



U.S.C. § 666(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”). Two items are before us on review to determine whether the judge erred in affirming them.<sup>1</sup>

### BACKGROUND

Hughes has a long-term agreement with Columbia Gas of Ohio (“the gas company”) to perform excavation and other activities incident to the laying and repair of underground gas lines. On the date of the inspection, the gas company suspected that there was a leak in a 12-inch high-pressure gas main in front of 1271 Harmon Avenue in Columbus, Ohio, and sent a Hughes crew to help investigate and repair the leak. Beginning about noon, Hughes excavated a trench approximately nine feet long to expose the gas main, which ran parallel to the street about 38 inches below the surface of the shoulder of the road. When investigation indicated that the leak was in an old, unused 1¼-inch service line, Hughes excavated another trench, approximately 11 to 12 feet long, perpendicular to the street. The result was an L-shaped trench 4½ feet deep at its deepest point and 20 to 21 feet in total length.

At this point, gas was escaping freely into the air, and the crew was aware that a spark or cigarette from a passing vehicle could cause an explosion. To repair the leak, Hughes removed a portion of the defective service line and inserted a plug into the hole in the main where the service line had been connected to it. The next step was to cap the plug, which required a metal cover to be welded over the plug. A gas company employee was in the trench welding the cap into place when the compliance officer arrived at approximately 3:15 p.m. to conduct the inspection. When he completed his work a few minutes later, the welder stepped onto the gas main, then stepped onto the trench wall to get out of the trench.

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<sup>1</sup>Initially, three items were directed for review. While this case has been on review, however, the Secretary has withdrawn item 4 of citation no.1, which alleged a violation of 29 C.F.R. § 1926.651(k)(2).

**Citation No. 1, Item 1.**

In Citation No. 1, Item 1, the Secretary alleged a serious violation of 29 C.F.R. § 1926.651(c)(2).<sup>2</sup> The citation alleged:

Prior to the commencement of work, the employer did not ensure that employees working in the trench which was four feet six inches deep were provided with adequate means of egress into and out of the excavation in which they were working, in that, no ladders were provided for employees to get out of the trench, thereby exposing the welder and foreman to a cave in hazard.

In excavating the trench, Hughes had left a slope at the end of the second leg of the trench, the end away from the road. Where this slope ended at the back wall of the trench, there was a step, which appears from the photographs to be approximately a foot and a half high. This slope and step were used by two workers to enter the trench. The issue is whether this sloped end of the trench satisfied the requirements of the standard.

According to the definitions section of the standard, 29 C.F.R. § 1926.650(b), "*Ramp* means an inclined walking or working surface that is used to gain access to one point from another, and is constructed from earth or from structural materials such as steel or wood." The compliance officer who conducted the inspection did not consider the sloped end to be a ramp because he believed that it was blocked by the backhoe, and he did not consider it to

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<sup>2</sup>That standard provides:

**§ 1926.651 General requirements.**

....

*(c) Access and egress—*

....

**(2) Means of egress from trench excavations.** A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

provide safe access because the employee in the trench did not use it to get out of the trench. The compliance officer also believed that the slope was too steep for an employee to walk out comfortably, although he had neither measured the ramp nor tried to use it himself. He agreed, however, that a ramp that permitted an individual to walk upright out of the excavation would be acceptable under the standard.

Hughes' foreman testified that he entered the trench by the ramp without difficulty and was able to walk up the ramp and out of the trench in an upright position. He also stated that there were no obstructions in the way. The gas company's welder testified that he entered the trench by walking from his truck around the spoil pile of excavated dirt, past the backhoe and down the ramp. His access to the trench was not obstructed, and he encountered no difficulty using the ramp. The welder did not remember how he had gotten out of the excavation when the job was completed, but another witness, a Hughes truck driver, saw him step onto the gas main and then onto the edge of the excavation.<sup>3</sup> Another gas company employee, who had entered the trench, testified that nothing prevented him from walking up the ramp and out of the trench.

The administrative law judge affirmed this item, even though he found that the trench was not blocked by the backhoe and that "[i]ts slope, while steep, does not appear so steep, nor does the loose material appear to be of such a nature as to prevent its effective use during the emergency situation. . . ." Although he never made a finding that the ramp and step did not provide safe egress from the trench, he found that Hughes was in violation of the standard. He concluded that the ramp provided "a questionable means of egress from the trench" without explaining why it was "questionable." From testimony that the welder stepped onto the gas pipe and out of the trench instead of using the ramp, the judge inferred

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<sup>3</sup>The dissent refers to the compliance officer's statement that the welder "crawled" out of the trench. Because the welder did not use the ramp, however, that observation is irrelevant to the question before the Commission.

that “walking up the ramp was not entirely free of difficulty.” The judge discounted the foreman’s testimony that he had walked up the ramp and exited the trench without any difficulty because, “as the competent person on the site,” the foreman had “an understandable interest in demonstrating that a safe means of egress was available.”

We disagree with the judge’s observation that the foreman had an interest in defending what he had done at the worksite because it is not supported by the record. The foreman had left Hughes’ employ and was working as a laborer for another company at the time of the hearing. Therefore his job was not threatened by his testimony and there is no apparent incentive for him not to tell the truth. To the extent that the judge discounted the foreman’s testimony, we find the judge’s reasoning to be unpersuasive. The judge’s conclusion is not set out as a credibility finding based on the demeanor of the witness or on other factors peculiarly observable by the judge. *See Waste Mgt. of Palm Beach*, 17 BNA OSHC 1308, 1309-10, 1996 CCH OSHD ¶ 30,841, p. 42,891 (No. 93-128, 1995). We are therefore in as good a position as the judge to determine whether Hughes failed to comply with the standard. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1190, 1993-95 CCH OSHD ¶ 30,059, p. 41,338 (No. 89-2883, 1993) (consolidated). We find no reason in the record to discredit the testimony of Hughes’ foreman. His testimony that he was able to enter and leave the trench safely using the ramp is un rebutted, and the compliance officer was not present to observe him at that time.

We consider it significant that the judge never found that the ramp did not provide safe egress. He instead concluded that using the ramp was “not entirely free of difficulty.” That is not the issue. Using a ladder, which is also permitted by the standard, is “not entirely free of difficulty,” either; but it is a legal means of complying with the requirements of the standard. We give great weight to the testimony of the two witnesses who testified that they had entered the trench by way of the ramp without encountering any difficulty. One of them, the foreman, testified that he had also exited the trench that way without any trouble. The

compliance officer admitted that he had not been present when the foreman left the trench and could not contradict his statement. The compliance officer testified that he did not consider the sloped end of the trench to be a ramp because it was obstructed by the backhoe, but the judge made a finding that the ramp was not blocked by the backhoe. The Secretary has not relied on that part of the compliance officer's testimony on review. On the other hand, the gas company's contract inspector, who was present the whole time the trench was open, testified that nothing would prevent an employee from walking out of the trench by way of the ramp. All witnesses employed by Hughes or the gas company who were asked believed that the ramp provided safe egress. The only evidence to the contrary is the opinion of the compliance officer, who had no first-hand knowledge of the difficulty of walking up the ramp. We give far greater weight to the foreman's statement that he had actually walked up the ramp and stepped out of the trench than we do to the compliance officer's speculation that it could not be done. When added to the testimony of individuals who work in and around trenches for a living, this constitutes a great preponderance of the evidence on the issue.

In his dissent, the Chairman relies on the evidence of Exhibit C-1, a photograph of the trench and the ramp introduced by the Secretary. The Chairman considers the photograph to be objective evidence which "establishes that the slope of the earth ramp was steep with a large step up at the end of the trench" and that an employee could not reasonably expect to quickly walk up the slope in an upright position and without slipping get out of the trench under emergency conditions. In this case, however, the testimony of employees who used the ramp was that egress was *not* unduly difficult. To the extent the judge relied on the photograph, it was not to confirm the steepness of the slope, but rather to note, as the Chairman does, that the ramp had loose materials on it. Although the photograph shows a low pile of loose dirt to be crossed by an employee leaving the trench, it does not appear to be enough of an obstacle to make egress unsafe. Indeed, the judge found that the "slope,

while steep, does not appear so steep, nor does the loose material appear to be of such nature as to prevent effective use during the emergency situation caused by the escaping gas.”

We agree with the Chairman that the particular photograph is of some evidentiary value when it is viewed in the context of the judge’s findings and the testimony of the employees who actually traversed the ramp, but we do not believe that it should outweigh that testimony.<sup>4</sup>

Having considered the testimony of all the witnesses and reviewed the exhibits, we conclude that the Secretary has failed to show by a preponderance of the evidence that Hughes did not comply with section 1926.651(c)(2) by failing to provide its employees safe egress from the trench.<sup>5</sup> Particularly in light of the compliance officer’s admission that, if an employee could walk out of the trench using the ramp, the ramp was acceptable, the testimony of the employees who were actually in the trench establishes that this trench provided the safe means of egress required by the standard. We therefore vacate this item.

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<sup>4</sup>Commissioner Montoya believes that, to the extent that Exhibit C-1 is probative, it can also be interpreted to support the conclusion that the ramp *did* provide safe egress. She notes that the exhibit shows that the ramp was not unduly steep and that the step at the end of the ramp does not appear to have been significantly greater than the distance between the rungs of a ladder would have been had Hughes elected to provide a ladder instead of a ramp under the standard. She concludes that the step was not so high or difficult that it made the ramp unsafe to use for egress from the trench. Finally, she concludes that, from the outriggers of the backhoe shown in the corner of the photograph, it appears that the backhoe was far enough from the end of the trench to support the judge’s finding that the backhoe did not obstruct egress from the trench.

<sup>5</sup>We note that, as a result of this inspection, the gas company was also issued a citation alleging a violation of the same standard cited here at the same trench. The administrative law judge in that case found that the Secretary had failed to establish a violation and vacated that item of the citation. *Columbia Gas of Ohio, Inc.*, (No 93-3232, Sept. 11, 1995)(ALJ).

**Citation No. 2, Item 1.**

Item 1 of Citation No. 2 alleged that Hughes had committed a repeated serious violation of 29 C.F.R. § 1926.652(a)(1)<sup>6</sup> by not protecting employees in the trench from cave-ins. Hughes argues that protection was not required because it satisfied exception (ii) of the standard that applies when the excavation is less than five feet deep, as this one was, and a “competent person” examines the excavation and finds no indication of a potential cave-in.

A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception. *Armstrong Steel Erect., Inc.*, 17 BNA OSHC 1385, 1389, 1995 CCH OSHD ¶ 30,909, p. 43,031 (No. 92-262, 1995), *aff'd*, 72 F.3d 919 (D.C. Cir. 1996); *Article II Gun Shop*, 16 BNA OSHC 2035, 2039, 1994 CCH OSHD ¶ 30,563, p. 42,302 (No. 91-2146, 1994) (consolidated). Having reviewed the evidence, we agree with Hughes that it has established, by a preponderance of the evidence, that it satisfied the requirements of exception (ii). The record establishes that a competent person inspected the trench and found no indication of potential collapse. That is sufficient to satisfy the requirements of the standard despite the compliance officer’s opinion that the inspection was inadequate.

During the inspection, the compliance officer interviewed Hughes’ foreman, who was the company’s designated competent person at the site. The foreman described his training

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<sup>6</sup>That standard provides:

**§ 1926.652 Requirements for protective systems.**

(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 (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

and his knowledge of the excavation standard, and the compliance officer noted on his worksheet that the foreman had been trained in soil analysis, protective methods, and the requirements of the standard, and that he was fully qualified as a competent person.<sup>7</sup> Having reviewed the foreman's experience and training, we agree with the compliance officer that the foreman was qualified to perform the duties of a competent person.

The compliance officer concluded, however, that the foreman's inspection of the trench must have been inadequate because he did not find any indication of potential collapse.<sup>8</sup> The compliance officer believed the weight of the spoil pile, the traffic along Harmon Avenue, and some indentations in the back wall of the trench all constituted indications of potential collapse, so Hughes should have taken measures to protect its employees from a cave-in. Hughes' foreman, on the other hand, testified at the hearing that he had performed both visual and manual testing before he entered the trench to perform a penetration test. On the basis of these tests, he concluded that there was no indication of potential collapse.

Two other individuals who had been trained as competent persons also observed the trench. The foreman's supervisor, who was in charge of all Hughes projects in Ohio, arrived at the site while the inspection was being conducted. He inspected the trench himself and concluded that there were no indications of potential collapse. The gas company welder who was in the trench during the inspection also was qualified by the gas company to act as a competent person. He testified that he had no concern about a potential cave-in in this trench.

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<sup>7</sup>The term "competent person" is defined in 29 C.F.R. § 1926.650(b) as "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."

<sup>8</sup>As the administrative law judge correctly noted, the standard does not afford any guidance in determining what constitutes an "indication of potential cave-in."

When OSHA revised the standard in 1990 to expand the role of the competent person, it clearly intended to afford that individual the freedom to exercise appropriate judgment in determining whether there were indications of potential collapse. Hughes' foreman exercised that judgment here. His testimony establishes that he had both the training and the knowledge necessary to act as a competent person and that he performed the inspection required by the standard. His conclusion that there was no indication of potential cave-in was supported by every witness except the compliance officer. Two of these witnesses were qualified as competent persons themselves. As the compliance officer admitted, these determinations involve "a judgment call." We note that we are not holding that a competent person's findings are dispositive, or that they are entitled to deference; we are merely holding that the exception set out in 29 C.F.R. § 1926.652(a)(1)(ii) will be established if the designated person is properly trained and that person acted in a competent manner, that is, if his conclusion is reasonable. If, on the other hand, the Secretary can show that the competent person's determination that there are no indications of potential collapse was not reasonable, a violation will be established. On the record before us, we find that the individual designated to perform the duties of a competent person was fully qualified to do so, that he performed the inspection required by the standard, and that the Secretary has failed to show that the foreman's determination that there was no indication of potential cave-in was not reasonable. In other words, the Secretary has not established that the foreman did not perform his duties in a competent manner.

We find that the Secretary has not shown that there was the potential for a cave-in because we find the compliance officer's observations to the contrary to be of questionable weight. The compliance officer conceded on cross-examination that the "fissures" he saw in the back wall of the trench could simply have been scars in the dirt made by the backhoe excavating the trench rather than weaknesses or infirmities in the soil itself. Although he claimed to have detected vibrations, all of the other witnesses who were asked, one of whom

was seated on the ground for part of the time the trench was open, testified that they had not detected any vibrations. The compliance office was also concerned that the weight of the spoil pile on the edge of the trench could cause a cave-in. Virtually every trench has a spoil pile, however; and, because this was a shallow trench, it had a comparatively small spoil pile. If we accepted the theory that this spoil pile constituted an indication of possible collapse, the same would be true for almost every trench; and it would be practically impossible for an employer to qualify for the exception set out in section 1926.652(a)(1)(ii). We do not believe that is what OSHA contemplated when it promulgated the exception to the requirement that an adequate protective system be used. Accordingly, we do not give significant weight to the compliance officer's observations.

Because the record establishes that a competent person inspected the trench in a competent manner and made a reasonable determination that there was no indication of a potential cave-in, Hughes has carried its burden of proving that it qualified for the exception set out in 29 C.F.R. § 1926.652(a)(1)(ii). Item 1 of citation 2 is therefore vacated.

#### ORDER

For the reasons above, we find that Hughes did not violate either 29 C.F.R. § 1926.651(c)(2) as alleged in Item 1 of Citation No. 1, or 29 C.F.R. § 1926.652(a)(1) as

alleged in Item 1 of Citation No. 2. We therefore reverse the administrative law judge and vacate those two items and the penalties assessed.<sup>9</sup>

  
Velma Montoya  
Commissioner

  
Daniel Guttman  
Commissioner

Dated: September 6, 1996

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<sup>9</sup>The Secretary has filed a motion to strike certain arguments made in Hughes' reply brief that the Secretary asserts are a belated attempt to raise the affirmative defense of unpreventable employee misconduct. Hughes has opposed that motion, asserting that the arguments do not raise an unpleaded affirmative defense but address arguments and assertions made in the Secretary's brief. In view of the fact that we do not consider here any unpleaded affirmative defense, we deny the Secretary's motion to strike.

WEISBERG, Chairman, concurring and dissenting:

I concur with my colleagues' decision to vacate item 1 of citation 2, the alleged failure to protect employees from cave-ins. I agree that Hughes has established that a competent person examined the trench and made a reasonable determination that there was no indication of potential cave-in.

I disagree, however, with my colleagues' decision to reverse the administrative law judge and to vacate item 1 of citation 1. I must dissent from the majority's conclusion that the slope at the end of the trench constituted a safe means of egress.

Under the applicable standard, section 1925.65(c)(2), a "stairway, ladder, ramp or other safe means of egress" must be located within 25 feet of every employee working in an excavation. In the instant case no ladders were provided for employees to get out of the trench. In order to constitute a safe means of egress, an earth ramp must permit an employee to walk out of the excavation upright, without leaning and without difficulty. The compliance officer testified that he had seen a welder "crawl" out of the trench<sup>1</sup>. The CO also testified that the earth ramp was steep and that an "employee could not actually walk out of that due to the slope of it."

The administrative law judge implicitly credited the CO's testimony, finding that walking up the ramp was not entirely free from difficulty and "a questionable means of egress from the trench" in an emergency. The judge discounted the foreman's testimony that he exited the trench by walking upright on the ramp, noting that as the competent person on the site, the foreman had "an understandable interest in demonstrating a safe means of egress was available."

My colleagues, reversing the judge, concluded there is no reason to discredit the testimony of Hughes' foreman. The Commission normally defers to credibility findings by

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<sup>1</sup> The majority asserts that this observation by the CO is irrelevant because the welder did not use the ramp. The fact that the welder would choose to "crawl" out of the trench instead of simply walking up the ramp in an upright position suggests that walking up the ramp was not entirely free from difficulty.

the judge who has observed the demeanor of the witnesses as they testified. *E.L. Jones & Son, Inc.*, 14 BNA OSHC 2129, 2132, 1991-93 CCH OSHD ¶29,264, p.39,231 (No. 87-8, 1991). What troubles me about the majority's decision is not that they found the judge's reasons for discounting the foreman's testimony unpersuasive, but rather their attempt to negate the testimony of the CO. The majority discredited the CO's testimony that the slope was too steep for an employee to walk out comfortably primarily because the CO had not "tried to use [the ramp] himself" and "had no first-hand knowledge of the difficulty of walking up the ramp." I am unaware of any requirement that a CO be an active participant or function as a "tester." What's next? Making a compliance officer walk the steel at 60 feet?

The majority also seemingly faults the CO for not being present to observe Hughes' foreman at the time he allegedly walked up the ramp out of the trench without difficulty. Unfortunately, there is no evidence that anyone else saw the foreman walk up the ramp. While my colleagues refer to the foreman's testimony as "unrebutted" one could just as easily substitute the word "uncorroborated". Thus, the foreman was apparently the only person to exit the trench using the ramp and no one saw him do it.

Finally, unlike the judge who had an opportunity to observe the demeanor of the witnesses, my colleagues choose to credit the foreman's testimony on the shaky, loose, unsupported ground that "[w]e give far greater weight to the foreman's statement that he had actually walked up the ramp and stepped out of the trench than we do to the compliance officer's speculation that it could not be done."

Indeed, the CO's testimony is supported by Exhibit C-1, a photograph taken by the CO, which shows a "ramp" that does not appear to constitute a safe means of egress. The photo establishes that the slope of the earth ramp was steep with a large step up at the end of the trench. The dirt on the ramp was soft and loose and loose stones and some gravel from the spoil pile had apparently fallen on part of the ramp. Looking at those photographs objectively, I do not believe that an employee could reasonably expect to quickly walk up that steep slope in an upright position and without slipping to get out of the trench under emergency conditions.

In *Brickfield Builders, Inc.*, 17 BNA OSHC 1084, 1993-95 CCH OSHD ¶30,696 (No. 93-2801, 1995), the judge had resolved conflicting testimony as to whether the anchorage of the west and south scaffolds was connected with a credibility finding in favor of the CO's testimony that they were connected. However, on review, the Commission, relying on the photographic evidence, reversed the judge, finding that the unstable board supporting the west side scaffold did not extend to the cited south side scaffold.

By contrast, in the instant case the majority has chosen to reverse the judge's resolution of the conflict in testimony as to whether the earth ramp was a safe means of egress while minimizing the significance of the photograph.

Relying on the photograph which supports the CO's testimony, I would affirm the judge's finding that Hughes violated section 1926.6512(c)(2).

Dated: September 6, 1996

Stuart E. Weisberg  
STUART E. WEISBERG  
Chairman



United States of America  
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SECRETARY OF LABOR, :  
 :  
 Complainant, :  
 :  
 v. : OSHRC Docket No. 93-3177  
 :  
 C. J. HUGHES CONSTRUCTION, INC., :  
 :  
 Respondent, :  
 :  
 and :  
 :  
 DISTRICT 23, UNITED STEELWORKERS :  
 OF AMERICA, :  
 :  
 Authorized Employee :  
 Representative. :  
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**NOTICE OF COMMISSION DECISION**

The attached decision by the Occupational Safety and Health Review Commission was issued on September 6, 1996. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

*Ray H. Darling, Jr.*  
 \_\_\_\_\_  
 Ray H. Darling, Jr.  
 Executive Secretary

Date: September 6, 1996

93-3177

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John H. Frye, III  
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SECRETARY OF LABOR  
Complainant,  
v.  
C. J. HUGHES CONSTRUCTION COMPANY  
Respondent.

OSHRC DOCKET  
NO. 93-3177

**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 March 9, 1995. The decision of the Judge will become a final order of the Commission on April 10, 1995 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 March 29, 1995 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  
Occupational Safety and Health  
Review Commission  
1120 20th St. N.W., Suite 980  
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Petitioning parties shall also mail a copy to:

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Counsel for Regional Trial Litigation  
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Washington, D.C. 20210

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.*  
Ray H. Darling, Jr.  
Executive Secretary

Date: March 9, 1995

DOCKET NO. 93-3177

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SECRETARY OF LABOR,

Complainant

v.

C.J. HUGHES CONSTRUCTION, INC.

Respondent, and

DISTRICT 23, UNITED STEELWORKERS  
OF AMERICA,

Authorized Employee  
Representative

Docket 93-3177

Appearances:

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For Complainant

Douglas M. Kennedy, Esq.  
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Columbus, Ohio

For Respondent

Carroll W. Floyd  
Subdistrict Director  
United Steelworkers of America  
Huntington, West Virginia  
For Authorized Employee Representative

Before: Administrative Law Judge John H Frye, III

**DECISION AND ORDER**

This proceeding is before the Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, as amended. The Respondent, C.J. Hughes Construction, Inc., is a corporation

and with its principal office in Huntington, West Virginia (Respondent's Answer). C.J. Hughes is and was an employer engaged in business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, as amended (Act), in that it operates in a seven state area of Virginia, Maryland, Pennsylvania, Ohio, Kentucky, the Carolinas, and Indiana. (Tr. 288).

At issue in this proceeding is Citation No. 1, which alleges serious violations, and Citation No. 2, which alleges repeat violations, of the occupational safety and health standards set forth at 29 CFR 1926.<sup>1</sup> The citations were issued October 29, 1993, as a result of an inspection conducted on October 4, 1993, of Respondent's workplace at 1271 Harmon Avenue, Columbus, Ohio. Trial of this proceeding took place before me in Columbus, Ohio on September 13 & 14, 1994.

#### BACKGROUND

C.J. Hughes at the times relevant to this proceeding employed approximately 230 employees; three of those employees were at the Harmon Avenue worksite in Columbus, Ohio (Tr. 86, 287). Harmon Avenue serves a business and light industrial area and carries some semi-truck traffic. (Tr. 30). At that worksite, C.J. Hughes excavated a main gas line and a service gas line for Columbia Gas of Ohio (Columbia Gas) in order to permit repair of

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<sup>1</sup>Item 2 of Citation No. 1, alleging a violation of 29 CFR 1926.651(g)(2)(i), was withdrawn in the Complaint.

a gas leak. (Tr. 11, 95). Columbia Gas installed a three inch bull plug as a permanent repair of the leak. (Tr. 34).

Mr. Richard Burns, safety and health specialist of the Columbus, Ohio area office of OSHA, performed the inspection in response to an imminent danger complaint of employees in a trench. (Tr. 153). When Burns arrived at the worksite, he observed Kenneth Cummins, a Columbia Gas welder, welding in the trench. (Tr.157). Burns conducted an abbreviated opening conference with Thomas Febes, crew leader/foreman for C.J. Hughes. Halfway through the inspection Richard Phillips, superintendent for C.J. Hughes, arrived. (Tr. 154). Robert Cook, an inspector for Columbia Gas, along with Douglas Riggs, a truck driver, and Jeff Moore, a laborer, both for C.J. Hughes, were also present at the worksite. (Tr.32, 86, 137) Burns inspected the excavation and took photographs. As a result of his inspection, Burns recommended issuance of Citation Nos. 1 and 2. These citations were contested at the hearing. The Secretary bears the burden of establishing that Hughes violated the standards under which it was cited.<sup>2</sup>

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<sup>2</sup>"To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence." Seibel Modern Mfg. & Welding Corp., 1991 CCH OSHD ¶ 29,442, p.39,678 (No.88-821, 1991).

### DESCRIPTION OF THE TRENCH

In carrying out its responsibilities, Hughes excavated an "L" shaped trench (Tr. 94). The first portion of the L-shaped excavation paralleled Harmon Avenue and the second portion of the excavation was perpendicular to Harmon Avenue (Tr. 94). The length of the parallel portion of the excavation measured between eight feet, ten inches, and nine feet. The length of the perpendicular portion of the excavation measured between eleven feet and twelve feet, two and one-half inches. (Tr. 115-16, 169; CX-10.) The deepest point of the excavation was four and one-half feet. (Tr. 166-67, 207.) The excavation did not exceed twenty-five feet in lateral distance. (Tr. 212, 213.)

The first excavation (paralleling Harmon Avenue) was benched for the full length of the excavation. (Tr. 95, 116-117, 185; CX-1). It exposed the main gas line and revealed that the leak was in an abandoned service line that was carrying 80 pounds of pressure and from which gas flowed freely into the atmosphere.<sup>3</sup> (Tr. 95). The second excavation (perpendicular to Harmon Avenue)

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<sup>3</sup>Mr. Febes described the gas leak as follows:

Q. How large was this gas leak that you were there to repair?

A. It was a pretty good gas leak, the pipe that was leaking was an inch and a quarter and the gas line itself carried 80 pounds of gas and I don't know if anybody in here is familiar with that but it's -- you know, that's quite a bit of gas flowing freely into the atmosphere and you're talking about traffic going by, you know, easily someone could flip a cigarette out, easily a hot exhaust could ignite this, you know, and then we're looking at some -- a real serious situation.

(Tr. 121-122).

was dug to reach the leaking service line. This required the spoil pile from the first excavation to be moved from its original placement (Tr. 95).

Mr. Febes was designated by Hughes as its competent person (Tr. 185). Mr. Febes took no measurements of the excavation or of the spoil pile, but he did conduct visual and manual inspections of the soil prior to any employee entering the excavation.<sup>4</sup> Mr. Febes, based upon his education, training and experience, determined there was no danger of a cave-in (Tr. 122).

A. Citation 1, Item 1 -- Alleged Serious Violation of 29 CFR 1926.651(c)(2).

This standard requires that a stairway, ladder, ramp or other safe means of egress be located in trench excavations that are 4 feet or more in depth so as to require no more than 25 feet of lateral travel for employees.

OSHA alleges that Hughes violated this standard. When Mr. Burns arrived at the excavation, the gas had been brought under control. (Tr. 68, 205.) He observed Mr. Cummins, the welder for

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<sup>4</sup>He took one random handful from the spoil pile from the first excavation to determine how cohesive and pliable it was and how much moisture it contained. The soil, composed of dirt, sand and wash gravel, held together "a little" and was rocky soil. He also performed a "thumb in the bank test" by sticking his thumb in the walls of the excavation. (Tr. 97-100.) Febes testified that the soil appeared consistent throughout the excavation (Tr. 123). Febes classified the soil as type "C" because it was the Columbia Gas standard to classify everything as type "C". (Tr. 102.) However, samples collected by Burns were determined to be type "B" by the Secretary's Salt Lake Technical Center. (Exhibit C-12).

Columbia Gas, working in the trench. He did not observe any type of ladder or any other means of egress which he regarded as safe. (Tr.157.) Mr. Burns observed that a slope to the rear of the second excavation by which one might exit, but believed that it was blocked by a backhoe<sup>5</sup> and that it was too steep to walk. (Tr. 160, 162; CX-8.)

Mr. Cummins and Mr. Febes both testified that they used the ramp to enter or exit the excavation, that they could climb the ramp in an upright position, and that the ramp was not blocked by the backhoe.<sup>6</sup> (Tr. 73-74, 76, 104-105, 117-118, 120). Mr. Febes described the ramp as solid and in a condition upon which you could enter and exit without slipping (Tr. 119), although one of Mr. Burns photographs (CX-1) depicts a considerable amount of apparently loose stones and other material on the ramp. Mr. Febes did not tamp the ramp because it had not been excavated. (Tr. 105-06.)

The other method of egress from the excavation was to step on the main service line and then out of the excavation (Tr. 119-120). This is how Robert Cook, a Columbia Gas employee, who was in the excavation to confirm that the service line was leaking,

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<sup>5</sup>Mr. Burns did not measure the distance from the backhoe to the ramp (Tr. 213).

<sup>6</sup>Mr. Cummins was uncertain how he exited the excavation, and indicated that he might have stepped on the main gas line in order to leave at that location. (Tr. 71.) Mr. Burns testified that he saw Mr. Cummins crawl out of the excavation at that point (Tr. 161), and Mr. Riggs also testified that he saw Mr. Cummins exit by stepping on the pipe and then the bench without difficulty. (Tr. 139.)

exited. (Tr. 41, 49). Similarly, Mr. Cummins apparently exited in this manner. (Tr. 139). The report prepared by Cook indicated that the depth of cover over the main pipe was 40 inches (Tr. 17-19, 49, CX-4), and Cook admitted that he may have used his hands in exiting the trench. (Tr. 50-51). In sum, no employee testified that exiting presented any difficulty.

The Secretary has established that the second method of egress, stepping onto the main service line and then out of the trench, was not a safe means of egress. While it would have been easy for an employee to step from the bottom of the trench onto the twelve-inch main service line, the fact that the main service line was forty inches below the surface meant that an employee could not have stepped easily and safely from the service line out of the trench in an emergency. Mr. Burns testified that an individual might fall back into the trench because of the steepness of that step.<sup>7</sup> (Tr. 164.)

The first means of egress, the ramp, presents a closer question. Given the depth of the trench and the exigencies of the situation presented by the volume of escaping gas, it would be difficult to conclude that the ramp violated the standard before the gas was brought under control. The ramp was not blocked by the back hoe. Its slope, while steep, does not appear so steep, nor does the loose material appear to be of such a nature as to prevent its effective use during the emergency

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<sup>7</sup>Mr. Cook, who exited the trench by this route, admitted that it may have been necessary to use his hands in order to do so. (Tr. 49-51.)

situation caused by the escaping gas. Moreover, those who used it testified that it did not present any problems.

However, once the gas was brought under control, there was no longer a need to be content with a questionable means of egress from the trench. Mr. Febes and Mr. Cummins testified that they used the ramp. As the competent person on site, Mr. Febes has an understandable interest in demonstrating that a safe means of egress was available. Mr. Cummins testified that he used the ramp to enter the trench, but was not certain that he exited by the same route. Mr. Burns testified that Mr. Cummins exited by means of the twelve-inch main service line, which required some climbing. This would indicate that walking up the ramp was not entirely free of difficulty. Time was available to acquire a ladder.<sup>8</sup> I conclude that the Secretary has established a violation of § 1926.651(c)(2).

B. Citation 1, Item 3 -- Alleged Serious Violation of 29 CFR 1926.651(j)(2)

This standard requires that employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or

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<sup>8</sup>While the parties did not raise the point, it would appear that the provision of a ladder, whether required by the standard or not, for every excavation of this nature would be neither burdensome nor expensive.

equipment from falling or rolling into excavations, or by a combination of both if necessary.

Mr. Burns observed two spoil piles, one to the left and one to the right of the service line excavation, both within two feet of the edge, and neither retained in any way. (Tr. 162, 175.) He testified that he observed a small amount of material from the spoil piles slowly trickling into the trench as he was doing the inspection (Tr. 162), although the employees at the excavation testified that they did not observe this. (Tr. 57, 74, 120, 140).

Mr. Burns testified that the hazard associated with this situation is that the added weight of the spoil piles might cause a cave-in. (Tr. 175, 177.) However, § 1926.651(j)(2) does not encompass this hazard. Cf. Secretary v. Flint Engineering and Construction Co., 15 BNA OSHC 2052, 2056-57 (Rev. Com. 1992). Rather, it is aimed at "... materials ... that could pose a hazard by falling or rolling into excavations." The standard specifically authorizes the use of retaining devices to prevent this hazard. Were the danger that the added weight of the material could cause a cave-in, the use of retaining devices would not alleviate it, and might well exacerbate it by permitting more weight to be concentrated at the edge of the trench. Moreover, the small amount of material slowly trickling into the excavation (as described by Mr. Burns) does not constitute a hazard within the contemplation of the standard. Citation 1, item 3, is vacated.

C. Citation 2, Item 2 -- Alleged Repeat Violation of 29 CFR 1926.651(k)(1)

This standard requires that an inspection be conducted by a competent person prior to the start of work and as needed throughout the shift. Mr. Burns interviewed Thomas Febes, the person designated by C.J. Hughes as competent, using a five-page form designed to evaluate the competence of an individual. (Tr. 185-188, CX-13.) Mr. Burns entries on the form were favorable to Mr. Febes except for responses to questions whether daily inspections were conducted and whether Mr. Febes recognized that the spoil pile was too close to the excavation. With respect to the former, it appears that Mr. Burns was of the opinion that Mr. Febes' examination of the trench fell short of that required for an inspection.<sup>9</sup> With respect to the latter, Mr. Burns testimony contradicted the form in that he indicated that Mr. Febes had recognized that the spoil pile was too close to the trench. (Tr. 188.) On the last page of the form, Mr. Burns indicated that Mr. Febes had done a visual inspection, had determined that the soil was class C and not cohesive, and had recognized the hazard posed by vibrations from traffic on Harmon Avenue.

At the hearing Mr. Febes testified that he took no measurements of the excavation or of the spoil pile prior to employees entering the excavation. (Tr. 96-97.) He took one

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<sup>9</sup>Mr. Febes had conducted a visual inspection of the trench and had conducted dry strength and thumb penetration tests of the first excavation. Tr. 96-102, 220-21.

random handful from the spoil pile from the first excavation and performed a simple test to determine the soil's cohesiveness.

(Tr. 97-100.) When asked at trial, he did not see any fissures depicted in Complainant's Exhibit 1, but did see pockets in the banks of the excavation where stones appeared to have fallen out.

(Tr. 101-102.) He performed a thumb penetration test while in the first excavation, but performed no tests on the soil in the second excavation. (Tr. 97, 99.) He classified the soil as type "C" because it was the Columbia Gas policy to classify all soils as type "C". When questioned about his competent person training, Mr. Febes stated that he had a hard time remembering and that it has been a while ago. (Tr. 111.) Indeed, it appears that Mr. Febes last training was about two and one-half years prior to the inspection.

While Mr. Febes should have been given refresher training given the amount of time that had passed since his last competent person training, the record reveals that he performed the function of a competent person within the requirements of the standards. He conducted both visual inspections and mechanical tests of the soil. He was aware of the hazards posed by vibrations caused by truck traffic and the proximity of the spoil piles to the excavations. He did not allow the pressure under which he was operating as a result of the gas leak to shunt aside his responsibility for the safety of the excavations. While his conclusions concerning the excavations may not have been completely correct, he nonetheless indicated through his actions

that he was qualified as a competent person. Citation 2, item 2, is vacated.

D. Citation 1, Item 4, and Citation 2, Item 1 -- Alleged Serious Violation of 29 CFR 1926.651(k)(2) and Repeat Violation of 1926.652(a)(1).

These two citations involve the same set of facts and call for a conclusion whether the excavations were safe. Section 1926.651(k)(2) requires that

Where the competent person finds evidence of a situation that could result in a possible cave-in, ... exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

Section 1926.652(a)(1) requires that

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:

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(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.

Thus, according to the Secretary, § 1926.651(k)(1) required Mr. Febes to remove employees from the trench until he installed a protective system and § 1926.652(a)(1) required him to provide a protective system unless he determined that there was no indication of a cave-in. The Secretary correctly points out that, because § 1926.652(a)(1) states an exception to the rule that a protective system must be supplied, the burden is on the Respondent to show that the exception applies. Secretary v. Falcon Steel Co., 16 BNA OSHC 1179, 1181; 1993 CCH OSHD ¶30,059, p.41,329 (Rev. Com. 1993). In contrast, the burden is on the

Secretary to show that Mr. Febes should have removed employees from the trench until a protective system was installed. Neither standard provides explicit guidance as to what constitutes an indication of a cave-in. Thus, in light of this meager record, it is possible that the Respondent might prevail on the question of whether Mr. Febes should have removed employees from the trench until he installed a protective system because the Secretary failed to meet his burden, while the Secretary might prevail on whether Mr. Febes was required to install a protective system because the Respondent failed to meet its burden. Such a paradoxical result is to be avoided.

The evidence which supports the Secretary's position that there was indication of a possible cave-in is the following.

1. Mr. Burns testified that he observed a small amount of material from the spoil piles slowly trickling into the trench as he was doing the inspection. (Tr. 162, 215-17.) This evidence is weak. The employees at the excavation testified that they did not observe this. (Tr. 57, 74, 120, 140). Moreover, the volume of material involved does not appear to be significant.

2. Mr. Burns testified that the added weight of the spoil contributed to the hazard of excavation wall cave-in. (Tr. 177.) However, he took no measurements of the spoil piles (Tr. 206-07), and the extent of their impact on the excavations is unclear. (Tr. 258-59, 267-68, 271-73.)

3. Mr. Burns testified that one wall of the excavation was fissured, and this assessment was confirmed by OSHA's Salt Lake City Technical Center. (Tr. 163, 217; CX-12.)

4. Mr. Burns testified that he classified the soil as type C, that the soil was not cohesive, that it was previously disturbed, and that there were vibrations from the road. He also testified that he was unable to perform penetrometer or torvane shear tests because he could not get the soil to form a clod. (Tr. 177-79, 184.)

As noted above, Mr. Febes also classified the soil as type C because of Columbia Gas' policy concerning excavations, and found that it held together "a little." (Tr. 98.) However, OSHA's Salt Lake City Technical Center classified it as type B and found it to be cohesive. (See CX-12.) Mr. Burns did not know how much time had passed since the soil had been disturbed (Tr. 228), and was the only one to notice vibrations from traffic on Harmon Avenue. (Tr. 55, 74, 120-121, 140.)

The evidence which supports C.J. Hughes' position that there was no indication of a possible cave-in is the following.

1. OSHA's Salt Lake City Technical Center classified the soil as type B, cohesive.

2. Each employee of both C.J. Hughes and Columbia Gas who was present at the site and testified indicated that, based upon the condition of the excavation as it then existed and their many years of experience, there was no danger of a cave-in (Tr. 60, 77, 122, 133, 144).

3. C.J. Hughes' expert, Richard Hayes, testified that he found no evidence that death or serious physical injury could result from the excavations. (Tr. 265.)

Thus, the indications that a cave-in was a possibility were that the soil was classified as type C, was fissured, did not appear to be cohesive when examined at the site, and there was some truck traffic on Harmon Avenue, although whether it caused vibration was disputed. In contrast, all of the workers who testified opined that there was no indication of a cave-in, and C.J. Hughes expert testified that he found no evidence that death or serious physical injury could result. Moreover, OSHA's Salt Lake City Technical Center classified the soil as type B, cohesive.

Acceptance of the Technical Center's soil classification would undermine Columbia Gas' prudent and conservative policy of classifying all soils as type C. If test results are permitted to override that policy in proceedings to enforce OSHA citations, competent persons will be encouraged to take short cuts based upon their on-site observations rather than follow the policy to classify all soils as type C. This would defeat the policy and result in a greater risk of injuries. Consequently, for purposes of determining whether these alleged violations occurred, I do not accept the Technical Center's classification and apply Columbia Gas' policy by assuming that soil here in question was type C.

The Technical Center also determined that the soil was cohesive. This conflicts with at least Mr. Burns' observation, and perhaps Mr. Febes' as well, and does not appear to be consistent with photographic exhibits CX-1, CX-2, CX-3, RX-5, and RX-6. I find that the soil was not cohesive. The Technical Center confirmed Mr. Burns' observation that the soil was fissured. Mr. Febes should have recognized this situation.

In sum, I find that the following were indications of a possible cave-in: fissured, not cohesive, type C soil, which was possibly subject to some vibrations and to the uncertain effects of the adjacent spoil piles. While these indications are perhaps not so strong as to justify delaying the capping of the gas leak, once that leak was brought under control, steps should have been taken to protect against a cave-in before any employee reentered the trench. Consequently, the Secretary has demonstrated violations of §§ 1926.651(k)(2) and 1926.652(a)(1) as charged in Citation 1, item 4, and Citation 2, item 1, respectively.

This conclusion requires that I determine whether the violation of § 1926.652(a)(1) is a repeat violation. The violation, which the Secretary asserts has been repeated, was also of § 1926.652(a)(1), but involved a trench in excess of five feet deep. (Tr. 195, 232.) Hughes argues that this difference is critical because, in the former situation, no judgement was called for on the part of the competent person. Rather, the trench was required to have been protected against cave-in.

Here, in contrast, protection was only required if the competent person found indication of a possible cave-in.

While the distinction cited by Hughes does exist, the hazard and the means to abate it are nonetheless the same in both instances. Therefore, I conclude that the Secretary was correct in characterizing this as a repeat violation. Cf. Secretary v. Monitor Construction Co., 16 BNA OSHC 1589, 1594 (Rev. Com. 1994).

E. Respondent's Argument That There Is No Evidence of a Serious Violation

Relying on § 17(k) of the Act, Respondent argues that there is no evidence that any violation is a serious offense, pointing out that the only evidence presented by the Secretary that an injury could occur was the testimony of Mr. Burns. Respondent notes that Mr. Burns' testimony is in conflict with that of the employees who were at the scene of the excavation and that of Respondent's expert, Mr. Richard Hayes.

Respondent argues that it is inconsistent for Mr. Burns to take the position that there were serious violations in view of the fact that he did not post an imminent danger sign. If there was indeed a substantial probability of death or serious physical injury from the alleged violations, Mr. Burns should have posted the sign immediately. By failing to post the sign, Respondent believes he conceded that it was safe for Mr. Cummins to stay in the excavation for approximately ten minutes to complete the repair on the leaking gas line.

Moreover, Respondent points out that Mr. Hayes' opinion that there was "no evidence that a serious physical harm or death could occur from that trench..." (Tr. 265) was not challenged. Accordingly, in Respondent's view, the above violations must be classified as other than serious.

Respondent position that there is no possibility that serious injuries or death could result from a cave-in of these excavations is in error. The testimony of the employees and Mr. Hayes notwithstanding, I have found that there were indications that a cave-in was possible. It cannot be seriously questioned that such an event, as Mr. Burns pointed out, could result in serious injuries or death. Moreover, Respondent's argument that Mr. Burns' failure to post an imminent danger sign is inconsistent with that position ignores the concept of "imminent danger" set forth in § 13 of the Act. As there explained, an imminent danger arises when "... a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." The dangers posed by these excavations were not so immediate as to fall within that concept. They were, nonetheless, real and posed the risk of serious physical harm or death.

F. Penalties

Respondent did not attack the Secretary's penalty calculations. I have reviewed those calculations and affirm or modify them as follows.

1. Citation 1, item 1 - Failure to Provide a Ladder.

The Secretary recommended a gravity-based penalty based on high severity of potential injuries, but lesser probability of an accident. This assessment is accurate. The Secretary's proposed adjustments to the penalty for size and good faith are adopted and a total penalty of \$1,625 is assessed.

2. Citation 1, Item 4, and Citation 2, Item 1 -- Serious Violation of 29 CFR 1926.651(k)(2) and Repeat Violation of 1926.652(a)(1).

The Secretary assessed a penalty of \$3,250 for Item 4 of Citation 1. Mr. Burns considered the severity of injury to be high and employees to be at the danger point. (Tr.190) The same factors in terms of size, good faith, and history taken into consideration for Item 1 were also taken into consideration. The Secretary assessed a penalty of \$8,000 for Item 1 of Citation 2, a repeat violation. The penalty was assessed taking into account the severity, probability of injury, and size.

Two considerations bear on these assessments. First, as pointed out in the discussion of these items above, they both raise the same hazard. For that reason, it would not be appropriate to assess two separate penalties. The assessment of the penalty for the repeat violation will be deemed to include the serious violation as well.

Second, Mr. Burns rated the probability of an accident as greater. This ignores the fact that OSHA's Salt Lake City Technical Center classified the soil more favorably than he had. While, as discussed above, it would not be appropriate to credit the Technical Center's classification in considering whether a violation took place, it is appropriate to consider it in assessing the penalty. Based on that classification, I find that the probability of an accident is lesser.

The Field Operations Manual directs that OSHA's penalty recommendations for repeat violations are to be calculated by computing the gravity based penalty for the violation after classifying it as either serious or other-than-serious, adjusting the penalty for size, and multiplying it by a factor of two if the employer has less than 250 employees and there has been only one repetition of the violation. (FOM, ¶ B.14.) In the absence of an argument to the contrary, it is appropriate to follow this formula.

The violation is clearly serious, and the severity of the consequences of an accident high. In light of the soil classification of the Technical Center, I have found that the probability of an accident is lesser. This yields a gravity based penalty of \$2,500. C.J. Hughes employs about 230 persons and is thus entitled to a 20% reduction. This yields an adjusted penalty of \$2,000. (FOM ¶ B.8.) Because this is the only repetition of this violation, I impose a total penalty for both these items of \$4,000.

### Conclusions of Law

1. Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

#### Citation 1, Item 1

3. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.651(c)(2). The proposed penalty of \$1,625.00 for this violation was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

#### Citation 1, Item 3

4. Respondent was not in violation of the standard set out at 29 C.F.R. § 1926.651(j)(2).

#### Citation 2, Item 2

5. Respondent was not in violation of the standard set out at 29 C.F.R. § 1926.651(k)(1).

#### Citation 1, Item 4, and Citation 2, Item 1

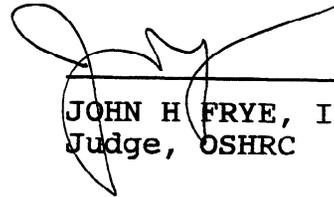
6. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.651(k)(2), and in repeat violation of the standard set out at 29 C.F.R. § 1926.652(a)(1). A penalty of \$4,000.00 is in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), is appropriate for both violations, and is assessed.

ORDER

1. Citation 1, Items 1 and 4, are affirmed as serious violations of the Act.

2. Citation 2, Item 1, is affirmed as repeat violation of the Act.

3. A total civil penalty of \$5,625.00 is assessed.  
It is so ORDERED.



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JOHN H. FRYE, III  
Judge, OSHRC

Dated: **MAR - 6 1995**  
Washington, D.C.