

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant,

v.

Roberts Sand Company, LLLP,  
Respondent.

OSHRC Docket No. **11-3032**

Appearances:

Jeremy K. Fisher, Esquire, U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia  
For the Complainant

Andrew N. Gross, Esquire, H B Training & Consulting, LLC, Lawrenceville, Georgia  
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER**

Roberts Sand Company (RSC) is a Tallahassee based sand and material company. It operates two sand dredging facilities as well as a clay pit operation in the Tallahassee/Quincy area. On October 2, 2011, an Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) began an inspection of the clay pit operation located at 1165 Selman Road in Quincy, Florida. The inspection was initiated due to a fatality at the clay pit when part of the highwall in the pit collapsed. As a result of the inspection, the Secretary issued a serious citation to RSC on October 27, 2011.

The serious citation alleges RSC violated the general duty clause set out at section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act) by not having an adequate protective system in the 23 foot deep excavation, exposing an employee to a collapse hazard. As a feasible means of abatement, the Secretary proposed sloping the walls of the excavation. The Secretary proposed a penalty of \$4,200.00 for this alleged violation.

RSC timely contested the citation. The undersigned held a hearing in this matter on May 17, 2012, in Tallahassee, Florida. The parties stipulated to jurisdiction and coverage under the Act. RSC admits it is an employer engaged in a business affecting interstate commerce (Tr. 6). Both parties filed post-hearing briefs.

RSC contends the Secretary has not met her burden of proof for the alleged general duty clause violation. It also contends that even if the Secretary proves the violation, it has met its burden of showing the accident was the result of unpreventable employee misconduct.

For the reasons discussed below, the undersigned finds the Secretary has proven the alleged violation and RSC failed to demonstrate the accident was caused by unpreventable employee misconduct. The citation is affirmed and a penalty of \$4,200.00 is assessed.

### **Background**

RSC operates two sand dredging facilities in the Tallahassee/Quincy area where it employs 22 to 23 employees. The dredging facilities are considered mines because RSC processes the dredged sand. For this reason, the Mine Safety and Health Administration (MSHA) has jurisdiction over the two mines. RSC's dredging facilities are active worksites. RSC also owns a clay pit in Quincy. The clay pit is not considered a mine because RSC does not process the sand and clay obtained from the pit. Customers who purchase the sand and clay send dump trucks to the site to pick up the material. The clay pit, also called a borrow pit, is large and wide, encompassing eight to ten acres. OSHA has jurisdiction over the clay pit. Work at the clay pit is intermittent, and there are not always employees at that site. RSC purchased the pit in 2004, and work at that site fluctuates depending on the economy (Tr. 18, 29, 32, 106-07, 110, 114, 228; Exh. C-10, p. 2; S. Brief, p. 6, n.3).

[redacted] was an equipment operator with RSC who worked for the company approximately ten years. [redacted] worked primarily at the sand dredging facility (mine) located just outside of Quincy. At that mine, he operated various types of equipment and was in charge of safety inspections. He was responsible for the operation of the mine's sand processing plant and he directed employees as necessary. He also supervised the dredge operator. RSC considered [redacted] a foreman and a "competent person" at the mine and the clay pit. [redacted] supervisor was Marlan Roberts, the overall supervisor of the mine (Tr. 17, 56, 109-14, 178-79).

In the summer of 2011, a customer ordered several loads of material from RSC's pit in Quincy. In July 2011, [redacted] was assigned to fill that order, which required him to work at the clay pit. RSC kept an excavator at the pit to extract the material. The excavator was a Link-Belt 4300, with the cab located on the left side. [redacted] utilized the excavator's boom and bucket, also called the stinger, to claw or scrape the sand clay from the pit's bank or highwall. The highwall was about 25 feet high. [redacted] placed the material, which fell from the wall, into piles with the bucket. As the customer's trucks arrived, he loaded the material onto the trucks. [redacted] worked at the pit on July 12-14, 21-22, and 25-29, 2011 (Tr. 24, 27, 116-17; Exh. C-10, p. 2).

[redacted] continued his work at the site on August 1, 2011. His last load of material onto customer's trucks occurred at 11:45 a.m. Afterwards, part of the highwall collapsed onto the excavator, crushing the cab with him inside. Two customer trucks arrived shortly after noon to pick up their next loads, and the truck drivers saw the wall had collapsed onto the excavator. They attempted to dig [redacted] out by hand and called 911 for help. When the Fire Rescue team arrived, it had to cut away the upper part of the cab to retrieve [redacted]. By the time he was removed, [redacted] was deceased (Tr. 19, 28, 60; Exh. C-10, p. 2).

After the accident, Michael Roberts, RSC's president, called both MSHA and OSHA, because he was not sure which agency had jurisdiction. In response to the call to MSHA, Louis Owens, an MSHA inspector, went to the site on August 1, 2011, and met with Roberts. Owens was familiar with RSC, having inspected its two mines before. He had not inspected the clay pit before the accident. Owens observed the conditions at the pit when he arrived at the site on August 1. He testified the excavator, which was basically destroyed, was positioned parallel to the highwall that had fallen; the pit's highwalls were essentially vertical, sloped two to three percent; and there was no benching in the pit, although there were soil berms at the base of the pit's highwalls. Owens could not tell if there was a berm at the base of the wall that had collapsed, due to the sand and clay material that had fallen there. Owens testified the pit's berms were sufficient according to MSHA, and the industry practice is to keep the excavator away from the wall by at least 25 percent of the wall's height, however the berms at the pit were not wide enough to accomplish this (Tr. 16-27, 32-34, 55, 62, 88, 129; Exhs. C-1, C-2, C-3, C-4).

Owens determined the collapse was caused by [redacted] undercutting the wall he had been working on, leaving little underlying support, causing the wall above the undercut to collapse. Owens testified it appeared [redacted] positioned the excavator parallel to the highwall, with the cab towards the wall, when he was scraping down a particular section. According to Owens, the industry practice was to position the excavator perpendicular to or facing the wall, and the proper way to move, after scraping down a wall, is to back the excavator away from the wall before turning it to scrape further down the wall. Owens believed [redacted] placed the excavator two to three feet from the wall, and he estimated that after the accident, the excavator was 13 to 15 feet from the remaining highwall. After observing the worksite and speaking to Roberts, Owens concluded MSHA did not have jurisdiction over the pit, since RSC was not processing any of the material being extracted from the pit (Tr. 23-24, 29-32, 38-44, 53-54, 57).

Upon learning MSHA did not have jurisdiction over the clay pit, OSHA's Jacksonville, Florida office assigned CSHO Henry Miller to inspect the site.<sup>1</sup> CSHO Miller went to the site on August 2, 2011. He spoke to Roberts and learned about [redacted] work at the site and the accident. The CSHO observed that the pit's west-side walls had been scraped or cut such that they were vertical. The other walls were sloped at the bottom, up to one third of the height, and then vertical. The CSHO measured the wall in the area next to the excavator, where the soil had collapsed. He found the wall was 23 feet high. He also found the remaining wall was 16 feet from the excavator. The CSHO noted the pit had layers of multiple clay soil types. He performed a manual test of soil obtained from the bottom of the pit, and concluded the soil was "Type B." He sent a sample of the soil to OSHA's testing laboratory, which confirmed the soil was a "sandy clay" "Type B" soil. During the inspection, Roberts told the CSHO he knew the pit was not covered by MSHA, because RSC did not process the soil, but RSC was following MSHA's highwall excavation standards nonetheless. He also told the CSHO he never thought the OSHA excavations standard applied to the pit since the soil was being excavated and hauled off (Tr. 67-68, 71-80; Exhs. C-10, C-11, C-12).

At the hearing, AAD Romeo testified he believed the pit should have been sloped or benched according to OSHA's excavations standard. Romeo further testified that keeping the excavator a safe distance (25 feet) from the highwall is also a protective measure. Romeo noted

---

<sup>1</sup> Jeffrey Romeo, the Assistant Area Director (AAD) of OSHA's Jacksonville office, testified about the OSHA inspection because CSHO Miller passed away in January 2012 (Tr. 64-66, 73-74).

the citation was issued as a section 5(a)(1) violation, rather than as a violation of OSHA's excavations standard, because the work at the site was not construction work, and that OSHA's general industry standards do not have specific standards for excavations (Tr. 81-86, 103).

### **The Alleged Violation**

Item 1 of Serious Citation 1 alleges a violation of the general duty clause, section 5(a)(1) of the Act. Section 5(a)(1) requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). The citation alleges a violation of section 5(a)(1) as follows:

On or about August 1, 2011, the 23 feet deep excavation did not have an adequate protective system, exposing an employee to a collapse hazard.

As a feasible means of abatement, OSHA proposed that the excavation walls be sloped.

### *The Evidence*

It is not disputed that MSHA has jurisdiction over RSC's two sand dredging operations, but does not have jurisdiction over the clay pit (Tr. 29, 32, 228). Roberts testified RSC follows MSHA highwall excavation rules for both its mines and its clay pit (Tr. 143). MSHA inspects RSC's mines twice a year. Owens testified his inspections of RSC's mines included the dredging operations' highwalls and checking the training records. He found RSC to be MSHA-compliant, and, as he had not cited RSC for any training violations, he assumed the training had included a highwall segment. He never reviewed any training records for RSC's pit (Tr. 16-17, 45-49, 55-59).

MSH Trainer Hart testified he has been conducting MSH training at RSC's mines since 1989 or 1990. According to Hart, the required MSH training includes annual refresher training for all miners, new miner training for inexperienced miners, and training for experienced miners who are returning to the industry or particular mine after an absence. Hart identified Exhibits R-4, R-5 and R-6 as training records for [redacted] for 2003, 2009 and 2010. Hart testified MSH trainer, Leroy Nichols, conducted [redacted] annual refresher training for 2003, 2009 and 2010. Since Hart had not conducted [redacted] highwall training, he did not know what was covered in that training. He testified there was no excavator training for [redacted] reflected in Exhibits R-4, R-5 or R-6 to indicate any excavator training for him (Tr. 203-16, 221-26, 231-35).

Roberts testified that [redacted] training included highwall training, which covered sloping back from highwalls and building a berm around a highwall pit so vehicles cannot drive into the pit. [redacted] held the title of “equipment operator.” According to Roberts, [redacted] could operate proficiently any RSC equipment. Before operating a piece of equipment, [redacted] was first trained and then tested on it. Roberts, also an excavator operator, tested [redacted] on operating the excavator. He described [redacted] as one of the best excavator operators in the area, even better than he. Roberts also believed [redacted] followed standard operating procedures and MSHA rules until the time of the accident (Tr. 109-10, 119-20, 123-24, 144-50, 164-65, 186).

Roberts trained [redacted] on how to work at the pit, but he could not remember when that training occurred. He testified that while the “four rules” were not in RSC’s safety documents, they were basic to equipment operation. Roberts communicated the rules by working with [redacted]. For example, he told [redacted] when training him to point the excavator toward the highwall and to not undercut. He also worked with [redacted] in the field and watched him work regularly. Roberts typically visits RSC’s worksites weekly to see the work and check on safety. He had not visited the pit when [redacted] was there in July 2011, because of his mother’s impending death, so he was spending time with her. Roberts did not go to the pit during the three weeks [redacted] was there (Tr. 117-18). No one from RSC’s management had gone to the site to check on [redacted] (Exh. C-10, pp. 2, 4). However, RSC had been in contact with [redacted] by phone in July 2011. Roberts was not concerned about [redacted] working alone at the pit, given his experience, safety and competence. He could not recall when [redacted] last worked there, but [redacted] worked at the clay pit intermittently, and he trusted [redacted] to work there safely (Tr. 111-27, 134-38, 150-56, 160-62, 179-86).

Roberts testified the excavator was too close to the wall, but it was more than two feet away because the excavator would not have been able to operate two feet from the wall. Roberts did not dispute, however, that the excavator could have been 11 feet away after the collapse. He testified the excavator should have been kept at a distance that complied with MSHA rules, but RSC had no specific rule regarding this. RSC’s written policy is to keep equipment two feet from the edge of a pit, but there is nothing in writing about keeping a certain distance from a

wall's bank. According to Roberts, all operators are to work under MSHA rules and best industry practice, much of which is based on the operator's personal assessment of what is safe.

Roberts agreed [redacted] could have made the wall safer by cutting back the top of the wall or sloping it. He testified the Link-Belt 4300, which has an approximately 34 foot reach could have been used for this purpose. According to Roberts however, work at the site was a "controlled collapse" and to get the proper mixture of clay and sand the bucket had to scrape the whole wall of strata. Cutting back the top would have affected the mixture. So Roberts felt cutting back the top of the wall was not necessary. According to him, the wall was safe until it was undercut. Roberts testified that other employees excavated the pit before and he never told them to cut or slope the wall back (Tr. 120-32, 139, 154, 165-78, 181-83, 186-87).

Charles Clark, loader operator at RSC's Tallahassee office for approximately two and one-half years. He testified he last operated the Link-Belt 4300 at RSC's clay pit one and one-half to two years ago. Before then, he worked at the pit for four to five months. During that assignment, he mostly worked alone but at times another operator was with him. Roberts was his supervisor when he worked at the pit, and Roberts visited the site at least twice a week to check on Clark and his progress. Roberts discussed safety with Clark. Clark testified he "definitely" tried not to turn the excavator sideways to the wall; if he did, he backed up first so if something fell it would not hit the excavator. Roberts told him to not undercut the wall. He did not recall Roberts telling him to stay a specific distance from the wall. Clark testified it was not possible to operate the excavator if it was too close to the wall. Further, to make the wall safer when he worked in the pit, he used the excavator to reach up and slope back the top of the wall three or four feet, to alleviate overhang. Clark recalled Roberts being at the site once when he was cutting the wall back, and Roberts confirmed it was safe. According to Clark, all operators cut the top of the wall back so there is no danger of an overhang falling (Tr. 190-99).

Clark testified cutting back the top of the wall does not affect the quality of the material provided to customers. He explained that the top layers of clay are needed to mix in with the sand at the bottom to make good sandy clay. The operator tries to scrape down the entire wall to get the proper mix. After scraping down the wall, the operator backs up and throws the material off to the side. The operator can usually judge if there is enough sand in the mixture, and, if more is needed, the operator adds it to the mixture (Tr. 199-201).

## DISCUSSION

### The Secretary's Burden of Proof

The Secretary has the burden of establishing that the employer violated the general duty clause. To prove a section 5(a)(1) violation, the Secretary must show that: (1) an activity or condition in the workplace constituted a hazard to employees; (2) either the cited employer or its industry recognized that the activity or condition was hazardous; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) there were feasible means to eliminate the hazard or materially reduce it. *Well Solutions, Inc.*, 17 BNA OSHC 1211, 1213 (No. 91-340, 1995) (citations omitted). Also, the evidence must demonstrate that the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 (Nos. 86-360 & 86-469, 1992) (citations omitted).

#### *Whether an Activity or Condition at the site Constituted a Hazard*

The conditions and activities at the jobsite were hazardous. The pit's highwall was over 20 feet high, and nearly vertical. Although OSHA's excavation standards do not apply in this case, they are instructive. As Romeo testified, OSHA's excavations standard requires an engineer to be involved in designing a protective system when an excavation is over 20 feet deep (Tr. 82). *See also* Appendix B to Subpart P, Table B-1, Maximum Allowable Slopes, Note 3. No engineer had designed a protective system for the pit (Tr. 82, 126). And even if the pit had been less than 20 feet deep, the soil was Type B, which, under the OSHA standard, requires a slope of 1:1 or 45 degrees. *See* Appendix B, Table B-1, Maximum Allowable Slope for Type B soil. No such sloping was done on the pit's highwall. The purpose of a protective system, such as sloping, under OSHA's excavations standard, is to protect employees in an excavation from a cave-in. *See* 29 C.F.R. § 1926.652(a)(1). The evidence shows [redacted] was working in proximity to the highwall. RSC's president, Roberts, testified that [redacted] was "way too close" to the wall (Tr. 123). Given [redacted] proximity to the highwall and the condition of the wall, [redacted] was exposed to the hazard of the wall caving in or collapsing on him.

[redacted] work at the site constituted a hazard. Michael Roberts testified that [redacted] made four critical mistakes in operating the excavator. First, he was "way too close" to the wall. Second, he had the excavator tracks turned sideways, instead of facing the wall. Third, he undercut the wall. Fourth, he turned the cab to the wall. As Roberts put it, this last point was "like rule one...never, ever turn that cab into danger" (Tr. 123). Owens and Ben Hart, a Mine



Safety and Health (MSH) trainer who testified on RSC's behalf, agreed with Roberts that [redacted] actions at the time of the accident were unsafe and contrary to prudent industry practice. (Tr. 23, 31-32, 38-40, 43, 217-19, 230). The Secretary has shown the first element of her burden of proof.

*Whether RSC or its Industry Recognized that the Activity or Condition was Hazardous*

A recognized hazard is a practice, procedure or condition under the employer's control that is known to be hazardous by the cited employer or the employer's industry. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). RSC recognized the hazards of working near highwalls. As noted above, Roberts described the four rules he believed [redacted] had not followed when the accident occurred. According to Owens and Hart, [redacted] actions at the time of the accident were unsafe and contrary to prudent industry practice. The Secretary has demonstrated the second element of her burden of proof.

*Whether the Hazard Caused or was Likely to Cause Death or Serious Physical Harm*

There is no question, and the facts of this case demonstrate, the hazard cited in this case caused death. The Secretary has established the third element of her burden of proof.

*Whether Feasible Means Existed to Eliminate or Materially Reduce the Hazard*

To abate the hazard, the Secretary proposed sloping the walls of the excavation. RSC contends it should not be held to the requirements of OSHA's excavation standard. It faults OSHA for not consulting with MSHA or the industry before issuing the citation and for attempting to enforce its own excavation standard in this case. RSC contends it has always complied with MSHA standards for highwall excavations and its work at the clay pit was done according to those standards. It also contends OSHA has no familiarity with clay pits and has no highwall excavation standards. According to RSC, MSHA routinely inspects highwall excavation sites and has strictly enforced rules for training, competency, inspection and safety at such sites. Further, RSC asserts OSHA has no basis for claiming there was not an adequate protective system in the pit. RSC argues the protective system in place at the site was more than sufficient and the accident would not have occurred but for [redacted] unforeseeable misconduct. The undersigned disagrees. The evidence shows the wall was not cut back properly. Clark testified the walls could be cut back. Sloping the walls, as proposed by the Secretary is a feasible means of abatement, as evidenced by the fact that RSC sloped the walls, albeit insufficiently.

Further, Roberts admits the walls could have been sloped back to make it safer (Tr. 120-32, 139, 154, 165-78, 181-83, 186-87).

*Whether RSC had Knowledge of the Violative Condition*

As noted above, the final element the Secretary must prove is that the employer either knew, or could have known with the exercise of reasonable diligence, of the violative condition. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 (Nos. 86-360 & 86-469, 1992) (citations omitted). The Secretary contends [redacted], a supervisor, had actual knowledge of the hazardous condition, in that he violated RSC's "four rules" with respect to excavator operation at the worksite. The undersigned agrees [redacted] was considered a foreman and a "competent person" at the Quincy mine and the clay pit (Tr. 112, 179). As such, under Commission precedent, [redacted] is deemed to have had knowledge of the violative conditions. [redacted] knowledge is imputable to RSC. *Id.* at 1537-38. RSC argues that [redacted] knowledge cannot be imputed due to a Fifth Circuit decision holding that a supervisor's knowledge of his own violative conduct cannot be imputed to the employer without further inquiry. *W.G. Yates & Sons Constr. Co.*, 459 F.3d 604, 608 (5<sup>th</sup> Cir. 2006); R. Brief, p. 38. This case arose in the Eleventh Circuit, not the Fifth Circuit, and the cited decision is not binding here. RSC had actual knowledge of the cited condition.

The Secretary also contends RSC had constructive knowledge of the violative condition in that, if it had exercised reasonable diligence, it could have discovered the violative condition. The undersigned agrees. "Reasonable diligence" includes the employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). The Commission has held that "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000 (citations omitted), *aff'd without published opinion*, 277 F.3d 1374 (5<sup>th</sup> Cir. 2001). [redacted] worked by himself for 11 days over a three-week period, and no one from RSC went to the site to check on his work at the site. RSC did not exercise reasonable diligence to determine whether conditions were safe. Constructive knowledge is established.

For the foregoing reasons, the undersigned concludes the Secretary has met her burden of proving that RSC's protective measures with respect to the clay pit were inadequate. Besides sloping, RSC could have taken other safety measures, such as keeping the excavator 25 feet from the wall (Tr. 86, 103). Or, RSC could have engaged an engineer to design an appropriate protective system (Tr. 82). *See also* Appendix B to Subpart P, Table B-1, Note 3. The Secretary has met her burden of proving the alleged violation in this case. The violation will be affirmed, unless RSC is able to prove its asserted defense that the violation was due to unpreventable employee misconduct.

### **Whether the Violation was due to Unpreventable Employee Misconduct**

The Eleventh Circuit, where this case arose, has held that to prevail on this affirmative defense, the employer "must demonstrate that it took all feasible steps to prevent the accident, and that the actions of its employees were a departure from a uniformly and effectively communicated and enforced work rule of which departure [the employer] had neither actual nor constructive knowledge." *Daniel Int'l Corp. v. OSAHRC*, 683 F.2d 361 (11<sup>th</sup> Cir. 1982).

There is no dispute as to how the accident occurred. The evidence reveals [redacted] placed the excavator parallel to the wall, rather than facing it, with the cab towards the wall. He was too close to the wall; and undercut the wall causing the wall to collapse (Tr. 31, 38-44, 123, 130-32, 167-71, 217-19, 230). These were the "four rules" Roberts testified [redacted] violated (Tr. 123). These rules are not in any of RSC's safety documents (Tr. 182-83). Roberts communicated the rules to [redacted] by working with him and by training him at the pit (Tr. 121-22, 127, 135). That the "four rules" were not in writing anywhere, and that [redacted], a supervisor, violated all four of them at the site, supports a conclusion that RSC failed to adequately communicate the rules.

Clark's testimony indicated he had learned three of the "four rules" from Roberts and other operators (Tr. 194-97). He did not recall ever being told to keep a specific distance from the highwall, however (Tr. 195). Further, the testimony of Clark and Roberts differs as to whether the tops of highwalls should be cut back. Roberts testified he never told [redacted] or anyone else to cut or slope back the top of the highwall, and he did not believe it was necessary (Tr. 122, 126-27). Clark testified it was his and other operators' regular practice to cut or slope back the top of the highwall three to four feet to prevent an overhang and a possible collapse (Tr.

195-96). Clark did not remember anyone telling him to do this but testified Roberts had been present once when he was cutting back the top of the highwall and Roberts had told him it was safe (Tr. 197-98). Roberts admitted the excavator, which can reach and work up to 34 feet, could have been used to cut or slope back the highwall and doing so would have made the wall safer (Tr. 127, 139, 176). Hart also testified cutting back the tops of highwalls is one way to negate the hazard of such walls (Tr. 229-30).

According to Roberts, RSC has no rule about keeping an excavator a specific distance from a wall (Tr. 120-21). He testified the excavator should have been kept at a distance that met MSHA rules, but he did not give a particular distance. He also testified that operators are to work under MSHA rules and best industry practice; however, much of this is based on the operator's personal assessment of what is safe (Tr. 121). According to Owens, the operator is to keep the excavator at a distance of at least one fourth of the wall's height (Tr. 33). Hart and Romeo both testified that a safe distance in this case would have been 25 feet (Tr. 86, 209). Despite these differing opinions, Roberts conceded [redacted] was too close to the wall (Tr. 123).

As the Secretary points out, RSC did not even follow MSHA regulations at the site, as it contends it does (S. Brief pp. 12-13). MSHA regulations require employers to utilize mining methods that "maintain wall, bank, and slope stability in places where persons work or travel." 30 C.F.R. § 56.3130. Employers must also create and provide a ground control plan when operating around highwalls. 30 C.F.R. § 77.1000. Areas must be inspected to ensure safety, and overhanging highwalls and banks must be eliminated. 30 C.F.R. § 77.1004. When necessary, highwalls must be scaled back before work is done. 30 C.F.R. § 77.1005. No evidence was adduced to show that these regulations were complied with.

That [redacted] violated the "four rules" also suggests RSC's training was inadequate or ineffective for work at the pit. RSC's primary business is its dredging mines. While those mines have highwalls, those walls are underwater and do not involve the same hazards that exist in the clay pit (Tr. 55-57). Employees do not regularly work in the clay pit, and the downturn in the economy resulted in even less of a demand for the material extracted from the pit (Tr. 114, 179). It appears that RSC's annual MSH training, which includes highwalls, focuses on its dredging mines. Further, no excavator training is reflected in [redacted] training records (Tr. 223). Based

on the evidence of record, there is nothing to show that the MSH training [redacted] received was relevant to the work he performed at RSC's clay pit.

The record in this case also supports a conclusion that RSC made inadequate efforts to detect violations of its rules. Roberts usually visits sites weekly to check on work and safety (Tr. 135-37). [redacted] worked at the clay pit for 11 days over a three-week period in July 2010.<sup>2</sup> However, no one from RSC went to the site when he was there (Tr. 117). Roberts' failure to visit the site while his mother was ill is understandable; however, he could have sent another manager to the site. Roberts testified that he was the only one who could perform this job due to the small size of RSC (Tr. 136-38). But he also testified that Marlan Roberts and Fred Byler, who work at the Quincy mine, were qualified to check on the work of other employees (Tr. 136-37). Accordingly, one of the managers from the Quincy mine could have visited the pit to check on [redacted] and assess the conditions at the site (Tr. 107).

RSC's "four rules" were not uniformly and effectively communicated and enforced. Further, RSC did not take all feasible steps to prevent the accident, as [redacted] was not checked on for the three weeks he worked at the pit alone. Finally, RSC had both actual and constructive knowledge of the violation. RSC has not met its burden of proof as to its asserted defense. The violation is serious because the hazardous condition resulted in death. The alleged violation is affirmed.

### **Penalty Determination**

The Secretary proposed a penalty of \$4,200.00 in this case. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* section 17(j) of the Act. The initial gravity-based penalty for the violation was \$7,000.00. The severity of the violation was rated as high, due to the serious consequences of a collapse of the highwall, and the probability was rated as greater, due to the proximity of the hazard. A 40 percent adjustment to the penalty was made for the relatively small size of RSC, resulting in the proposed penalty of \$4,200.00. No

---

<sup>2</sup> The Secretary asserts that, pursuant to Owens' testimony, MSHA rules do not allow miners to work alone at mine sites (Tr. 14-15, 46-47, 59; S. Brief, pp. 13-14). The undersigned agrees with RSC that Owens was apparently mistaken as to the MSHA regulations in this regard, which distinguish between working alone at a surface mine, such as RSC's clay pit, and working alone at an underground mine. *Compare* 30 C.F.R. § 56.18020 with 30 C.F.R. § 57.18025. *See also* R. Brief, p. 25. Also, MSH Trainer Hart testified that a supervisor is permitted to work alone at a mine (Tr. 227-28). [redacted] was considered a foreman and a "competent person" (Tr. 111-12, 178-79). [redacted] working alone at the site was not contrary to MSHA regulations (Tr. 117-18; 30 C.F.R. § 56.18020).

adjustments were made for good faith, due to the high severity and greater probability ratings, or for history, as RSC had not been inspected within the past five years (Tr. 85-87; Exh. C-1, p. 1). The undersigned finds the proposed penalty of \$4,200.00 appropriate.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of Serious Citation 1, alleging a violation of Section 5(a)(1) of the Act, is affirmed, and a penalty of \$4,200.00 is assessed.

**Date: January 4, 2013**  
**Atlanta, Georgia**

*/s/*  
\_\_\_\_\_  
**SHARON D. CALHOUN**  
**Judge**