SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 96-0681
BRUSCHI BROTHERS, INC., Respondent.	:	

Appearances:

James H. Angevine, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

David W. Sanborn, Esq.
Brooks, Sanborn, Smith & Brodeur-McGan
Springfield, MA
For Respondent

Before Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq* ("the Act") to review citations issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act.

On April 15, 1996, the Secretary issued citations to Respondent Bruschi Brothers, Inc. alleging that serious and other than serious violations occurred at Respondent's worksite located at Chicopee, Massachusetts, during the period of April 2, 1996 to April 4, 1996 and proposed a penalty in the amount of $1,125 for the serious violations. A timely notice of contest was filed by Respondent and, on May 29, 1996, the Secretary filed a complaint with this Commission incorporating the alleged violations set forth in the citations. Respondent answered the complaint by, *inter alia*, denying that the review Commission has jurisdiction over this matter. Specifically, Respondent, in its answer "[d]enies that it is engaged in receiving, handling, and otherwise working in and with goods and materials that are moving or have moved across state lines in interstate commerce, and denies that it is engaged in a business affecting commerce within the meaning of the Act" (Respondent's answer Paragraph III). The record in this matter is silent regarding the

jurisdictional issue raised by Respondent in its answer including Respondent's post hearing memorandum of law filed with this Administrative Law Judge. Complainant declined to file a post hearing memorandum. Jurisdiction is a fundamental issue and, once raised, should have been addressed by the parties.

The determination of jurisdiction lies with the Review Commission *Marshall v. Able Contractors, Inc.,* 573 F.2d 1055, 1057 (9th Cir. 1978) cert. Denied 439 U.S. 826, 99 S.Ct. 98 (1978). The burden to establish jurisdiction by a preponderance of the evidence lies with the Secretary. *Armor Elevator Co.*, 1 OSHC 1409, 1973-74 OSHD ¶16,958 (1973). The Commission has defined this burden as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Ultimate Distrib. Systems, Inc.*, 10 OSHD 1569, 1570 (1982). Although the burden to establish interstate involvement may be easily met with evidence that Respondent used the telephone and mails, purchased supplies from out of state or used goods manufactured out of state *Marshall v. Anchorage Plastering, Co.,* 570 F.2d 351 (9th Cir. 1978); *Avalotus Painting Company*, 9 OSHC 1226, 1981 OSHD 25,157(1981); where the Secretary has failed to present any facts in support of a finding of interstate involvement by Respondent the Courts have vacated citations. *Burk Well Service, Co.,* 12 OSHC 1598, 1985 OSHD ¶27,453(1985); *Val-Pak, Inc.,* 11 OSHC 2094 (1984). Specifically, the Fifth Circuit Court of Appeals, in reversing the Review Commission, held that the finding of jurisdiction by the Commission was "speculative and conclusionary" and "not based upon adequate factual findings." *Austin Road Company v. OSHRC*, 683 F.2d 905, 908 (5th Cir. 1982).

On the other hand, courts have held that it is not an abuse of discretion for a Commission Administrative Law Judge to reopen a hearing *sua sponte* to take further evidence relating to Respondent's involvement, if any, in interstate commerce *Brennan v. John J. Gordon Co.,* (OSHRC) 492 F.2d 1027 (2nd Cir. 1974). It is concluded, however, that the record in this case contains sufficient facts from which inferences can be made in support of a finding that Respondent is engaged in a business affecting interstate commerce and falls within the jurisdiction of the Act and the Review Commission.

Respondent admits that it is engaged in the general contracting business (Respondent's Answer Paragraph II). The record reveals that it was engaged in laying a sewer line in the city of

Chicopee when the inspection was conducted by OSHA. During the course of its work activity, Respondent used a back hoe, a trench box, sheets of steel, trucks, sewer pipes and other tools and equipment necessary to perform the work activity. The Ninth Circuit Court of Appeals has held that employers engaged in construction work, such as the Respondent in this case, fall within the class of work activities Congress intended to regulate. *Usery v. Lacy*, 628 F.2d 1226 (9th Cir. 1980). The Court stated that "statutory jurisdiction [exists] so long as the business affects commerce" *ibid* at 1228. The Court found that a construction firm was engaged in a business that affects commerce "as a matter of law" and "within the class of activities that it was Congress' intent to regulate...." *id* at 1229. The review Commission has adopted this rule for construction firms even if the firm's contribution to the stream of commerce is small and the work activity is purely local *Clarence M. Jones* 11 OSHC (BNA) 1529 (1983). Thus, it is concluded that Respondent, as an entity engaged in the construction business, is engaged in an industry affecting interstate commerce and falls within the jurisdiction of the Act and the review Commission.

BACKGROUND

The following facts have been gleaned from the record. Respondent is a corporation engaged in the general contracting business. On April 2, 1996, compliance officer Walter Cienaski of the Occupational safety and Health Administration conducted a safety inspection of Respondent's worksite located at Chicopee, Massachusetts. Respondent was engaged in installing a sewer line at the time of the inspection. According to testimony as well as photographs taken at the worksite, Respondent had dug a trench approximately 13 to 15 feet deep, 29 feet long and 6½ feet wide (Tr. 32, 70) and had placed a trench box within the trench. The box was twelve feet long, six feet high and six and one-half feet wide (Tr. 47). In addition, sheet steel approximately 17 feet long, 4 feet wide and ¾" inches thick had been placed on either side of the trench box to provide protection against collapse of the trench walls above the six foot high trench box (Tr. 47). Four steel sheets had been placed on each side of the trench box (Tr. 109). There was also a secondary trench on one side behind the sheet steel. The compliance officer measured the depth of the secondary trench as 60", 63" and 66" due to the uneven bottom of the trench (Tr. 55). Respondent's foreman stated, however, that the depth of the secondary trench was 59" (Tr. 55). The side wall of that trench was vertical (Tr. 66) without any support to prevent the wall from collapsing.

Upon arriving at the site, the compliance officer observed four employees in the trench (Exh. C-1). They were in the process of installing a three foot diameter sewer pipe to a manhole of an existing sewer line. As a result of the inspection, the following citation items were issued to Respondent:

> **Citation 1 Item 1a**
>
> 29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury:
>
> **LOCATION:** JOBSITE
> **HAZARD:** WORKERS DID NOT KNOW ABOUT CONFINED SPACES, WHERE AND WHEN TO SHORE OR SLOPE EXCAVATIONS, WHAT CONSTITUTES A PROPER JOBSITE INSPECTION TO INCLUDE SOIL ANALYSIS AND LATERAL BRACING, AND WHEN AND HOW TO PROTECT AGAINST UNDERMINED SIDE WALK SECTIONS.

Initially, it is noted that this violation alleges, *inter alia*, that employees were not instructed in the recognition of hazards associated with confined space entry. This item is identical to the violation alleged at item 1(b) of the citation. Since confined space entry instruction under item 1(a) is duplicative and subsumed within item 1(b), and discussed *infra*, the alleged failure to provide instructions relating to the hazards associated with confined space entry is vacated under this item *see Miniature Nut and Screw Co.*, 17 BNA OSHC 1557, 1560 (1996).

The standard cited in this instance does not outline any particular requirements for a safety program and requires only that an employer inform employees of "safety hazards which would be known to a reasonably prudent employer or which are addressed by specific OSHA regulations" *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2009 (1991). The review Commission has concluded, notwithstanding its general language, that

> "....the standard is not unenforceably vague if it is applied with reference to either a reasonable person test or OSHA standards"

R&R Builders, 15 BNA OSHC 1383, 1390 (1991). Moreover "....[e]vidence that the employees were unaware of particular safety requirements, because of a lack of specific instruction, establishes a violation" *ibid* citing *John R. Jurgensen Co.*, 872 F.2d 1026 (6th Cir. 1989).

In this item the Secretary alleges that Respondent failed to instruct its employees regarding the hazards associated with trenching operations. Specific standards address the activities and hazards associated there with and for which the Respondent allegedly failed to provide appropriate instructions to its employees. The shoring and sloping requirements are set forth at 29 CFR 1926.652; worksite inspection requirements at 29 CFR 1926.651(k) and stability of adjacent structures (the side walk) at 29 CFR 1926.651(i). In support of the allegation, Complainant relies upon the testimony of the compliance officer that, when asked, the union stewart, Augusto Crespo, who was also employed by Respondent, replied that he had not received any safety training relating to trenches (Tr. 22, 23). Respondent's foreman, Tony Pereira, however, told the compliance officer that employees had received safety training relating to trenching operations (Tr. 22). Pereira testified that he and other foreman attended a 2 to 3 hour seminar conducted by OSHA during either 1989 or 1991 at which time safe trenching operations were discussed (Tr. 187, 188). When asked whether he had received any other safety training, Mr. Pereira stated that he had received safety instruction 29 years previously when first employed by the firm (Tr. 189). He stated however, that he and the other foreman periodically received "safety stuff" from the company (Tr. 189). Nonmanagement employees also received safety training from the foremen on the job, according to Pereira, as an "on going thing," however, the firm's written safety program does not require periodic safety instruction (Tr. 190).

According to Louis Bruschi, the firm's chief estimator, Respondent employed a safety officer; however, that person had left the firm the year previous to the inspection and had not been replaced as of the date of the inspection (Tr. 233, 234). The safety officer was responsible for conducting safety meetings; however, the last safety meeting that Mr. Bruschi recalls being held for the members of foreman Pereira's crew was during 1991 (Tr. 235). Mr. Bruschi was appointed as safety officer after the inspection which resulted in this action (Tr. 230) . Bruschi testified that "everyone" was responsible for safety during the period when the safety officer position was vacant (Tr. 231).

Based upon the foregoing it is concluded that Respondent's employees did not receive the safety instructions contemplated by the standard cited. Although Respondent has a written safety program, it is clear that the employees who worked in the trench did not receive adequate safety instructions regarding the hazards associated with trenching operations. Faced with evidence that

the union stewart stated that employees received no safety training as well as the fact that the safety officer position had not been filled, Respondent presented no evidence that members of foreman Pereira's crew received the specific instructions which Complainant alleges were not received *Astra Pharmaceutical Products*, 681 F.2d 69, 74 (1st Cir. 1982). As previously stated, Complainant must establish the alleged violation by a preponderance of the evidence *Armour Elevator Co., supra*. Based upon this record, as a whole, it is concluded that "it is more probably true than false" *Ultimate Distrib. Systems, Inc.*, *supra* that Respondent's employees did not receive the instruction contemplated by the standard. Therefor, the violation is affirmed.

Citation 1 Item 1B

> 29 CFR 1926.21(b)(6)(i): Employees required to enter into confined or enclosed spaces were not instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required:
>
> **LOCATION:** JOBSITE - TRENCH
> **HAZARD:** WORKERS REQUIRED TO ENTER THE TRENCH FOR PLACEMENT OF SEWER LINE IN AND AROUND EXISTING SEWER LINES 14-15 FT. DEEP WERE NOT TRAINED IN HAZARDOUS ATMOSPHERES AND THE PRECAUTIONS TO BE TAKEN PRIOR TO ENTRY.

The compliance officer asked the union stewart whether he had received any instructions from Respondent regarding the hazards associated with confined space[1] entry. The union stewart answered in the negative (Tr. 14, 17). Moreover, Respondent did not have a written confined space safety program (Tr. 17) and the foreman, Tony Pereira, acknowledged that he did not receive any confined space entry training nor had any of the other employees received such training (Tr. 23, 30, 31, 192). Pereira knows that trenches may be confined spaces (Tr. 190); however, no atmospheric testing had been conducted at the trench in which employees were observed working (Tr. 17, 45).

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[1]Confined space is defined at 29 CFR 1926.21(6)(ii) as follows:

> For purposes of paragraph (b)(6)(i) of this section, *confined* or *enclosed space* means any space having a limited means of egress, which is subject to the accumulation of toxic or flammable contaminants or has an oxygen deficient atmosphere. Confined or enclosed spaces include, but are not limited to storage tanks, process vessels, bins, boilers, ventilation or exhaust ducts, sewers, underground utility vaults, tunnels, pipelines, and open top spaces more than 4 feet in depth such as pits, tubs, vaults, and vessels.

The most startling testimony regarding this alleged violation was elicited from Respondent's President Joseph Gallo:

> **JUDGE YETMAN**: Now, can a trench be a confined space?
> **THE WITNESS**: Not unless there is any - not unless there is a significant presence of odor.
> **JUDGE YETMAN**: All right. And how do you determine that?
> **THE WITNESS**: Basically !
> **JUDGE YETMAN**: The old smell test?
> **THE WITNESS**: So they say, that's the best in the world.
> **JUDGE YETMAN**: Okay.
> **THE WITNESS**: The senses of our nose are much better than the monitors.
> **JUDGE YETMAN**: Is that how you instruct your employees to test?
> **THE WITNESS**: It always has been, but we've got a monitor.
> **JUDGE YETMAN**: Well !
> **THE WITNESS**: We were advised !
> **JUDGE YETMAN**: My question is whether the company instructed its employees !
> **THE WITNESS**: Yes.
> **JUDGE YETMAN**: To test the work !
> **THE WITNESS**: Yes,
> **JUDGE YETMAN**: Environment inside a trench by smelling?
> **THE WITNESS**: Yes. Correct.
> **JUDGE YETMAN**: And that's how you instructed your employees?
> **THE WITNESS**: That's what they've done for many years.
> (Tr. 248, 249).

Based upon the foregoing, this item is affirmed.

<u>Citation 1 Item 2a</u>

> 29 CFR 1926.651(k)(1): Daily inspections of excavations, the adjacent areas, and protective systems were not made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions:
> **LOCATION:** JOBSITE - TRENCH AREA
> **HAZARD:** DAILY TRENCH INSPECTIONS OF THE QUALITY REQUIRED TO DETECT AND ELIMINATE HAZARDS SUCH AS IMPROPERLY SHORED TRENCHES, UNTESTED ATMOSPHERES, INADEQUATE SOIL ANALYSIS, UNTAGGED LOADS BEING RAISED AND LOWERED AND UNDERMINED SIDEWALK SECTIONS WERE NOT BEING DONE.

With respect to this item, the Secretary asserts that a competent person[2] was not at the worksite (Tr. 36, 37); therefor, it was impossible for Respondent to comply with this standard. This conclusion is based upon the conditions observed by the compliance officer at the worksite such as "[t]he cracking or spoiling of soils, the improperly placed ladder or ladders at the discharge points, the undermined sidewalk area, the untagged load being raised and lowered in the trench and the fact that it was a sewer line and people had not ! employees had not been trained in confined space entry procedures" (Tr. 44, 45). In addition, the compliance officer observed a Komatsu backhoe working at the end of the trench as well as vehicular traffic traveling parallel and in close proximity to the trench (Tr. 37, Exh. C-6). The presence of these vehicles placed a "great burden" upon the unshored portions of the trench and was inconsistent with a competent person's oversight of the work area (Tr. 39). Moreover, the trench had not been tested for hazardous atmospheres (Tr. 45). This is particularly significant since the new line was being connected to an existing sewer line.

Mr. Pereira testified that, as foreman at the site, he was the designated competent person (Tr. 186). He inspected the worksite on a daily basis (Tr. 195) and determined that the undermined sidewalk section did not pose a hazard (Tr. 193; Exh. C-3). He tested the soil on the morning of the OSHA inspection and determined that the soil was type B (Tr. 196). He also inspected the trench box and the sheets of steel lining each side of the trench. However, he did not check the bottom of the trench for hazardous atmospheres even though the trench was dug in close proximity to an open existing sewer line (Tr. 197). Although there is testimony that Mr. Pereira has been employed by Respondent for 29 years (Tr. 189) there is no evidence in the record indicating that by training or experience Mr. Pereira is qualified to be a competent person within the meaning of the definition set forth at 1926.650(b). This is particularly evident from the cavalier attitude that this Respondent and Mr. Pereira exhibited regarding the requirement to test a fifteen foot deep trench adjoining an open existing sewer line for hazardous atmospheres. For these reasons, this item is affirmed.

Citation 1 Item 2(b)

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[2]Competent person is defined at 29 CFR 1926.650(6) as follows:

> *Competent person* means 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.

29 CFR 1916.651(j)(1): Adequate protection was not provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face:

LOCATION: JOBSITE - TRENCH ROADSIDE
HAZARD: AN OPENING BETWEEN THE STEEL PLATES USED TO HOLD BACK THE LATERAL PRESSURES DEVELOPED IN THE SIDE WALLS OF THE TRENCH EXISTED WHERE A GAS PIPE PROTRUDED ALLOWING DIRT AND OTHER MATERIAL TO TUMBLE INTO THE TRENCH WHERE WORKERS WERE PRESENT.

This item relates to a space approximately two feet wide between two sheets of steel which had been placed on the side of the trench box to protect the trench walls above the trench box from collapsing into the trench (Tr. 47-52). Because a gas line extended beyond the trench wall into the work area, it was necessary to leave a gap between the sheets of steel (Exh. C-10, C-11). Complainant asserts that the space between the steel plate created a potential hazardous condition in the event that the trench wall collapsed (Tr. 136). It is clear from the photographs, however, that the trench wall was sloped back from the steel plates (Exh. R-5) and any materials falling from the trench wall would fall below the gap in the steel plates and fill the void between the trench box and the trench wall. For these reasons, this item is vacated.

Citation 1 Item 3

29 CFR 1916.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper that one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

LOCATION: JOBSITE - SECONDARY TRENCH ALONG SIDE THE PRIMARY
HAZARD: A TRENCH WAS CUT ALONG THE SIDE OF THE PRIMARY SEWER LINE TRENCH 5 FT. - 3 IN. DEEP WITH VERTICAL WALLS AND NO SHORING WITH EMPLOYEES ALLOWED TO ENTER AND EXIT.

The photographic evidence offered by Complainant clearly depicts a trench on the outside of the steel plates placed along the trench box (Exh. C-1, C-4, C-5). An employee is shown in the trench and the wall of the trench opposite the steel plates is vertical. The only dispute with respect

to this item is whether the trench depth exceeds five feet[3]. Respondent's foreman, Mr. Pereira disputes the compliance officer's conclusion that the trench depth exceeded five feet and maintains that the trench was only 59" deep. That dispute cannot be resolved on this record. However, in order to be exempt from the protective system requirement, the trench must be less than five feet in depth "and the examination of the ground by a competent person provides no indications of a potential cave in" (see foot note 3). There is no evidence in this record that the secondary trench had been inspected by a competent person. Indeed, it has been found that there is insufficient evidence to support a conclusion that a competent person within the meaning of the standard was at the worksite *supra* pg 8. On this basis, this item is affirmed.

Citation 1 Item 4

> 29 CFR 1926.652(c)(4)(i&ii): Support systems, shield systems, and other protective systems not utilizing Options 1, 2, or 3 above were not approved by a registered professional engineer such that a plan indicating the size, types, and configuration of the materials to be used in the protective system was not available with the identity of the registered professional engineer.
>
> **LOCATION:** JOBSITE - TRENCH
> **HAZARD:** THE SYSTEM DESIGN USED BY THE FOREMAN ON THE SITE WAS DEVELOPED BY A REGISTER PROFESSIONAL ENGINEER FOR ANOTHER SITE, IN ANOTHER YEAR, IN ANOTHER STATE WITH DIFFERENT TRENCH BOX SIZE AND DEPTH OF CUT AND ALTHOUGH A GENERIC PLAN WAS AVAILABLE IT DID NOT HAVE A REGISTERED PROFESSIONAL ENGINEER'S NAME AFFIXED TO IT.

In order to establish this violation, the Secretary must provide some evidence in support of

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[3]The standard set forth at 29 CFR 1926.652(a) states in pertinent part:

> (A) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
>
> > (i) Excavations are made entirely in stable rock ; or
> > (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

each of the elements of the alleged offense. First, the Secretary must provide evidence that Respondent utilized a trench support system which did not fall within the requirements of options 1, 2, and 3 of the standard,[4] (2) the system in use was not approved by a registered professional engineer, (3) the design for the protective system in use must be in writing, and include (4) the size, types and configurations of the materials to be used in the protective systems and finally (5) the name of the professional registered engineer approving the design.

With respect to the first element, the compliance officer testified that Respondent had designed a support system for trenching operations which fell within option (4) of the standard.[5] The compliance officer stated, without any evidence to the contrary being offered by Respondent, that options (1), (2) and (3) of the standard are not applicable to the design created by Respondent (Tr. 68) therefor, Complainant had met its burden with respect to the first element. The compliance officer testified that the complete design, however, was not signed by a registered professional engineer (Tr. 75). He testified that the design was originally developed by Respondent for a jobsite in Connecticut and revised as a generic plan for all worksites. According to the compliance officer, the design changes creating a generic design plan were not signed by a registered professional engineer (Tr. 73). In its case in chief Respondent called Dr. Walter Jaworski as a witness. Dr. Jaworski is a

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[4]The options for protective systems are set forth, in pertinent part at § 1926.652(c)(1)(2) and (3) as follows:

> (1) *Option (1)! Designs using appendices A, C, and D.* Designs for timber shoring in trenches shall be determined in accordance with the conditions and requirements set forth in appendices A and C to this subpart. Designs for aluminum hydraulic shoring shall be in accordance with paragraph (c)(2) of this section, but if manufacturer's tabulated data cannot be utilized, designs shall be in accordance with appendix D.
> (2) *Option (2)! Designs Using Manufacturer's Tabulated Data.* (i) Design of support systems, shield systems, or other protective systems that are drawn from manufacturer's tabulated data shall be in accordance with all specifications, recommendations, and limitations issued or made by the manufacturer....
> (3) *Option (3)! Designs using other tabulated data.* (i) Designs of support systems, shield systems, or other protective systems shall be selected from and be in accordance with tabulated data, such as tables and charts....

[5]The complete design created by Respondent consists of 13 pages and was entered into evidence as Exhibit R-6.

geotechnical engineer who, as part of his professional qualifications, co-authored a three volume design manual for the Federal Highway Administration relating to trenching operations throughout the United States (Tr. 150). He is also a registered professional engineer in the Commonwealth of Massachusetts (Tr. 150). Based upon his educational and work experience as well as his demeanor as a witness, I conclude that Dr. Jaworski is eminently qualified as an expert in the design of soil protective systems and his testimony is highly reliable.

Dr. Jaworski testified that he co-authored Exhibit R-6 with his daughter, who is also a geotechnical engineer, and his seal at page 5 of that document represents his approval of all of the design specifications contained in the document (Tr. 156). Dr. Jaworski also testified that Exhibit R-6 was developed as a generic plan to eliminate the need to create a new plan for each jobsite having similar conditions (Tr. 154). The design is intended to eliminate the need to "reinvent the wheel" for each jobsite (Tr. 154). It appears that Complainant takes the position that since the plan was based upon a jobsite in Connecticut and Dr. Jaworski is a registered professional engineer in Massachusetts his review of the plan and seal is invalid (Tr. 167, 168). However, there is no requirement on the face of the standard that the engineer be registered in a particular state nor is there any prohibition in the standard against a generic plan of the type devised by Dr. Jaworski. Accordingly, I find that Complainant had failed to produce convincing evidence that the design plan used by Respondent was not approved by a registered professional engineer.

Furthermore, Exhibit R-6 fully complies with the third requirement that the plan must be in writing, as well as the 4th and 5th requirements that the size, type and configuration of materials being used in the protective system must be contained in the written design and that the name of the registered professional engineer be on the document (Exhibit R-6). Thus, Complainant has failed to provide that quantum of evidence necessary to sustain the violation alleged *Ultimate Distrib Systems, Inc.,*.

This is not to say, however, that the protective system in use on the day of the inspection complied with Respondent's design system or the standard. To the contrary, the evidence clearly establishes that steel plates had been placed in the trench beyond each end of the trench box. These plates had been driven approximately 2 feet into the soil at the bottom of the trench and back fill placed in the trench supported the steel plates from the inside. No other support for the plates was

provided (Tr. 71, 72). When asked about the steel plates in the trench outside the trench box, Dr. Jaworski stated that they were not braced and if they were to be supported solely by the soil, each plate should be buried eight feet into the soil to keep them from falling over (Tr. 158, 164). The steel plates clearly were not driven eight feet into the ground. At most, the plates were driven four feet into the soil (Tr. 72). Dr. Jaworski testified that the placement of the steel plates outside the trench box did not comply with OSHA standards (Tr. 158, 159).

Based upon the foregoing it is concluded that Respondent complied with the design requirement for protective support systems pursuant to the standard cited by the Secretary; however, Respondent's employees at the site failed to comply with the design requirements and, therefor, failed to provide an "adequate protective system" as required by 29 CFR 1926.652(a).[6] There is ample evidence on the record to support the conclusion that Respondent litigated the issue of hazards presented by the steel plates located outside the trench box. Accordingly, it is concluded that the parties tried the issue of whether Respondent violated the provisions of 29 CFR 1926.652(a) by consent. Thus, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, citation item 4 is amended to alleged a violation of section 1926.652(a). *National Realty and Construction Co., v. OSHRC* 489 F.2d 1257 (D.C. Cir. 1973); *John and Ray Carlstrom,* 6 BNA OSHC 2101 (1978); *Rodney E. Fossett*, 7 BNA OSHC 1915 (1979). The violation, as amended, is affirmed.

Citation 2 Item 1

29 CFR 1926.251(b)(1): Welded alloy steel chain slings did not have permanently affixed durable identification stating size, grade, rated capacity and sling manufacturer's name.

LOCATION: JOBSITE
HAZARD: THREE STEEL CHAIN SLINGS OF VARYING

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

(i) Excavations are made entirely in stable rock; or
(ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.
(2) Protective systems shall have the capacity to resist without failure all loads that are intended or could reasonably be expected to be applied or transmitted to the system.

DIMENSIONS DID NOT HAVE PERMANENTLY AFFIXED IDENTIFICATION TAGS.

Citation 2 Item 2

29 CFR 1926.251(b)(6)(i&ii): A through periodic inspection of alloy steel chain slings in use were not made on a regular basis with the most recent months record in which the chain sling was inspected made available for examination.

LOCATION: JOBSITE
HAZARD: CHAIN SLINGS USED ON THE JOBSITE WERE NOT BEING PERIODICALLY INSPECTED NOR WERE RECORDS OF THE FINDINGS RECORDED.

The compliance officer observed three chain slings which did not have identification tags listing the information required by the above standard. Moreover, Mr. Pereira was unable to produce inspection records for the chains (Item 2 above) (Tr. 80, 83, 86). Mr. Pereira testified that the firm purchased only one grade of chain and he visually inspected the chain. Pereira stated that the tags were frequently knocked off the chain during normal use and, in the past, he returned the chains to their supplier to have tags replaced (Tr. 204). There was no explanation as to why the chains observed by the compliance officer had not been returned to the supplier to be retagged nor was there any explanation for failing to record the visual inspections of the chains. For the foregoing reasons, these items are affirmed.

The Secretary has alleged that the violations set forth at items 1(a), 1(b), 2(a), 3, and 4 are serious violations within the meaning of section (k) of the Act. Section 17(k) of the Act defines a serious violation as follows:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death if serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 CFR § 666(k).

The Secretary does not have to prove that there is a substantial probability that an accident will occur, but rather that death or serious physical harm could occur. See *East Texas Motor Freight,*

Inc. V. OSHRC, 671 F.2d 845 (5th Cir. 1982); *Bethlehem Steel Corp. V. OSHRC*, 607 F.2d 1069(3rd Cir. 1979). Testimony by the compliance officer and photographs support the conclusion that failure to comply with the standards cited exposed employees to serious physical harm or death due to collapsing trench walls or exposure to hazardous fumes. The failure to instruct employees regarding the hazards associated with trenching operations is particularly egregious in this case in view of the lack of understanding of hazardous atmospheres displayed by the firm's President. Accordingly, the aforesaid items are affirmed as serious violations. Items 1 and 2 of citation 2 are affirmed as other type violations.

Section 17(j) of the Act requires that due consideration must be given to four criteria in assessing penalties: the size of the employer's business, gravity of the violation, good faith and prior history of violations. In *Secretary of Labor v. J.A. Jones Construction Company,* 15 BNA OSHC 2201 (1993), the Commission stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.,* 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶29,582, p. 40,033 (No. 88-2681, 1992); *Astra Pharmaceutical Prods., Inc.,* 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶25,738 p. 32, 107 (No. 76-2644, 1981).

With respect to serious item 1(a) and 1(b), the Secretary has proposed a penalty of $225. Based upon the evidence it is concluded that the failure to instruct employees in this instance constitutes a moderate gravity factor. Taking into consideration the size, good faith and lack of prior violations, the proposed penalty of $225 is appropriate and is assessed for the violations. Item 2(a), failure to conduct daily inspections of the excavations, also presented a moderate gravity factor. Accordingly, the proposed penalty of $225 is assessed for this violation. Items 3 and 4 also present the same gravity factor as items 1 and 2. Thus a penalty in the amount of $225 is assessed for each of those violations. The Secretary proposed a zero penalty for the other than serious items. Based upon the low gravity factor of the violations, the Secretary's proposal is adopted and a zero penalty

is assessed for the other than serious violations.

FINDINGS OF FACT

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. *See* Rule 52(a) of the Federal Rules of Civil Procedure. All proposed findings if fact inconsistent with this decision are denied.

CONCLUSIONS OF LAW

1. Bruschi Brothers, Inc., is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.

2. Bruschi Brothers, Inc., at all times material to the proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

3. At the time and place alleged, Respondent was in violation of 29 CFR 1926.21(b)(2).

4. At the time and place alleged, Respondent was in violation of 29 CFR 1926.21(b)(6)(i).

5. At the time and place alleged, Respondent was in violation of 29 CFR 1926.651(k)(1).

6. At the time and place alleged, Respondent was not in violation of 29 CFR 1926.651(j)(1) and the violation is vacated.

7. At the time and place alleged, Respondent was in violation of 29 CFR 1926.652(a)(1).

8. At the time and place alleged, Respondent was not in violation of 29 CFR 1926.652(c)(4)(i&ii) but was in violation of 29 CFR 1926.652(a).

9. At the time and place alleged, Respondent was in violation of 29 CFR 1926.251(b)(1).

10. At the time and place alleged, Respondent was in violation of 29 CFR 19126.251(b)(6)(i&ii).

ORDER

(a) Serious Citation 1 Item 1(a) and 1(b) **are affirmed** as serious violations and a penalty in the amount of **$225 is assessed** thereto.

(b) Serious Citation 1 Item 2(a) **is affirmed** as a serious citation and a penalty in the amount of **$225 is assessed** thereto.

(c) Serious Citation 1 Item 2(b) **is vacated**.

(d) Serious Citation 1 Item 3 **is affirmed** as a serious violation and a penalty in the amount of **$225 is assessed** thereto.

(e) Serious Citation 1 Item 4, as amended, **is affirmed** and a penalty in the amount of **$225 is assessed** thereto.

(f) Citation 2 Item 1 **is affirmed** and **no penalty is assessed** thereto.

(g) Citation 2 Item 2 **is affirmed** and **no penalty is assessed** thereto.

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ROBERT A. YETMAN
Judge, OSHRC

Dated: ____________________
Boston, MA