

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1244 North Speer Boulevard, Room 250  
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

ALLEN HOWE & SON, INC.,

Respondent.

OSHRC DOCKET NO. 01-1077

**APPEARANCES:**

For the Complainant:

Helen J. Schuitmaker, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

Allen Howe, *pro se*, Allen Howe & Son, Inc., Waterloo Wisconsin

Before: Administrative Law Judge: Benjamin R. Loye

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Allen Howe & Son (Howe), at all times relevant to this action maintained a place of business on Robert Street, Fort Atkinson, Wisconsin, where it was engaged in construction of a sewer main. Because construction is an activity which as a whole affects interstate commerce, *see, Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983), Respondent is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 10, 2001 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Howe's Robert Street worksite. As a result of that inspection, Howe was issued a citation alleging a repeat violation of §1926.652 of the Act together with a proposed penalty. By filing a timely notice of contest Howe brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 2, 2001, an E-Z hearing was held in Madison, Wisconsin. No briefs are required in E-Z proceedings, and this matter is ready for disposition.

## Alleged Violations

Repeat citation 1, item 1 alleges:

Allen Howe & Son Inc., was previously cited for a violation of this Occupational Safety and Health Standard 29 CFR 1926.651 (a)(1) which was contained in OSHA Inspection Number 300568631, Citation Number 01, Item Number 02, Issued on 08/03/99.<sup>1</sup>

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

Employees working in an excavation that was approximately 7 feet in depth did not have adequate protection from cave-ins.

### Facts

On May 10, 2001, OSHA Compliance Officer (CO) Chad Greenwood observed two Howe employees in a trench at Howe's Robert Street work site (Tr. 6-7, 13; Exh. C-1). CO Greenwood testified that Howe's foreman, Jerry Nelson, was operating a backhoe in the trench and was aware that men were working in the trench (Tr. 19).

Greenwood calculated the depth of the trench at about seven feet (Tr. 17). He measured the walls of the trench with an engineering rod and an angle indicator and found that the trench was approximately 9.1 feet across; the bottom portion of the east bank was sloped to approximately 76°, while the top four and a half feet of the east bank was sloped to about 46°; the bottom of the west bank was sloped to 74°; the top portion of the west bank was sloped to 52° (Tr. 8-15; Exh. C-2 through C-7). CO Greenwood noted that the trench was dug in previously disturbed soil (Tr. 15). He examined the soil in the trench visually and manually, and determined that the trench was dug in Type B soil (Tr. 16). Greenwood testified that Type B soil should be sloped on a ratio of 1:1, or to an angle of repose of 45° (Tr. 17).

Jerry Nelson testified that he had dug miles of trench with backhoes in the last ten years, and had never had a trench cave in (Tr. 33-34). Nelson stated that on May 10, 2001, he could feel the pull of the backhoe against the soil; based on his experience he believed that the trench was adequately sloped (Tr. 33). Nelson further testified that the weather was dry, and that he did not believe that there

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<sup>1</sup> The citation issued May 22, 2001 refers to an August 3, 1999 citation issued under §1926.651(a)(1). It is clear from Complainant's Exhibit C-9, however, that Howe was actually cited for violation of §1926.652(a)(1) in 1999.

was any danger of a cave-in (Tr. 31). Nelson admitted that it would have been possible to slope the west bank of the trench back further, though he did not feel it was necessary (Tr. 36).

Howe introduced an August 1, 2001 report from Construction Geotechnical Consultants (CGC) (Tr. 39; Exh. R-1). According to the report, a July 20, 2001 analysis of the soil at the Robert Street trench near the area of the May 10, 2001 inspection yielded the same results reached by CO Greenwood. CGC found that the soil in the area was “fine to coarse sand with some silt and scattered cobbles for the full excavation depth of 7.5 ft. . .” (Exh. R-1). CGC’s report stated that these soils “are routinely classified as Type B soils per OSHA standards 29 CFR 1926.652 Subpart P, Appendix A. . .” (Exh. R-1).

Discussion

The cited standard provides:

(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. . .

\* \* \*

(b) *Design of sloping and benching systems.* The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3); or, in the alternative, paragraph (b)(4); as follows:

(1) *Option (1)–Allowable configurations and slopes.* (i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.

(2) *Option (2)–Determination of slopes and configurations using Appendices A and B.* Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

**Applicability.** Howe was cited under the default option (1) at subparagraph (b)(1). Under option (1), the employer must treat all unclassified excavations as if they were dug in Type C soils.

Where sloping rather than shoring is chosen, the banks of the excavation must be cut back to a 34° angle, or to a ratio of 1-1/2:1.

The Secretary did not set forth the reasons for citing Howe under the default provisions of subparagraph (b)(1). CO Greenwood did not disclose whether Jerry Nelson was a competent person,<sup>2</sup> whether Nelson took into account appendices A and B,<sup>3</sup> performing the visual and manual examinations required thereunder to classify the soil, or whether Nelson determined allowable slopes based on his classification. In other words the Secretary failed to establish that subparagraph (b)(1) had become the applicable standard by default.

Admittedly, Howe introduced no evidence suggesting that it did classify the soil and determine allowable slopes prior to beginning work at the Robert Street work site. However, this matter comes up as an E-Z proceeding; the employer was not represented by an attorney, and Allen Howe's questioning did not reflect any understanding of the subtleties of §1926.652(b). What *is* clear is that, in this case, both Howe and the OSHA CO understood the cited trench was cut in Type B soil, and should have been cut back to a 45 degree slope, or 1:1 ratio, as required under subparagraph (b)(2), Option 2.

Pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, made applicable to Commission proceedings by 29 CFR §2200.2(b), post-trial amendment of the pleadings is proper “[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties.” *Peavey Co.*, 16 BNA OSHC 2022, 1994 CCH OSHD ¶30,572 (No. 89-2836, 1994). Consent may be implied from the parties introduction of evidence relevant only to the unpleaded issue. *McWilliams Forge Company, Inc.*, 11 BNA OSHC 2128, 1984 CCH OSHD ¶26,979 (No. 80-5868, 1984). Because both parties introduced evidence tending to show that the cited trench should have been cut back according to the guidelines set forth in appendices A and B, as allowed under §1926.652(b)(2), this judge finds that §1926.652(b)(2) is the applicable standard. The citation is amended to conform to the evidence.

**Violation.** The evidence establishes that Howe was in violation of subsection (b)(2), in that the cited trench walls were not cut back to a 45° angle from the lip to the toe of the trench. The undisputed testimony of CO Green establishes that the east trench wall's angle of repose varied between 46° and

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<sup>2</sup> Section 1926.650(b) defines *Competent person* as “one 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>3</sup> Appendix A states that the employer must base its classification on at least one visual and one manual analysis, including roll tests, thumb penetration tests, and/or penetrometer tests, conducted by a competent person.

76° while the west bank ranged from 52° to 74°. Only the top portion of the east bank conformed to the requirements of the standard. Neither bank conformed to the requirements of the standard in their entirety. The Secretary has established the violation.

**Exposure/Knowledge.** Howe does not dispute the CO's testimony establishing that its employees were exposed to the cited hazard with the knowledge of its supervisory personnel.

Penalty

A penalty of \$2,000 was proposed for this item.

Greenwood testified that he observed two Howe employees working in the cited trench for approximately 15-20 minutes. Greenwood testified that the employees were in danger of being engulfed by collapsing soils (Tr. 16-17). Collapsing soils exert extreme pressure on the body and can cause asphyxiation (Tr. 19). Greenwood believed, however, that the trench was unlikely to collapse, and stated that the probability of an accident actually occurring was low (Tr. 22). Howe maintains that though the cited trench may not have been 100% in compliance with OSHA regulations, it was in no danger of collapse (Tr. 46).

The violation was classified as a repeat violation, because Howe had been cited for violation of the same standard in 1999 (Tr. 20, 22; Exh. C-9). Howe admits that it was previously cited for violation of §1926.652 (Tr. 46). CO Greenwood testified that, because the violation was classified as repeated, the gravity based penalty was doubled. A 60% deduction was taken based on Howe's size. However no credit was given for good faith or for history in calculating the penalty, because the violation was repeated (Tr. 20-22).

The violation was properly cited as repeated. The gravity of the violation was properly calculated as low. Because the top half of the trench was cut back, there was little probability of an accident occurring. Though the protective measures taken by Howe did not comply with the requirements of the cited standard, they did provide some protection for employees in the trench.

This judge believes that Respondent's second violation of the cited standard does not, in itself, demonstrate bad faith. Allen Howe's testimony at the hearing convinces this judge that Howe supports OSHA's mission, and attempts to provide safe working conditions for its employees. Howe now understands the need to conscientiously comply with the exact requirements of the excavation standards. This judge also believes that the Secretary's doubling of the gravity based penalty provides sufficient deterrent effect from future violations, and that denying Howe credit for good faith is unwarranted.

