are in dispute in this case. Citation 1, Items 1(a), 1(b), and 1(c) allege multi-employer liability on the part of Respondent for the exposure of two subcontractor employees. Citation 1, Items 2(a) and 2(b) allege exposure of Respondent's own employee.

Discussion

To establish a violation of an OSHA standard, Complainant must establish that: (1) the standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (i.e. the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k).

2. CSHO Bennett did not testify at trial.

Complainant need not show that there was a substantial probability that an accident would actually occur; she need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

Citation 1, Item 1(a)

Complainant alleged a serious violation of the Act in Citation 1, Item 1(a) as follows:

> 29 C.F.R. § 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section:
>
> (a) On or about May 2, 2011, Redline Pipeline, LLC, as a controlling employer, did not ensure that Quetzal Environmental (subcontractor) protected their employees from cave-ins while they worked in a trench which was not protected from cave-ins by an adequate protective system. Employees worked in a trench which was approximately 8–10 feet deep with the north wall cut at approximately a 90 degree angle to the base of the trench. There was some undercutting and sloughing of soil visible. In addition, other walls were not appropriately sloped, especially since the soil had been previously disturbed and standing water was located at the base of the trench.

The cited standard provides:

> 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: Excavations are made entirely in stable rock; or 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.

29 C.F.R. § 1926.652(a)(1).

After observing the two Quetzal employees climbing out of the trench, CSHO Olaechea measured the trench depth and angles to determine compliance with 29 C.F.R. § 1926.652(b), which sets forth the protection requirements for excavations depending on configuration and soil

type.[3] (Tr. 32–34, Ex. C-1). CSHO Olaechea determined that the depth of the trench at the north, south, and west walls was approximately 10 feet. (Tr. 34, Exs. C-10, C-14, C-15, C-24). His depth measurements were confirmed by Respondent's superintendent, Mr. Woods, who also testified that the depth was approximately 9–10 feet. (Tr. 262).

CSHO Olaechea and CSHO Bennett took slope angle measurements for the north, south, and west walls using a story pole and angle meter. (Tr. 33, 35). They measured the north and south wall at a 90-degree angle (vertical) from the base to a height of 8 feet. (Tr. 35). The remaining 18–24 inches was measured at a 45-degree angle. (Tr. 35). They noted that the west wall had a bench located a few feet above the base of the trench.[4] (Tr. 36, 57, Ex. C-6). The slope of the west wall from the bench measured 60 degrees. (Tr. 36).

CSHO Olaechea determined that, at best, the soil in the excavation was type B based upon: (1) the previously disturbed nature of the soil from the installation of the original water pipe; (2) a thumb-pressure test indicating type B soil; (3) active roadway traffic nearby, which caused vibration; (4) the presence of water in the base of the trench; (5) sloughing of the soil at the base of the north wall; (6) operation of the excavator near the edge of the trench, which introduced additional vibration; and (7) the presence of accumulated water outside of the northeast wall of the trench. (Tr. 38–40, 47, 88–90).[5]

Superintendent Woods, on the other hand, testified to different conclusions regarding the slope of the trench walls and the classification of the soil. Mr. Woods said that first thing in the morning on May 2, 2011, he performed a visual and manual evaluation of the trench. (Tr. 253). Using a penetrometer, Mr. Woods took three readings—one at the top of a wall, one in the

3. Subsection (b) also cross-references Appendices A and B of Subpart P of 29 C.F.R. § 1926.
4. The "bench" was actually the cement anchor which had been covered and tamped down with overlaying dirt. (Tr. 189, 198).
5. CSHO Olaechea did not send samples of the soil to OSHA's Salt Lake City Laboratory for testing. (Tr. 88).

middle, and one near the base.[6] He concluded that the bottom 4–5 feet of the wall was composed of stable rock and the top 4–5 feet was type A soil.[7] In addition, Mr. Woods testified that, although the bottom 4–5 feet of the trench was sloped at a 90-degree vertical angle, the top 4–5 feet had a slope of ¾ to 1, or roughly 53 degrees.[8] (Tr. 268–271).

Respondent also introduced a geotechnical analysis of the trench, prepared by Ground Engineering Consultants, Inc. The Court affords very little weight to the report for the following reasons: (1) it was not obtained until three days after the OSHA inspection; (2) there was no reliable evidence which established that conditions in those three days were unchanged; (3) the author of the report did not testify at trial; (4) the report was based, in part, on two other reports prepared by a third party (Kumar & Assoc.) months earlier which were not included in Respondent's exhibit; (5) the report did not address the north wall, which was OSHA's primary concern; (6) the report did not address the previously disturbed nature of the soil; and (7) the report did not address the introduction and extraction of water at the excavation site on the morning of OSHA's inspection. (Ex. R-2)

The court credits Complainant's conclusions and testimony regarding the configuration of the trench walls and the soil type over Respondent's for the following reasons. First, Respondent's contention that it excavated beyond the area previously disturbed when the original installation occurred is rejected. (Tr. 153, 155, 160, 214–215). The east and west faces of the walls of the trench had to contain previously disturbed soil because the pipe ran from east to west and a portion of it remained in the wall. (Ex. C-1, C-3, C-6). At the very least, all of the soil on top of the previously installed pipe, as well as some of the soil to the left right, and below the

6. Mr. Woods could not specifically say on which of the walls he took the penetrometer readings. (Tr. 276–277).
7. Mr. Woods testified that the bottom 4–5 feet had an unconfined compressive strength of 4.5 tons per square foot (tsf) and that the top 4–5 feet had an unconfined compressive strength of 3.0–3.5 tsf. (Tr. 260). Appendix A of Subpart P states that type A soil is characterized as having an unconfined compressive strength of 1.5 tsf or greater. *See* 29 C.F.R. § 1926, Subpart P, Appendix A.
8. Mr. Woods did not record any of his purported slope measurements on his daily report. (Tr. 277–278, Ex. R-1).

existing pipe had been previously disturbed. The assertion that native soil was encountered at some point on the outer left, right, or bottom edges of the trench walls, and the location at which that occurred, was merely speculative. *See, e.g.*, *Freeze Technology Int'l, Inc.*, 19 BNA OSHC 1076 (No. 99-308, 2000) (finding trench with existing pipeline contained previously disturbed soil and rejecting as speculative claim that trench only contained virgin soil because the new excavation was larger than the one needed for new pipeline). Second, enough water had been released into the excavation earlier that morning, before OSHA's arrival, to require the use of pumps to remove it from the excavation. (Tr. 104–105, 129–130, 180, 202). Third, the investigative video established that the excavation was located very close to the intersection of two heavily used roads. In fact, vibration and heaving from the nearby roads was causing the previously installed pipelines to break, necessitating this replacement project. (Tr. 187, Ex. C-1). Fourth, the angles of the north, south, and west walls depicted in the investigative video were consistent with the angle measurements presented by CSHO Olaechea. (Ex. C-1). Fifth, the condition of the soil in the excavation, as depicted in the investigative video, was not consistent with Mr. Wood's testimony concerning type A soil or solid rock. (Ex. C-1). The preponderance of the evidence, considered in light of the definitions of types A, B, and C soil in Appendix A to Subpart P of Part 1926, convinces the Court that the soil in the excavation was, at best, type B soil. Therefore, the maximum allowable slopes for the walls of the excavation were 1:1, or 45 degrees. 29 C.F.R. § 1926 Subpart P, App. B, Table B-1. The bottom eight feet of the north and south walls, as well as the west wall, were non-compliant. Based on the foregoing, the Court finds that the cited standard applied and was violated.

The Commission has held that "[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act, 29 U.S.C. § 666(a)(2), to protect not only its own

employees, but those of other employers 'engaged in the common undertaking.'" *McDevitt Street Bovis*, 19 BNA OSHC 1108 (97-1918, 2000) (quoting *Anning-Johnson*, 4 BNA OSHC 1193, 1199 (No. 3694, 1976)). "An employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010) (quoting *McDevitt* at 1109). With respect to creating employer liability, the Commission "has long held that the employer who creates a violative or hazardous condition is obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard." *Id.* (quoting *Smoot Constr.*, 21 BNA OSHC 1555, 1557 (05-0652, 2006)).

In this instance, the Court finds that Respondent was properly cited under both the controlling and creating employer doctrines. Although Respondent did not directly contract with Quetzal, as the general contractor for the project it did possess and assert control over the worksite. *See Summit*, supra (general contractor did not directly contract with exposed subcontractor, but had control over worksite and cited condition). Respondent excavated the trench, took responsibility for ensuring compliance with applicable standards by designating its superintendent as the competent person, and directly monitored the work that was being performed inside of the trench. Clearly, Respondent was in a position to "prevent or detect and abate" violations of the excavation protection standard to ensure the safety of the two Quetzal employees who were in the trench, engaged in the common undertaking of replacing the existing water line. Further, by digging the trench and failing to ensure its compliance with the standards, Respondent created the hazard to which the Quetzal employees were actually exposed. *Smoot Constr.*, supra; *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052 (No. 90-2873, 1992) (general

contractor that created non-compliant trenches held responsible for exposure of subcontractor employees).

Respondent also had direct knowledge of the violative condition. Respondent's supervisors and its owner were present at the edge of the non-compliant trench on the morning of the OSHA inspection while the Quetzal employees were inside working. Further, Mr. Woods had performed an inspection of the trench earlier that morning. (Tr. 25, 32, 253, Ex. C-1). Complainant is not required to establish that an employer understood that a condition was hazardous or non-compliant, only that it was aware of the condition itself. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076 (No. 90-2148, 1995). Citation 1, Item 1(a) was also properly characterized as a serious violation of the Act. A cave-in or other failure of an excavation wall could cause serious injuries, including crushing injuries, broken bones, or death. (Tr. 41, 59, 60). *Mosser Construction*, supra. Accordingly, Citation 1, Item 1(a) will be AFFIRMED.

Citation 1, Item 1(b)

Complainant alleged a serious violation of the Act in Citation 1, Item 1(b) as follows:

> 29 C.F.R. § 1926.651(h)(1): Employees were working in excavations in which there was accumulated water, or excavations in which water was accumulating, and adequate precautions had not been taken to protect employees against the hazards posed by water accumulation:
>
> (a) On or about May 2, 2011, Redline Pipeline, LLC, as controlling employer, did not ensure that Quetzal Environmental (subcontractor) protected their employees from cave-ins while they worked in a trench which contained standing water and was not protected from cave-ins by an adequate protective system.

The cited standard provides:

> Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation,

> but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

29 C.F.R. § 1926.651(h)(1).

This citation involves the same trench discussed above in Citation 1, Item 1(a). Accordingly, the Court incorporates by reference all findings of fact discussed in the previous section. The focus of this item is whether the presence of a small amount of water at the bottom of the trench constituted a violation of the cited standard. In order to comply with the standard, an employer must take adequate precautions to protect employees from the hazards posed by accumulated or accumulating water. CSHO Olaechea observed puddles in the base of the trench and estimated that they contained a total of one to two gallons of water. (Tr. 38). Water had entered the trench that morning before OSHA's arrival, when the existing pipeline was broken open by Quetzal employees. (Tr. 104, 105, 129, 130, 180). Respondent used two to three sump pumps to extract the accumulated water. (Tr. 199, 203). However, as the pumps were being removed, some residual water leaked back into the trench from the pump hoses. (Tr. 203–204, 212–213). CSHO Olaechea testified that the presence of that water could "potentially weaken the base of the wall, and make a cave-in more likely." (Tr. 51).

Complainant's argument focuses on the first portion of the standard, which states that "[e]mployees shall not work in excavations in which there is accumulated water . . . ." 29 C.F.R. § 1926.651(h)(1). Complainant's position, however, disregards the second clause of the sentence: "unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation." *Id.* Respondent clearly implemented precautionary measures by using two to three sump pumps to remove excess water from the trench, installing wash rock to disperse any residual water at the base, and diverting the water away from the excavation into to

a nearby drainage ditch, which was separated from the excavation by a concrete storm drain. (Tr. 199, 201, Ex. C-1). Further, Complainant failed to establish how one to two gallons of accumulated water in this excavation posed a hazard. *See, e.g.*, *Straight Ahead Constr., Inc.*, 2012 WL 3059588 (No. 12-0047, 2012) (general statements regarding the effect of water on an excavation are insufficient to illustrate that an undetermined amount of water posed a hazard). Based on this record, it is not clear that the small puddles at the base of the trench created any specifically identifiable hazardous condition which violated the cited standard. Accordingly, Citation 1, Item 1(b) will be VACATED.

Citation 1, Item 1(c)

Complainant alleged a serious violation of the Act in Citation 1, Item 1(c) as follows:

> 29 C.F.R. § 1926.651(k)(1): An inspection of the excavations, the adjacent areas, and protective systems was not conducted by the competent person prior to the start of work and as needed throughout the shift.
>
> (a) Redline Pipeline, LLC, as a controlling employer, did not ensure that the trench in which Quetzal Environmental (subcontractor) employees were working had been inspected by a competent person. The trench was not protected from cave-ins by an adequate protective system and had signs of water accumulation and sloughing at the base.

The cited standard provides:

> 29 C.F.R. § 1926.651(k)(1): 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. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

29 C.F.R. § 1926.651(k)(1).

Citation 1, Item 1(c) was primarily based on CSHO Olaechea's observation of excavation

deficiencies, rather than the qualifications of the designated competent person. (Tr. 108–109). Mr. Woods had taken competent person training courses, had many years of excavation experience, testified very clearly as to the methods he employed in order to evaluate the trench, and had authority to correct non-compliant conditions. (Tr. 252). Respondent also presented undisputed evidence that Mr. Woods performed a manual and visual inspection of the trench on the morning of May 2, 2011, prior to work being performed. (Tr. 253, Ex. R-1). The Court finds that Mr. Woods was qualified to serve as the competent person and conducted an initial daily excavation inspection. However, the cited standard requires the competent person to perform additional inspections "as needed throughout the shift" and after any "other hazard increasing occurrence." 29 C.F.R. § 1926.651(k)(1).

After his initial inspection, Mr. Woods and other members of the Redline crew attended a two-hour course on asbestos abatement. (Tr. 194–195). Mr. Woods testified that after returning from the course, but prior to the OSHA inspection and the two Quetzal employees entering the trench, he simply "walked around" and concluded that "nothing had changed." (Tr. 273–274). However, significant changes had actually occurred in and around the excavation since his initial inspection. For example, a "jumping jack compactor" was used to backfill the dead man anchor. (Tr. 198, 236). According to Mr. Conley, this intentionally introduced vibration into the trench. (Tr. 236). Second, the trench box that was being used in the excavation when Mr. Woods conducted his initial competent person inspection had been removed from the trench. (Tr. 190, 273–274). Third, water was released into the bottom of the excavation, and then extracted using two to three sump pumps. (Tr. 104–105, 129–130, 180). Fourth, two Quetzal employees were about to climb down a ladder and enter the now trench-box-less excavation with sledgehammers to obtain samples of broken pipe for the purposes of asbestos testing. (Tr. 198–199). Mr.

Woods' testimony that, after his two-hour training course, he simply "walked around to make sure nothing had changed" was inconsistent with the numerous changes that had occurred since his early morning inspection. As the designated competent person, he was required by the cited standard to conduct a new and thorough inspection, factoring in the numerous changes that occurred, to determine whether entry by the two Quetzal employees was safe. He did not. The cited standard applied and was violated.

For the same reasons discussed above with respect to Citation 1, Item 1(a), the Court also finds that Respondent had direct knowledge of the violative condition. Mr. Woods and Mr. Conley were both present and had direct knowledge of whether another competent person inspection of the trench was conducted after returning from the asbestos training course. (Tr. 25, 190). The violation was properly characterized as serious in that failure of a competent person to adequately inspect an excavation can, and did, result in non-compliant, hazardous excavation conditions. Finally, as discussed above, Respondent was properly cited as the creating and controlling employer in that it controlled this worksite and created this violative condition, to which two Quetzal employees were exposed. Citation 1, Item 1(c) will be AFFIRMED.

Citation 1, Item 2(a)[9]

Complainant alleged a serious violation of the Act in Citation 1, Item 2(a) as follows:

> 29 C.F.R. § 1926.1101(h)(3)(iii)(A): The employer did not provide a half-mask air-purifying respirator, other than a disposable respirator, equipped with high-efficiency filters, whenever the employee(s) performed Class II and Class III asbestos jobs where the employer did not produce a negative-exposure assessment:
>
> (a) On or about May 2, 2011, an employee (excavator operator) was exposed to asbestos fibers while removing transite water pipe because he was not provided with at least a half-mask air purifying respirator with high-efficiency filters. The transite pipe contained Class II

9. In light of the fact that both items in Citation 2 are premised on the same issue—whether the work being performed was Class II asbestos work—this decision addresses both items in the same discussion.

asbestos material.

The cited standard provides:

> Employers must provide employees with an air-purifying half mask respirator, other than a filtering facepiece respirator, whenever the employees perform: Class II or Class III asbestos work for which no negative exposure assessment is available.

29 C.F.R. § 1926.1101(h)(3)(iii)(A).

Citation 1, Item 2(b)

Complainant alleged a serious violation of the Act in Citation 1, Item 2(b) as follows:

> 29 C.F.R. § 1926.1101(k)(9)(iv)(C): For Class II operations not involving the categories of material specified in paragraph (k)(9)(iv)(A) of this section, training shall be provided which shall include at a minimum all the elements included in paragraph (k)(9)(viii) of this section and in addition, the specific work practices and engineering controls set forth in paragraph (g) of this section which specifically relate to the category of material being removed, and shall include "hands-on" training in the work practices applicable to each category of material that the employee removed and each removal method that the employee used:
>
> (a) On or about May 2, 2011, an employee (excavator operator) was exposed to asbestos fibers while removing transite water pipe which contained asbestos without receiving adequate training in asbestos standards, control methodologies, and other information contained in the asbestos standard which would help to minimize his exposure. The transite pipe contained Class II asbestos material.

The cited standard provides:

> For Class II operations not involving the categories of material specified in paragraph (k)(9)(iv)(A) of this section, training shall be provided which shall include at a minimum all the elements included in paragraph (k)(9)(viii) of this section and in addition, the specific work practices and engineering controls set forth in paragraph (g) of this section which specifically relate to the category of material being removed, and shall include "hands-on" training in the work practices applicable to each category of material that the employee removes and each removal method that the employee uses.

29 C.F.R. § 1926.1101(k)(9)(iv)(C).

As stipulated and discussed above, Respondent was the general contractor at this worksite. Contractual documents for this project indicated that the existing pipe likely contained asbestos.[10] (Tr. 192, 195, 236–238). Respondent, in turn, subcontracted with ECOS, who subcontracted with Quetzal and D.S. Consulting, to assist in the asbestos abatement requirements at the worksite. Quetzal's primary responsibility was the removal of the asbestos-containing pipe. (Tr. 193). D.S. Consulting was hired to perform asbestos monitoring and to provide asbestos-related training. (Tr. 193).

On the morning of May 2, 2011, D.S. Consulting provided a two-hour asbestos training course to Redline employees, including Mr. Jasso, Respondent's excavator operator.[11] (Tr. 195–197). After completing the training, Mr. Jasso operated an excavator located approximately 15 feet away, on the outside edge of the trench at issue in this case. (Tr. 163). It was undisputed that Mr. Jasso was not wearing a half-mask respirator while operating the excavator. (Tr. 144).

The dispute with respect to these two citation items relates to the type of work that Mr. Jasso was performing during the morning of May 2, 2011 and whether the Class II respirator and training requirements applied. Complainant argued that Mr. Jasso was engaged in Class II asbestos work and therefore required to wear a half-mask respirator pursuant to 29 C.F.R. § 1926.1101(h)(3)(iii)(A) and take comprehensive Class II training pursuant to 29 C.F.R. § 1926.1101(k)(9)(iv)(C).[12] OSHA's position is based on CSHO Olaechea's observations at the site and Mr. Alvarado's testimony asserting that Mr. Jasso removed large sections of pipe from the trench during the morning before OSHA's arrival. (Tr. 175).

10. The presence of asbestos in the pipe was later confirmed through testing. (Tr. 136, 235).
11. Complainant argued that the two-hour training session was not comprehensive enough to satisfy the requirements for Class II asbestos work. (Tr. 116).
12. CSHO Olaechea testified that only Mr. Jasso was exposed to the conditions alleged in Items 2(a) and 2(b). The court notes that Complainant's investigative video shows approximately 13 people standing out in the open at the edge of the excavation containing asbestos-containing-pipe, much closer and less protected than Mr. Jasso while in the enclosed cab of his excavator. (Ex. C-1).

Respondent contends that Mr. Jasso, from inside the closed cab of an excavator located outside the trench, simply removed soil down to just a few inches above the existing pipe so that Quetzal employees could expose the pipe by hand and break it open with sledgehammers for asbestos testing. (Tr. 137–139). Mr. Jasso testified that he did tell CSHO Olaechea that they would be removing sections of pipe from the trench at some point, but not necessarily that day. (Tr. 153). Ultimately, Respondent argued that Mr. Jasso was merely engaged in preparatory work for the removal of the pipe, which, according to the standards cited by Complainant, did not constitute Class II work.

Class II asbestos work is defined as "activities involving the removal of ACM [asbestos containing material] which is not thermal system insulation or surfacing material. This includes, but is not limited to, the removal of asbestos containing wallboard, floor tile and sheeting, roofing and siding shingles and construction mastics." 29 C.F.R. § 1926.1101(b). The term "removal" is defined as "all operations where ACM and/or PACM [presumed asbestos containing material] is taken out or stripped from structures or substrates, and includes demolition operations." *Id.*

At the time of the inspection, the only evidence that anything had been removed from the trench at this location was two small white plastic bags containing small pieces of broken pipe material that were resting outside of the trench. (Tr. 176–178, Ex. C-1). The Court is not persuaded that Mr. Jasso removed any asbestos-containing material from the trench on the day of the inspection. The preponderance of the evidence convinces the Court that the following occurred immediately prior to OSHA's arrival: (1) Mr. Jasso used an excavator, located several feet outside of and away from the excavation, to dig down to a point just a few inches above the section of pipe to be tested; (2) two Quetzal employees, in protective suits, then climbed into the

trench and hand dug until they reached the pipe; (3) the Quetzal employees then wrapped the exposed section of pipe with plastic and broke pieces off with a sledgehammer; (4) two small plastic bags of pipe material were removed from the trench by ladder for testing; and (5) the only section of pipe exposed at the time of the inspection remained in the bottom of the trench covered with white plastic sheeting. (Tr. 137–138, 147–153, 176–178, 200, 204–209, Ex. C-1).

Therefore, the Court finds that Mr. Jasso was not engaged in Class II asbestos work on May 2, 2011. Mr. Jasso's activities that morning did not qualify as "removal", which is the process that defines Class II asbestos work. *See* 29 C.F.R. § 1926.1101(b). The cited standards in Items 2(a) and 2(b) did not apply. Accordingly, Citation 1, Items 2(a) and 2(b) will be VACATED.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Citation 1 Items 1(a) and 1(c) involve the failure to protect employees from excavation hazards. Falling soil from even a partial trench collapse can cause crushing injuries, broken

bones, and death. (Tr. 41, 59, 60). In calculating the proposed penalties, CSHO Olaechea factored in the low probability of an accident actually occurring, the small size of Respondent's company, and the brief exposure of two subcontractor employees. (Tr. 60–61). Based on the totality of the circumstances discussed above with regard to Citation 1, Items 1(a) and 1(c), the Court finds that a grouped penalty of $2,000.00 is appropriate.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Items 1(a) and 1(c) are AFFIRMED and a grouped penalty of $2,000.00 is ASSESSED;
2. Citation 1, Item 1(b) is VACATED; and
3. Citation 1, Items 2(a) and 2(b) are VACATED.

SO ORDERED.

/s/
Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

Date: December 26, 2012
Denver, Colorado