



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

DOCKET NO. 19-0007

v.

REYES CONSTRUCTION, INC.

Respondent.

Appearances:

Tara Stearns, Esq., Veronica Melendez, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, CA  
For Complainant

Eugene McMenamin, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Costa Mesa, CA  
For Respondent

Before: Administrative Law Judge Brian A. Duncan

**DECISION AND ORDER**

**Procedural History**

On October 31, 2018, OSHA Compliance Safety and Health Officer (“CSHO”) Todd Brady was conducting trench and excavation worksite inspections, pursuant to OSHA’s national emphasis program, on Camp Pendleton in California. (Tr. 19, 40, 43). He was accompanied by a new CSHO, Adrian Miranda. (Tr. 40). Upon arriving, they drove by a work crew at an excavation site next to one of the main roads leading in/out of Camp Pendleton. (Tr. 41, 84-86). They proceeded to check-in at the Naval Facilities Engineering Command Office to notify the Base Safety Officer of their presence, then returned to the excavation site to conduct an inspection. (Tr. 42). Based on information and observations gathered during the inspection,

CSHO Brady concluded that Respondent committed four violations of various trenching and excavation regulations.

As a result, Complainant issued a *Citation and Notification of Penalty*, alleging four serious violations of the Occupational Safety and Health Act with a total proposed penalty of \$16,296.00. Respondent filed a timely notice of contest. This brought the matter before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. A trial was conducted on October 24, 2019 in San Diego, California. Four witnesses testified at trial: (1) CSHO Todd Brady, Las Vegas Area OSHA Office; (2) Michael Gomez, Construction Craft Laborer employed by Respondent; (3) Omar Alvarado, Leadman/Acting Foreman employed by Respondent; and (4) Joe Reyes, General Superintendent employed by Respondent. (Tr. 31, 162, 188, 247). Both parties submitted post-trial briefs for the Court's consideration.

### **Jurisdiction & Stipulations**

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, 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). (Tr. 17-18). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties also stipulated to other factual matters, which were read into the record. (Tr. 17-18).

### **Factual Background**

Respondent was hired by CDM Constructors to locate and excavate around a leaking underground water pipe on Camp Pendleton on October 30, 2018. (Tr. 17, 52, 125). As CSHO Brady approached the excavation site on October 31, 2018, he saw an employee climbing out of the excavation using a ladder that was inside a silver trench shield (a/k/a trench box). (Tr. 44;

Ex. C-1, pp. 5, 13, 18). Omar Alvarado was serving as the crew's acting foreman and designated competent person at the time because Respondent's superintendent, Joe Reyes, was not at the site. (Tr. 47-48, 191, 206, 266). Respondent had three employees on site during OSHA's inspection: acting foreman Omar Alvarado, and laborers Michael Gomez and Albert Evans. (Tr. 52, 55, 164, 187). There were two trench boxes in the excavation, one green and one silver. (Tr. 48-50; Ex. C-1, pp. 1, 17). The excavation was 8 feet deep, 26 feet long, and the side walls of the excavation were vertical. (Tr. 49, 55, 62, 217; Ex. C-1, pp. 9, 10, 12). It was undisputed that the soil in the excavation was Type B or C soil.<sup>1</sup> (Tr. 59, 272). During the inspection, CSHO Brady observed 12-inch, 17-inch, and 29-inch gaps between the vertical walls of the excavation and the green trench box; an open end of the green trench box adjacent to a vertical soil wall; and a 4 ½ foot section of missing shield wall in the bottom of the silver trench box. (Tr. 49-50, 60-64, 84; Ex. C-1, pp. 7, 13).

During on-site discussions, Alvarado and Gomez acknowledged to CSHO Brady that they had been in both trench boxes before OSHA arrived. (Tr. 52-54). Superintendent Reyes also acknowledged that once the leaking pipe was located, the work plan was for Alvarado and Gomez to enter the excavated trench to dig around the pipe. (Tr. 274-275, 282; Ex. C-7, p. 1).

As a result of his investigation, CSHO Brady recommended, and Complainant approved, the issuance of the following proposed violations of the Act.

### **Discussion**

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<sup>1</sup> See 29 C.F.R. §1926, Subpart P, Appendix A. CSHO Brady concluded the excavation consisted of Type B soil; while Superintendent Reyes classified it as Type C soil. (Tr. 59, 272). The record also established that the excavation was near a heavily used, multi-lane road, and contained previously disturbed soil as evidenced by the existing water pipe. (Tr. 84-86, 270-272). Either soil type would require the implementation of one of the acceptable employee protection methods identified at 29 C.F.R. §1926.652. In this case, Respondent chose to use trench shields, as discussed in §1926.652(g).

Citation 1, Item 1a

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

29 C.F.R. §1926.651(k)(2): Where the competent person found evidence of a situation that could result in possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees were not removed from the hazardous area until the necessary precautions have been taken to ensure their safety:

Vicinity of Vandergrif Blvd. and El Camion Real, Camp Pendleton, California:  
An employee locating and preparing a water line for repair in a trench approximately 8 feet deep was without an adequate protective system on the north end of the trench.

*Citation and Notification of Penalty at 6.*

The cited regulation provides:

*Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety. 29 C.F.R. §1926.651(k)(2).*

Citation 1, Item 1b

Complainant alleged a serious violation of the Act in Citation 1, Item 1b 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:

Vicinity of Vandergrif Blvd. and El Camion Real, Camp Pendleton, California:  
An employee locating and preparing a water line for repair in a trench approximately 8 feet deep was without an adequate protective system on the north end of the trench.

*Citation and Notification of Penalty at 7.*

The cited regulation provides:

*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) [shield systems] of this section except when: [exceptions not applicable in this case]. 29 C.F.R. §1926.652(a)(1).*

Citation 1, Item 1c

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

29 C.F.R. §1926.652(g)(1)(ii): Shields were not installed in a manner to restrict lateral or other hazardous movement of the shield in the event of the application of sudden lateral loads:

Vicinity of Vandergrif Blvd. and El Camion Real, Camp Pendleton, California:  
An employee locating and preparing a water line for repair in a trench approximately 8 feet deep was without an adequate protective system on the north end of the trench.

*Citation and Notification of Penalty* at 8.

The cited regulation provides:

*Shield systems – (1) General...(ii) Shields shall be installed in a manner to restrict lateral or other hazardous movement of the shield in the event of the application of sudden lateral loads. 29 C.F.R. §1926.652(g)(1)(ii).*

All three of the above violations relate to the green trench box in the excavation and were grouped by Complainant for penalty purposes. (Tr. 83; Ex. C-1). Accordingly, the Court will also analyze them as a group.

The Standards Applied and Were Violated

The parties stipulated that 29 C.F.R. §1926.651 and 652 applied to the worksite at issue. (Tr. 18). The Court will begin with the alleged violation discussed in Item 1(b). The end of the green trench box was open and adjacent to a vertical soil wall. (Tr. 84; Ex. C-1, p. 1). To protect an employee inside the green trench box, CSHO Brady explained that the soil wall at the open end needed to be sloped back to a compliant angle for the soil type, or a trench box end cap needed to be installed. (Tr. 84). Neither action was taken. Therefore, the cited regulation was violated. With regard to Item 1(c), large gaps (12”, 17”, and 29”) between three of the green trench box walls and the vertical soil walls allowed for lateral movement of the trench box in the event of a soil wall collapse. (Tr. 92). Failure to protect the trench box from the possibility of

such lateral movement violated the cited regulation. With regard to Item 1(a), the acting foreman and competent person, Alvarado, failed to take corrective action when the green trench box was openly and obviously missing protection from the vertical soil wall on one end (lack of sloping of soil/lack of trench box end cap) and had large gaps between the box and the soil wall on three sides. (Tr. 91; Ex. C-1, p. 1). Alvarado's failure to correct these conditions, and his failure to prohibit employees from entering the green trench box, constituted a violation of the cited regulation.

#### Respondent's Employees Were Exposed to the Hazard

To establish exposure under Commission precedent, the Secretary must show Respondent's employees were actually exposed to the violative condition or that it was "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). *See also Oberdorfer Industries, Inc.*, 20 BNA OSHC 1321 ("The zone of danger is determined by the hazards presented by the violative condition that presents the danger to employees which the standard is designed to prevent.").

Unlike the silver trench box (discussed below for Citation 1, Item 2), CSHO Brady did not witness any of Respondent's employees in the green trench box. (Tr. 128). At trial, Respondent's employees and supervisors presented inconsistent testimony about their entry into the green trench box before OSHA's arrival. Gomez and Alvarado initially testified at trial that none of Respondent's employees ever entered the green trench box on 10/30 or 10/31. (Tr. 180, 223). When asked how the crew wrapped a chain around (*and under*) a green pipe located in the excavation (at the corner of the green trench box), without someone getting in the excavation, Gomez and Alvarado claimed they laid at top of excavation and looped the chain around *and*

*under* the pipe. (Tr. 183-185, 236; Ex. C-1, p. 6). However, CSHO Brady testified that Gomez admitted to him during the inspection that he entered both the green and silver trench boxes – the silver box on the day of the inspection (10/31), and the green box the day before (10/30). (Tr. 52-53, 89, 94). Alvarado also admitted to CSHO Brady during the inspection that Respondent’s employees had been in both trench boxes. (Tr. 54, 55). At trial, Alvarado was impeached by his pre-trial deposition testimony, wherein he admitted that both he and Gomez climbed into the green trench box on ladders to unhook chains from each corner. (Tr. 227, 245). Alvarado attempted to explain the contradictions between in his trial testimony and his deposition testimony about he and Gomez entering the green trench box on ladders by saying: “I got confused.” (Tr. 247). Superintendent Reyes later confirmed, despite Alvarado’s inconsistency, that it would have been necessary for Respondent’s employees to stand on a ladder inside the green trench box to disconnect the chain/hook from each corner. (Tr. 253, 264-265).

Alvarado also testified that no hand-digging around the pipe was done by any employee at this worksite. (Tr. 195). When asked how the pipe in the bottom of the excavation was so clean and fully exposed on the top and sides, he claimed it was all done by backhoe scoop. (Tr. 229; Ex. C-1, pp. 2, 12, 17). Alvarado testified that on other jobs, plastic pipe (as was the type in this case) is often hand-dug by shovel to completely expose it, but claimed that did not happen here, nor did the backhoe scrape off the top of the pipe. (Tr. 228-230; Ex. C-1, pp. 2, 12, 17). The Court notes that the green pipe was very clean, dirt-free and fully exposed on three sides.<sup>2</sup> (Ex. Ex. C-1, pp. 2, 12, 17. The cleanliness and full exposure of the pipe by backhoe scoop only is also suspect considering the testimony that the backhoe operator could not clearly see into the bottom of the excavation. (Tr. 181, 230).

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<sup>2</sup> Superintendent Reyes also discussed past practices of vacuuming off the top of pipe at other worksites, referred to as “potholing”, but never testified that such action was taken at this location. (Tr. 255-256).

Superintendent Reyes' testimony was also inconsistent. He testified at one point that he told employees not to enter the green trench box. (Tr. 253-254). He later acknowledged that Alvarado and Gomez were authorized to enter the green trench box, that they needed to enter by ladder to disconnect chains on each corner, and also to dig out the pipe by hand once it was located. (Tr. 265, 274-275, 282; Ex. C-7, p. 1). Based on inconsistencies in Gomez's, Alvarado's, and Reyes' testimony, the Court credits CSHO Brady's testimony over theirs in those instances where they are contradictory.

Even if Respondent's employees only entered the green trench box on a ladder, the Court agrees with CSHO Brady's conclusion that standing on a ladder inside a deficient trench box still exposed employees to hazardous conditions. (Tr. 99, 146). In case of a soil wall collapse at the open end of the box, or a shift of the box due to the gaps between the trench box walls and the excavation walls, the employee could easily be knocked off the ladder into the collapsing soil. (Tr. 99-100). The Commission has long-recognized that employee exposure to a hazardous condition may be established by showing "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012). *See also Secretary v. Honey Creek Contracting Co.*, 1998 WL 138687 (OSHRC ALJ, March 9, 1998) (employees using ladder in trench box exposed to unsafe excavation). Complainant established employee exposure to the violative conditions in Citation 1, Items 1(a), 1(b), and 1(c).

#### Respondent Had Knowledge of the Violation



To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood that the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of the noncomplying conduct of a subordinate, it is reasonable to charge the employer with that knowledge. See *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980).

Respondent's knowledge of the violative conditions is not in serious dispute. Alvarado, Respondent's acting foreman and competent person, was at the excavation with Gomez at all relevant times. In fact, the record establishes that Alvarado and Gomez both entered the green trench box on a ladder. (Tr. 227, 245). Because Alvarado was acting as the supervisor at the time, his knowledge is properly imputed to Respondent. Accordingly, Complainant established actual employer knowledge of the violative conditions.

#### The Violation Was Serious

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). Complainant need not show that there was a substantial probability that an accident would actually occur; he 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).

If soil collapsed at the open, unprotected end of the trench box (Item 1, 1b), an employee on a ladder inside the box could have been seriously injured. Likewise, if the box shifted laterally as a result of a soil collapse, an employee on ladder inside the box could have been seriously injured. (Tr. 93). Alvarado's failure to correct these obvious non-compliant conditions, and failure to prohibit employee entrance into the excavation, as the competent person, could have resulted in serious employee injuries. Complainant described various types of possible injuries that could result: broken bones, engulfment, suffocation, and even death. (Tr. 88). Accordingly, the violations were properly characterized as serious.

Based on the discussion above, the Court finds Complainant established violations of 29 C.F.R. §§ 1926.651(k)(2); 652(a)(1); and 652(g)(1)(ii) as described in Citation 1, Items 1(a), 1(b), and 1(c).

#### Citation 1, Item 2

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

29 C.F.R. §1926.652(g)(2): Excavations of earth material to a level no greater than 2 feet (.61m) below the bottom of a shield was permitted:

Vicinity of Vandergrif Blvd. and El Camion Real, Camp Pendleton, California:  
An employee was exposed to cave-in hazards while locating and preparing a water line for repair in a trench approximately 8 feet deep where the trench box bottom was 4.5 feet above the bottom of the trench.

*Citation and Notification of Penalty* at 9.

The cited regulation provides:

*Additional requirement for shield systems used in trench excavations. Excavations of earth material to a level not greater than 2 feet (.61 m) below the bottom of a shield shall be permitted but only if the shield is designed to resist the forces calculated for the full depth of the trench, and there are no indications*

*while the trench is open of a possible loss of soil from behind or below the bottom of the shield.* 29 C.F.R. §1926.652(g)(2).

#### The Standard Applied and Was Violated

Citation 1, Item 2 relates only to the silver trench box at this worksite. (Tr. 83). The parties stipulated that 29 C.F.R. §1926.651 and 652 applied to the worksite at issue. (Tr. 18). The cited regulation allows up to 2 feet of excavation under the bottom edge of a trench box under certain conditions. In this case, however, 4 ½ feet of the paneling on the bottom of the silver box was missing, resulting in more than half of the bottom portion of trench box wall being unprotected. (Tr. 62-63; Ex. C-1, p. 13). Respondent, through Reyes and Alvarado, acknowledged that they ordered the silver trench box with the lower sections of panels missing on one side, so that it could sit over some of the pipe in the ground. (Tr. 199, 262, 281; Ex. C-1, p. 13). Respondent's failure to protect the bottom 4 and ½ feet of the silver trench box from the vertical soil wall violated the cited regulation.

#### Respondent's Employee Was Exposed to the Violative Condition

Gomez was observed climbing out of the silver trench box by a ladder as OSHA arrived to conduct its inspection. (Tr. 44, 95, 116, 121). Gomez acknowledged at trial that he was climbing out of the silver trench box from a ladder when OSHA arrived on Oct. 31. (Tr. 164). Gomez testified that he had been disconnecting a hook from the trench box. (Tr. 165, 170-171, 174). He denies ever stepping off the ladder into the bottom of the box. (Tr. 170). However, when CSHO Brady looked in the bottom of the silver trench box, he observed boot-shaped imprints in the soil.<sup>3</sup> (Tr. 68-69, 76; Ex. C-1, p. 3).

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<sup>3</sup> Complainant attempted to introduce a photograph enhanced by something called a "Neofilter" at trial, which purportedly better depicted the soil impressions. However, no foundation was laid to explain how Neofilter worked, and Respondent's objections to the enhanced photograph were sustained. (Tr. 72-77). CSHO Brady's testimony that he personally observed the footprint impressions was received into evidence. (Tr. 76-77).

And once again, even if employees entered the silver box only on a ladder, the Court agrees with CSHO Brady's conclusion that standing on a ladder inside a deficient trench box still exposed employees to a hazardous condition. (Tr. 99, 146). If a soil collapse occurred at the 4 ½ feet of unprotected bottom wall of the box, the employee could easily be knocked off the ladder and into the collapsing soil. (Tr. 99-100).

Gomez's testimony that he was wearing a harness and lanyard attached to a steel plate on the ground approximately twenty-five feet away from the excavation does not eliminate the violation. Wearing fall protection equipment, such as a harness and lanyard, is not one of the proscribed and acceptable means of protection from excavation hazards. (Tr. 175-177).

#### Respondent had Actual Knowledge of the Violative Condition

Reyes specifically ordered the silver trench box with the bottom 4 ½ feet of paneling removed. (Tr. 262). In addition, Alvarado, Respondent's acting foreman, specifically instructed Gomez to enter the silver trench box on the ladder to unhook a chain and pin. (Tr. 203). As supervisor, his knowledge is properly imputed to Respondent. *See Mountain States Tel. & Tel. Co.*, 623 F.2d at 158.

#### The Violation was Properly Characterized as Serious

The missing 4 ½ foot lower section of the silver trench box subjected Respondent's employees to the possibility of serious injuries if the soil collapsed into the bottom half of the excavation, including broken bones, engulfment, suffocation, and death. (Tr. 88, 98). CSHO Brady opined that the likelihood of soil falling off vertical walls and coming into the bottom of the box was increased due to the vibrations from vehicle traffic on the adjacent busy road. (Tr. 95; Ex. C-1, p. 16). Alvarado agreed that soil cave-in was a possibility due to the excavation's

proximity to the road. (Tr. 219). Accordingly, the violation was properly characterized as serious.

Based on the discussion above, the Court finds Complainant established a violation of 29 C.F.R. § 1926.652(g)(2) as described in Citation 1, Item 2.

### **Penalties**

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 1a, 1b, and 1c were grouped by Complainant for penalty purposes. An \$8,148.00 penalty was proposed for the three violations. As to Citation 1, Item 2, Complainant proposed a second penalty of \$8,148.00. The record does not contain specific evidence of the lengths of time Alvarado and Gomez were in the green trench on the ladders, nor the length of time Gomez was in the silver trench on the ladder, but the evidence suggests the duration of exposure was fairly short. The Court also recognizes and acknowledges Respondent's good faith attempts at using trench boxes to protect employees, even if the conditions of the boxes were not fully compliant.

Respondent is a small employer with less than 100 employees. (Tr. 89, 99). Therefore, when calculating the proposed penalties, Complainant applied a 30% size-based reduction. (Tr. 89, 99). Complainant also applied a 10% penalty reduction since Respondent had no OSHA violations within the past 5 years. (Tr. 89, 99).

Based on the totality of the circumstances discussed above, the Court will assess a penalty of \$4,500.00 for grouped Citation 1, Items 1a, 1b, and 1c; and \$4,000.00 for Citation 1, Item 2.

### **Order**

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

1. Citation 1, Item 1a, 1b, and 1c are AFFIRMED as serious violations, and a grouped penalty of 4,500.00 is ASSESSED; and
2. Citation 1, Item 2 is AFFIRMED as a serious violation, and a penalty of \$4,000.00 is ASSESSED.

Date: July 6, 2020  
Denver, Colorado

/s/ *Brian A. Duncan*

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