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SECRETARY OF LABOR
Complainant,
v.
BANCKER CONSTRUCTION CORPORATION
Respondent.

OSHRC DOCKET
NO. 92-0334

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 16, 1993. The decision of the Judge will become a final order of the Commission on October 18, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before October 6, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Review Commission
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Petitioning parties shall also mail a copy to:

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: September 16, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0334

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SECRETARY OF LABOR, Complainant, v. BANCKER CONSTRUCTION CORP. Respondent.	OSHRC Docket No. 92-0334

Appearances:

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For Complainant

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For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

On November 11, 1991, Bancker Construction Corp. ("Bancker") was cited for a repeat violation of 29 C.F.R. § 1926.652(a)(1), which requires employees working in excavations that are five feet or more in depth to be protected from the possibility of a cave-in by an adequate protective system. The Secretary amended the citation in his complaint to allege, instead, serious violation of 29 C.F.R. § 1926.652(e)(1)(ii), which requires employees who are installing and removing support systems from such excavations to be

protected from cave-ins, structural collapse, and being struck by parts of the support system itself. The Secretary also reduced the original proposed penalty of $8000 to $4000.

The citation was issued as a result of an inspection conducted by Compliance Officer Richard Andree on August 5th and 6th, 1991, of an excavation site in Bethpage, New York, where Bancker was installing a controlled environment vault ("CEV") or manhole designed to house electronic equipment for New York Telephone Company (Tr. 19, 58, 81-82, 95-96, 99, 141-42; Exhibit R-2). It is undisputed that the excavation in question was approximately 18 feet wide, 36 feet long, and dug in Type C soil with vertical walls (Tr. 15, 85, 118, 146, Exhibits C-3, C-5 & R-15).

THE "REASONABLE PROMPTNESS" ISSUE

Section 9(a) of the Occupational Safety and Health Act of 1970 ("Act"), 29 U.S.C. § 658(a), provides:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of...any standard...or of any regulations prescribed pursuant to this Act, he shall with *reasonable promptness* issue a citation to the employer.

(Emphasis added). Bancker contends that in issuing the citation in question more than three months after the OSHA inspection, the Secretary failed to comply with this requirement.[1] According to Bancker, at no point prior to the issuance of the citation was it ever informed that it was to be cited for a violation.[2] Bancker's Post-Hearing Brief at 27-28. As a result, Bancker maintains that it was unable to gather important information about the excavation

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[1] The citation was issued well within the six-month limitation set forth in § 9(c) of the Act, 29 U.S.C. § 658(c): "No citation may be issued...after the expiration of six months following the occurrence of any violation."

2 Walter Behrens, Bancker's general manager, testified, however, that Bancker first learned of the alleged violation almost two weeks *prior* to the issuance of the citation when the compliance officer held a closing conference on October 29, 1991 with Rudy Giaccaglia, Bancker's project superintendent (Tr. 26, 108, 120-22, 145-46).

necessary to its defense of this case since the CEV project had been completed by the time the citation was issued.

The Review Commission has held that "the appropriate consideration for determining whether to vacate a citation for the Secretary's noncompliance with section 9(a) of the Act is the prejudice to the employer from the delay rather than the justifiability of the delay." *Natl. Indus. Constructors, Inc.*, 10 BNA OSHC 1081, 1084, 1981 CCH OSHD ¶ 25,743 (No. 76-4507, 1981). *See also Bland Constr. Co.*, 15 BNA OSHC 1031, 1040-41, 1991 CCH OSHD ¶ 29,325 (No. 87-992, 1991). Thus, it is not a question of whether the Secretary's delay in issuing the citation was proper, but whether the delay demonstrably prejudiced the employer in the preparation of its case. *Id. See also Stearns-Roger, Inc.*, 8 BNA OSHC 2180, 2183, 1980 CCH OSHD ¶ 24,870 (No. 78-819, 1980) (Review Commission rejects holding set forth in *Jack Conie & Sons Corp.*, 4 BNA OSHC 1378, 1976-77 CCH OSHD ¶ 20,849 (No. 6794, 1976) that a citation should be vacated pursuant to § 9(a) of the Act if the circumstances surrounding the citation's issuance indicate that the delay was unnecessary and unjustifiable).

To support its allegation of prejudice, Bancker cites to several aspects of its case which it claims was hindered by the delay. Specifically, Bancker states that it was unable to "more accurately" measure the excavation at the time of the inspection, to conduct an analysis of the soil making up the trench's walls, to photograph the excavation "in more detail", and to hire surveyors or other qualified persons to evaluate the site (Tr. 145; Bancker's Post-Hearing Brief at 28). However, Bancker already had a significant amount of information about the excavation available to it by the time the citation was issued. For instance, several photographs of the excavation were taken by Giaccaglia, Bancker's project superintendent, both during and after the inspection (Tr. 94-98, 106; Exhibits R-3 through R-11). Two of these photos depict a Bancker employee measuring the depth of the excavation and, according to Giaccaglia, measurements of the excavation's depth were also taken earlier that morning on August 5th after the initial pilot cut was made (Tr. 86, 116-17). Moreover, Bancker has admitted that the soil in which the excavation was dug was granular, sandy, Type C soil and has not shown that the performance of a soil analysis would have indicated otherwise (Tr. 118, 146; Exhibit C-3 at 5). On the basis of these facts, it would be unreasonable to hold that Bancker's ability to gather information about the excavation site

and prepare a defense in this case was materially harmed by the three month lapse between the OSHA inspection and the issuance of the citation. Accordingly, the "reasonable promptness" defense is rejected.

THE EXCAVATION SUPPORT SYSTEM UNDER § 1926.652(e)(1)(ii)

Bancker acknowledges that on the day of the inspection, three of its employees entered the excavation during the installation of a protective system consisting of steel beams and wood planks (Tr. 8-9, 19-21, 23, 47, 100-01, 115). These employees entered the trench to level off the area underneath a square of steel beams that was resting on the floor of the excavation and had four, dark blue, wood uprights attached at each corner (Tr. 87-88, 100-01, 115, 147-48; Exhibits C-6 & R-15).[3] This was accomplished by lifting the beams with a cable attached to the excavator and placing blocks or boards underneath as needed (Tr. 100-01, 126-27, 147-48; Exhibits C-6, C-7, C-8, C-10, R-3, R-5 & R-6).

Bancker maintains that the excavation was cut at a precise depth of five feet as demonstrated by the fact that the six-foot-high blue upright pictured in Exhibits R-5 and R-6 seems to extend about one foot above the top of the trench (Tr. 85-86, 93-94, 114, 116-17, 124-25, 133, 142, 146). The compliance officer's measurements, on the other hand, indicate that the excavation ranged in depth from five feet, six inches to six feet, eight inches (Tr. 11-13; Exhibit C-4). While it is true that in one of the photographs taken by the compliance officer, the trench pole he used to measure the depth of the excavation does appear to be leaning at some sort of angle (Exhibit C-12), the four other measurements documented in these photos clearly indicate that the excavation's depth was over five feet in most areas. Moreover, it is highly unlikely that the excavation could have been cut to precisely five feet at all points; Giacagglia conceded as much at the hearing (Tr. 87, 124-25). Even Bancker's general manager, Behrens, admitted that due to the imprecision of the excavator, it was

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[3] To complete the protective system, a second square of beams was attached to the top of these uprights, then wood planks were lain vertically, side-by-side, against these beams to create a large, walled "box" (Tr. 25, 91-93, 103-04; Exhibits C-6, C-8, C-10, & R-3 through R-11).

"very possible and very likely" the trench could be five feet deep in one spot, but six feet deep in another (Tr. 151).[4]

Bancker also challenges the Secretary's allegation that the excavation posed a hazard to the employees at the time that they entered it. It has already been established, however, that the protective system was only partially installed at the time these employees were inside the excavation which, as noted above, was over five feet in depth (Tr. 15-17, 24-25, 65-66, 88, 101-04). Bancker has also admitted that the soil in which the excavation was dug was granular, sandy soil that can be classified as Type C soil pursuant to Appendix A of Subpart P (Tr. 118, 146; Exhibit C-3 at 5). Because *granular* soil has "no cohesive strength", it is, by definition, unstable soil. Appendix A, subsection (b), Definitions. As a result, the conditions of this excavation were such that the employees inside the trench were clearly exposed to the hazard of a potential cave-in. Accordingly, the Secretary has satisfied his burden of proving a violation of the cited standard.

THE GREATER HAZARD AND INFEASIBILITY DEFENSES

Bancker argues that in order to ensure the protection system utilized at this site was properly installed in the excavation, its employees *had* to enter the trench to level the bottom square of beams; if they had not done so, Bancker claims, the system could have collapsed, exposing the employees to an even greater hazard than that posed by entering the unprotected trench. Bancker also contends that any alternative to installing the protective system in this manner was infeasible, essentially because the efficacy of the system would be seriously compromised if it were installed in any other way.[5] Although one may agree with

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[4] Even if the trench were shown to have been exactly five feet deep, contrary to Bancker's interpretation of the trenching standards' requirements, only excavations which are *less than* five feet in depth, *not* five feet or less, are exempt from the protection requirements set forth in Subpart P, 29 C.F.R. §§ 1926.650 - 1926.652 (Tr. 118, 133, 135-36, 150-51). § 1926.652(a)(1)(ii). As a result, Bancker could not validly argue that because the excavation at this site was cut at a "safe" initial depth of five feet, compliance with these standards was not required.

[5] The compliance officer suggested that one possible alternative to having the employees enter the excavation during the installation process was to utilize the bucket of the excavator from outside the trench to perform whatever adjustments to the system were necessary (Tr. 30-31). According to both Giaccaglia and Behrens, the specific task of levelling off the area beneath the bottom steel beams was much too delicate to be performed in this manner; indeed, it is difficult to envision being able to place blocks underneath a square of steel beams without actually entering the trench and manually doing so (Tr. 100-01, 126-27, 147-48).

Bancker that the type of protective system utilized here must be installed in a precise manner in order to be effective, Bancker has nonetheless failed to satisfy its burden of proof with regard to both of these defenses.

In order to prove a greater hazard defense, an employer must show that the hazard of compliance is greater than that of noncompliance; that an alternative means of protection is not available; and that a variance was either unavailable or inappropriate. *Lauhoff Grain Co.*, 13 BNA OSHC 1084, 1088, 1986-87 CCH OSHD ¶ 27,814 (No 81-984, 1987). *See also Falcon Steel Co.*, 16 BNA OSHC 1179, 1185 (No. 89-2883, 1993). Giaccaglia and Behrens stated that if the steel beams were not level, the system could fail, but neither explained in what way that possibility would pose a greater hazard than that created by not complying with the standard (Tr. 100-01, 104-05, 127, 147-48). Even if Bancker had established that the hazard of compliance was greater, the record is devoid of any evidence relating to a variance and Bancker has failed to show that an alternative method of protecting these employees was not available.

According to the compliance officer, the violation could have been avoided by cutting the excavation to an initial depth of *four* feet, as opposed to five feet or over, thereby rendering the requirements set forth in the trenching standards inapplicable (Tr. 30-31). Although Giaccaglia testified that this alternative was not feasible since at an initial depth of four feet, the system's steel framework would "drop down" as the trench was dug deeper and the system as a whole would fail (Tr. 128-29, 133), Giaccaglia himself suggested a viable way in which this problem could have been eliminated when he described the procedure utilized by Bancker at this site to keep the protective system intact and prevent it from "dropping down" as the excavation was dug to a depth of approximately 14 feet (Tr. 131-32). Indeed, in response to questioning by the Secretary's counsel, Giaccaglia was unable to explain why this procedure could not be used to avoid the same problem he claims would occur if the excavation was installed at an initial depth of four feet (Tr. 128-29, 131-35). Even Behrens, who had initially testified that it was not possible to install the protective system at an initial depth of four feet, conceded that it *was* possible to adapt the design of

the system to accommodate an initial installation depth of four feet (Tr. 148-52).[6] Thus, Bancker has failed to prove that an alternative method of protecting its employees at this site was unavailable.

The availability of this option also defeats Bancker's claims of infeasibility. Indeed, the testimony of both Giaccaglia and Behrens suggests that it was possible to cut the trench at an initial installation depth of four feet and still maintain the integrity of the system. Furthermore, nothing in the record suggests that using this alternative installation depth would have significantly altered or interfered with Bancker's performance of work at this site. *Trinity Industries Inc.*, 15 BNA OSHC 1985, 1987, 1992 CCH OSHD ¶ 29,889 (No. 89-2317, 1992). It is not unreasonable to expect employers to alter routine work practices to the extent that such changes are "reasonably necessary" to achieve compliance with OSHA standards. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1227, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991).

It should also be observed that one of the alternative methods of protecting employees from a cave-in is the sloping protective system described in Appendix B to Subpart P, which calls for Type C soil to be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal). Bancker failed to explain why this abatement system was not a feasible option under the circumstances for which Bancker was cited. Where a feasible alternative to noncompliance exists and the employer has failed to show that the alternative was infeasible under the circumstances present at the worksite, a defense of infeasibility cannot be found. *Id.* at 1228; *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160-61 (No. 90-2894, 1993).

Because it is likely that an employee would suffer serious physical injury or even death in the event of a cave-in, the violation is properly characterized as serious. 29 U.S.C.

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[6] Behrens had originally indicated that at this depth, ten feet of the 14-foot-long wood planks used to shore the walls of the excavation would extend above the top of the trench (Tr. 148-49). He never actually identified, however, how this condition renders the four foot alternative infeasible, stating only that the boards might "flap around" and have to be pushed down by a machine or tool which, in turn, might involve the erection of scaffolding (Tr. 148-49).

§ 666(k). A penalty in the amount of $1,000 is appropriate under the penalty criteria of 29 U.S.C. § 666(j).

Based upon the foregoing findings and conclusions, it is

ORDERED that the citation is affirmed and a penalty of $1,000 is assessed.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: September 10, 1993
Boston, Massachusetts