THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

Secretary of Labor, Complainant, v. KS Energy Services, Inc., Respondent.	DOCKET NO. 09-1272

Appearances:

Margaret Sewell, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Charles Palmer, Esq., Denise Greathouse, Esq., Michael Best & Friedrich, LLP, Milwaukee, Wisconsin
For Respondent

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a KS Energy Services, Inc. ("Respondent") jobsite in Madison, Wisconsin on June 10-11, 2009. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging two violations of the Act with proposed penalties totaling $14,500.00. Respondent timely contested the citation and a trial was conducted over the course of June 10-11 and August 3, 2010, in Madison, Wisconsin. Prior to the hearing, the parties agreed that Citation 2 Item 1 was amended to allege a repeat violation of 29 C.F.R. §1926.652(a)(1) with a proposed penalty of $12,500.00, and that Citation 1 Item 1 was withdrawn. (Tr. 7-8, 88, 588-589; *Orders dated May 28, 2010 and August 3, 2010*). Both parties

submitted a post-trial brief and the case is ready for disposition.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of a specific regulation promulgated under Section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Prod*., 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

When Complainant alleges a repeat violation, it has the burden of establishing that: (1) the same employer, (2) was cited at least once before, (3) for a substantially similar violation of the Act, and (4) the citation became a final order. *Bunge Corp. v. Secretary of Labor*, 638 F.2d 831 (5th Cir. 1981). Complainant makes a *prima facie* showing of "substantial similarity" by showing that the past and present violations are for failure to comply with the same standard. *Potlatch Corp*., 7 BNA OSHC 1061 (No. 16183, 1979). The burden then shifts to Respondent to rebut that showing. *Monitor Construction Co*., 16 BNA OSHC 1589 (No. 91-1807, 1994). "In cases where the Secretary shows that the prior and present violations are for an employer's failure to comply with the same specific standard, it may be difficult for an employer to rebut the Secretary's *prima facie* showing of similarity." *Potlatch*, supra.

Factual Findings

Six witnesses testified at trial: Compliance Safety and Health Officer ("CSHO") Kimberly Morton; CSHO Nicholas Kerkenbush; Harry Butler, Respondent's expert witness on soil classification and excavation safety; Don Halterman, Complainant's expert witness on soil classification; Chad Greenwood, Assistant Area Director of the Madison Area OSHA Office; and Joshua Retzleff, Respondent's Safety Director. (Tr. 30, 153, 210, 329, 419, 694). Based on their testimony and the evidentiary exhibits admitted into the record, the court makes the following factual findings: [1]

On June 10, 2009, CSHO Morton was driving on University Avenue in Madison, Wisconsin when she observed individuals working in an excavation. (Tr. 33-34, 96; Ex. J-32, J-33, J-34). Pursuant to an OSHA National Emphasis Program on excavation safety, CSHO Morton stopped her vehicle and initiated an inspection for excavation safety compliance. (Tr. 34). After receiving permission from the on-site general contractor, CSHO Morton entered the site and learned that multiple subcontractors were present and engaged in an underground pipe installation project. (Tr. 34-35, 141). It was a large project which spanned eight to ten city blocks. (Tr. 701).

Other on-site employers were inspected as well, but for the purpose of this case, CSHO Morton photographed the excavation east of the pedestrian bridge where she was told Respondent's employees had been working. (Tr. 35, 98-99, 122). She also took various measurements at three different locations east of the bridge.[2] (Tr. 38, 47; Ex. C-1, C-2, C-3, J-3 through J-8, J-11 through J-24, and J-42 through J-53). CSHO Morton was told that two of

[1] Each party listed several "undisputed facts" in their pretrial statements to the court. However, the purported "undisputed facts" were different for each party, and in many instances contradictory. Therefore, the court will make its own factual findings based on the record.

[2] Some of CSHO Morton's measurements, especially in the lowest areas of the excavation, were estimated. However, Respondent's expert witness, who also took measurements during the inspection, did not dispute OSHA's measurements because they were "substantially similar" to his own, and used them in his own analysis. (Tr. 102-104, 112-113, 116, 229, 283).

Respondent's employees had been working in the excavation at two of three places she measured just before she entered the site. (Tr. 36, 58, 69). CSHO Morton's measurements determined that the angles of protection at each of the three locations were 46 degrees, 50 degrees, and 46 degrees. (Tr. 46, 51, 55, 109; Ex. C-1, C-2, C-3). One of the locations measured was at the end of the most recently installed pipe, where multiple tools, supplies, and welding helmets were observed. (Tr. 54-55, 60-62; Ex. C-3, J-1, J-5). Ultimately, Respondent's counsel and Safety Director, Joshua Retzleff, conceded that Respondent's employees were working in the excavation just before CSHO Morton arrived at the site. (Tr. 678, 758-760).

OSHA introduced evidence of multiple on-site conditions which can reduce the integrity of excavation walls. For example, CSHO Morton observed a small amount of water accumulated in some of the footprints in the bottom of the trench. (Tr. 58; Ex. J-49). She also noted two lanes of heavy vehicular traffic on the road running parallel to the trench, approximately twelve feet away from the excavation edge. (Tr. 71, 132, 146). In addition to nearby traffic, Respondent was using a large tracked backhoe which operated near the edge of the excavation. (Tr. 74, 170, 761-762; Ex. J-8, J-30). There were also at least four previously installed utility lines which crossed the trench in the area Respondent's employees had been walking and working. (Tr. 162, 164, 178, 187). Two of the lines were halfway up the excavation, under the pedestrian bridge, near the access ladder. (Tr. 764, 773; Ex. C-2(c)). Another previously installed utility line was just under the bottom of the pedestrian bridge. (Tr. 785-786; Ex. C-2(c)). A fourth previously installed utility line was approximately seven feet from the end of most recently installed pipe, where tools and welding masks were observed. (Tr. 731; Ex. J-3, J-4, J-11, J-28). None of the testifying witnesses had any direct knowledge of the amount of soil which had been disturbed when these previous utilities were installed. (Tr. 241, 308, 463-464, 809).

After photographing the site and taking several measurements, CSHO Morton was not

sure if the excavation was in compliance, so she returned to her office and presented her information to her supervisor, OSHA Assistant Area Director Chad Greenwood. (Tr. 77, 110). Although Respondent had attempted some benching of the excavation walls, Asst. Area Director Greenwood concluded that CSHO Morton's measurements and photographs indicated that the trench was out of compliance, and instructed her to return to the site the following day with CSHO Nick Kerkenbush, who had more excavation inspection experience. (Tr. 76-77). During their visit to the jobsite the following day, the amount of water in the bottom of the excavation had increased to the point that plywood was placed in the bottom of the excavation to walk on. (Tr. 79-80, 781-783; Ex. J-63). CSHO Kerkenbush described the water accumulation the second day as "puddling." (Tr. 170, 172). The court also notes that Respondent never determined the source of the accumulating water. (Tr. 715). Water in the bottom of an excavation can weaken the stability of the lower portion of an excavation wall, where the most pressure exists. (Tr. 173).

Also during this second visit, CSHO Kerkenbush took two soil samples from the wall of the excavation, approximately 3-4 feet below the top edge. (Tr. 78, 160, 725-726). He visually and physically evaluated the two samples, by rolling the soil in his palm to assess cohesiveness. His field tests concluded that one sample was Type B soil and the other was borderline Type B/Type C soil. (Tr. 162, 166). Subsequent soil analysis at OSHA's Salt Lake City Technical Laboratory, utilizing OSHA's ID-194 laboratory method, determined that one of the samples was cohesive, sandy clay, Type B soil, and the other was granular, sandy gravel, Type C soil. (Tr. 343, 345, 350; Ex. C-7, C-8, C-9).

During the second day of the OSHA inspection, Harry Butler, an engineering consultant and expert in soil classification, was also present at the site, evaluating the excavation and soil at Respondent's request. (Tr. 211-223, 725). At trial, Mr. Butler concurred with the results of one of OSHA's laboratory analyses; that soil taken from the side of the excavation was Type B soil. (Tr. 225, 269-270). He did not agree with OSHA's laboratory analysis that the second sample

taken from the side of the excavation was Type C soil. (Tr. 226). He also disputed that either of OSHA's two samples accurately represented the soil in the bottom half of the excavation, which he determined to be Type A soil based on his visual observations, pocket penetrometer tests, and cohesiveness tests. (Tr. 230-231, 234-237). Based on his observations and field-testing of three soil samples from the excavation, he concluded that the trench consisted of layered soil types; with approximately 9 inches of stable rock at the top (roadway material), approximately 23 inches of Type B soil below that, and approximately 52 to 70 inches of native, cohesive, clay loam, Type A soil below that. (Tr. 230-234, 244-246, 270, 279; Ex. R-1, Diagrams 4, 5, 8, and 9).

Due to the nearby traffic, the operation of the tracked backhoe, the presence and increasing amount of water in the excavation, and multiple previously installed utilities, OSHA disputed Mr. Butler's conclusion that the excavation contained soil that could possibly be characterized as Type A soil. (Tr. 463-465, 468-472). Although Mr. Butler agreed that the regulations identify several conditions that prohibit classification of soil as Type A, he did not agree that any of those conditions were present in this excavation. (Tr. 237-240, 824, 826).

Using OSHA's measurements, which he said were "substantially similar" to his own, Mr. Butler prepared a report with diagrams that also reflected benched angles of protection at 46 degrees and 50 degrees. (Ex. R-1, Diagrams 3, 4, 7, and 8). Mr. Butler opined that because the excavation was comprised of layered soil types, different diagrams from 29 C.F.R. §1926, Subpart C, Appendix B, could be, and were, used at this site to create a compliant protective system. (Tr. 286; Ex. R-1, Diagrams 5 and 9). OSHA agreed that the excavation contained layered soil types, but argued that under such circumstances only the diagrams in 29 C.F.R. §1926, Subpart C, Appendix B-1.4 "Excavations Made in Layered Soils" could be applied.[3] (Tr. 498, 502-503, 534, 633-634). Mr. Butler disputed OSHA's interpretation of the regulation on

[3] It was undisputed that Respondent was attempting to utilize Option 2 of 29 C.F.R. §1926.652, which identifies acceptable benching and sloping methods of compliance. Therefore, Options 1, 3, and 4 in the regulation do not apply here. (Tr. 702, 744, 793).

this point, but acknowledged that if the diagrams in Appendix B-1.4 were the only applicable diagrams, he was not sure whether Respondent's excavation was compliant. (Tr. 289, 292, 295). Mr. Butler did testify that if the soil in the excavation was determined to be all Type B soil, or layered Type B and Type C soils, Respondent's excavation was definitely *not* in compliance with the cited regulation. (Tr. 293, 299).

Complainant also argued alternatively that, if the court accepts Mr. Butler's conclusions that the bottom half of the excavation contained Type A soil, the excavation was still out of compliance. (Tr. 629-630). Applying 29 C.F.R. §1926, Subpart C, Appendix B-1.4 "Excavations Made in Layered Soils," the excavation should have been sloped at no greater than a 53-degree angle in the Type A soil starting at the bottom, with no greater than a 45-degree angle in the Type B soil near the top of the excavation. (Tr. 652). It was not. Investigative photographs and Mr. Butler's diagrams clearly depict that the excavation was nearly vertical for the first several feet before any sloping or horizontal benching began. (Ex. J-4, J-6, J-7, J-8, R-1, Diagrams 4, 5, 9). The court also notes, as Asst. Area Director Greenwood testified, that none of the diagrams in 29 C.F.R. §1926, Subpart C, Appendix B-1.4 for "Excavations Made in Layered Soils" depict benching, as opposed to sloping, as an acceptable method of protection. (Tr. 639-640, 647).

Respondent's Foreman, Brian Williams, was the designated competent person for this excavation. (Tr. 70). Mr. Williams had authority to direct employees and correct conditions at the site when necessary. (Tr. 168). Prior to OSHA's arrival on the first day of the inspection, Mr. Williams had concluded that the soil in the excavation where Respondent's employees would be working was Type B soil. (Tr. 708). Respondent's Safety Director, Joshua Retzleff, who had been at the site for several hours in the morning before OSHA first arrived, also thought that the soil in the excavation was Type B soil and told Foreman Williams to follow the 1 to 1 slope requirements (45 degrees) for that type of soil. (Tr. 707-708, 710-711). Safety Director

Retzleff conceded that he "never, for a second, thought that the soil was A" on June 10, 2009. (Tr. 738).

It was undisputed that Respondent received an OSHA citation for a violation of 29 C.F.R. §1926.652(a)(1) in September of 2008, the same regulation cited in this case, and accepted that violation after OSHA modified it to "other-than-serious" in an Informal Settlement Agreement on October 15, 2008. (Tr. 12-13, 668; Ex. C-14, C-15).

Discussion

Citation 2 Item 1

The Secretary alleged in Citation 2 Item 1:

> *KS Energy Services, Inc. was previously cited for a violation of this Occupational Safety and Health Standard 29 CFR 1926.652(a)(1) which was contained in OSHA Inspection Number 309842698, Citation Number 1, Item Number 1 issued on 9/22/08. 29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system. Employees working in an excavation were not protected from cave-ins.*

The cited regulation states:

> *29 C.F.R. 1926.652. (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* [with two noted exceptions which were not asserted and do not apply in this case]

Did the cited standard apply?

Respondent conceded that the excavation was greater than five feet in depth and that 29 C.F.R. §1926.652(a)(1) applied to the conditions of the excavation on June 10, 2009. (*Resp.*

Brief, p. 21).

Were the terms of the cited standard violated?

OSHA's measurements of Respondent's attempts to bench the excavation walls at three different locations east of the bridge resulted in angles of 46 degrees, 50 degrees, and 46 degrees. Mr. Butler testified that he concurred with OSHA's measurements because they were "substantially similar" to his own, and depicted a general outline of the excavation walls with the same angles in his report. (Ex. C-1, C-2, C-3, R-1, Diagrams 3, 4, 7, 8). The parties generally agreed that the upper two feet of the excavation walls (below nine inches of concrete roadway) was comprised of Type B soil.[4] Therefore the primary issue in dispute is whether the bottom 52 to 70 inches of soil in the lower portion of the excavation walls was properly characterized as Type A soil by Mr. Butler.

Based upon: (1) two lanes of heavy vehicular traffic running parallel to the excavation approximately twelve feet from the excavation edge, (2) the operation of a large, tracked backhoe along the length and edge of the excavation, (3) the presence of increasing amounts of water in multiple footprints in the bottom of the excavation which accumulated to the point that plywood needed to be placed over a large puddle on the second day of the inspection, (4) the presence of four previously installed utility lines running perpendicular to the excavation in areas Respondent's crew was working and traveling, (5) Foreman Williams and Safety Director Retzleff's initial (pre-OSHA) determination that the soil in the excavation was Type B soil, (6) CSHO Kerkenbush's field tests of two soil samples concluding Type B soil, and (7) OSHA Laboratory Analyst Halterman's conclusion of Type B soil, the court rejects Mr. Butler's conclusion that any of the soil in the excavation east of the pedestrian bridge could be properly classified as Type A soil. With the exception of the top nine inches of roadway, the court concludes that the soil in the excavation was subject to vibrations from traffic and the backhoe,

[4] For the purposes of the discussion and analysis, the court is setting aside the single OSHA laboratory result of Type C soil at one location in the excavation as it would not alter the court's ultimate findings in this case.

contained increasing amounts of water from an unknown source, and was previously disturbed at multiple locations in the trench. These factors lead the court to conclude that any soil in the excavation which initially tested as Type A, should have been downgraded to at least Type B soil pursuant to Appendix A to Subpart P of Part 1926.

The angles of protection measured by OSHA at three different locations all exceeded the maximum 1 to 1 ratio (45 degrees) required for Type B soil underneath solid rock (the 9 inches of roadway material at the top of the excavation). 29 C.F.R. §1926.652, Subpart P, Appendix B-1.4. Even Mr. Butler agreed that if the soil in the excavation was determined to be Type B soil, the excavation was not in compliance. (Tr. 293). Additionally, the court concludes that Complainant's interpretation of its own promulgated standard, specifically that Appendix B-1.4 contains the applicable diagrams for layered soil systems, is a reasonable interpretation. It is consistent with the court's reading of the standard. Therefore, the court defers to the Secretary's reasonable interpretation in this instance. *Martin v. OSHRC,* 499 U.S. 144 (1991).

The preponderance of the evidence establishes that Respondent failed to implement an acceptable excavation protection method as proscribed by 29 C.F.R. §1926.652(b)(2) and Appendix B to Subpart P of Part 1926. The cited standard was violated.

Did Respondent's employees have access to the violative condition?

To establish employee exposure to a violative condition, Complainant must prove that it was reasonably predictable that employees "will be, are, or have been in the zone of danger" created by the violative condition. *Fabricated Metal Products*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶20,448 (No. 504, 1976). Respondent conceded in its post-trial brief that Complainant "can show by the physical evidence that employees were in the excavation." (*Resp. Brief*, p. 28). In addition, Safety Director Retzleff's testimony was consistent with CSHO Morton's conversations with employees at the site, which established that two of Respondent's

employees were working in the excavation just before OSHA arrived. (Tr. 678, 758-760). Therefore, the court finds that, on June 10, 2009, Respondent's employees were working in the excavation under the conditions depicted in OSHA's investigative photographs and measurements. The location of numerous tools, welding helmets, the end of the most recently installed section of pipe, the ladder, and footprints, all demonstrate to the court that Respondent's employees were working and traveling throughout the excavation area east of the pedestrian bridge at various points which were determined to be non-compliant. Complainant established, by a preponderance of the evidence, that at least two of Respondent's employees were exposed to the violative condition.

Did Respondent know, or with the exercise of reasonable diligence, could it have known, of the violative condition?

Foreman Williams was present at the site, directing employee work throughout the day on June 10, 2009. He and Safety Director Retzleff discussed the classification of the soil in the excavation as Type B soil and the requirement for a 1 to 1 (45 degrees) angle of protection. Although Safety Director Retzleff had already left the site when OSHA arrived, Foreman Williams was still present and had direct knowledge of the conditions of the excavation. His knowledge is imputed to Respondent. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991). Complainant established employer knowledge of the violative condition.

Was the violation properly characterized as a "repeat" violation?

Respondent accepted a violation of 29 C.F.R. §1926.652(a)(1) in an Informal Settlement Agreement regarding OSHA Inspection Number 309842698 on October 15, 2008. (Tr. 12-13; Ex. C-14, C-15). Although the prior violation was amended to an "other-than-serious" violation for settlement purposes, excavation safety issues are quite serious. The cited standard proscribes the *minimum* amount of protection employers must provide to employees working inside

underground excavations. Complainant has determined that "excavation work is one of the most hazardous types of work done in the construction industry [and] [t]he primary type of accident of concern in excavation-related work is [the] cave-in." *Mosser Construction, Inc.*, 23 BNA OSHC 1044, 2010 CCH OSHD ¶33,049 (No. 08-0631, 2010). Failure to comply with the minimum levels of protection in the standard could result in trench collapses and serious physical harm to employees. *Id.*

Complainant established a rebuttable presumption that the violation was properly characterized as repeat by proving that Respondent had received a citation for a violation of the same standard previously, which became a final order in 2008 pursuant to Section 10(b) of the Act. Respondent failed to rebut that presumption. *Potlatch*, supra. Accordingly, Citation 2 Item 1 will be AFFIRMED as a repeat violation.

Vagueness of the Standard

Respondent argued that the cited standard is "unconstitutionally vague as applied." (*Resp. Brief*, p. 16). The court notes that "it is not the position of the Respondent...that the standard is vague on its face." (*Resp. Brief*, p. 16). To determine whether a standard is impermissibly vague, the court first examines the language of the standard at issue, which is viewed "in context, not in isolation." *Dayton Tire*, 23 BNA OSHC 1247 (No. 94-1374, 2010). Due process does not impose drafting requirements of mathematical precision or impossible specificity. *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978). If the language is vague, then the court must consider whether "a reasonable person, examining the generalized standard in the light of a particular set of circumstances, can determine what is required," or whether "the particular employer was actually aware of the existence of a hazard and of a means by which to abate it." *Dayton Tire* supra. First, the court concludes that the language of the cited standard is not vague. It clearly requires that one of four optional protective methods must be implemented in excavations more than five feet deep which are not entirely comprised of stable rock. 29 C.F.R.

§1926.652(a). The record establishes that Respondent understood this, employed individuals at the site with the ability to choose one of the four acceptable methods of protection based on their observations, field tests, and conclusions about soil types. Respondent's foreman and safety director correctly concluded, before OSHA's arrival, that the excavation was comprised of Type B soil, and correctly discussed the requirement to establish a maximum slope angle of 1 to 1 (45 degrees). (Tr. 707-708). Their failure to comply with their own discussion and initially correct application of the standard does not render the language of the standard vague. Second, Respondent's foreman and safety director clearly recognized the hazards posed by employees entering excavations and understood that there were multiple methods of protection available under the standard to abate the hazard.[5] Therefore, the court rejects Respondent's vagueness challenge.

Penalties

In calculating the appropriate penalty for affirmed violations, Section 17(j) of the Act requires the Commission to 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. 29 U.S.C. §666(j). 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, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). CSHO Morton considered the violation to be of high severity but with a low probability of someone actually being injured. (Tr. 85-86, 135). Accordingly, she calculated a proposed penalty of $12,500.00, largely due to the repeat classification of the violation. Considering Complainant's penalty determinations, as well as the totality of the factual circumstances discussed above, the court assesses the penalty for Citation 2 Item 1 as set out below.

[5] For example, the record established that Respondent had 13-16 trench boxes on-site and available for use. (Tr. 750).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 2 Item 1 is hereby AFFIRMED as a repeat violation of 29 C.F.R. §1926.652(a)(1) and a penalty of $12,500.00 is ASSESSED.

Date: January 10, 2011 _____/s/_____
Denver, Colorado BENJAMIN R. LOYE
Judge, OSHRC