



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,

Complainant

v.

Bridges Grading & Hauling, Inc.,

Respondent.

OSHRC Docket No. 03-1874

Appearances:

Dane L. Steffenson, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Michael G. Murphy, Esquire
Holland & Knight
Orlando, Florida
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Bridges Grading & Hauling, Inc. (Bridges), is a construction contractor specializing in site preparation for residential subdivisions. A Bridges crew was working at a site off Derrick Road in College Park, Georgia, in August 2003. On August 26, 2003, Occupational Safety and Health Administration (OSHA) compliance officer David Lucas conducted an inspection of the worksite in response to a complaint from a homeowner in the neighborhood. As a result of Lucas's inspection, the Secretary issued a citation to Bridges alleging five serious violations of the Occupational Safety and Health Act of 1970 (Act) on October 1, 2003. On February 5, 2004, the Secretary and Bridges entered into a partial stipulation agreement, wherein the Secretary withdrew items 4 and 5 (alleging violations of §§ 1926.652(a)(1) and (b)(4)(i), respectively) .

Left for consideration are item 1, alleging a violation of § 1926.651(c)(2) for failing to provide a stairway, ladder, ramp, or other safe means of egress from a trench; item 2, alleging a violation of § 1926.651(j)(2) for placing a spoil pile within 2 feet of the edge of an excavation; and

item 3, alleging a violation of § 1926.651(k)(1) for failing to have a competent person make daily inspections of the site for evidence of potential hazardous conditions.

A hearing was held in this matter on February 19 and 20, 2004, in Atlanta, Georgia. The parties have submitted posthearing briefs. Bridges denies that it violated any of the cited standards and contests all proposed penalties.

For the reasons that follow, items 1 and 2 are affirmed and item 3 is vacated.

Background

Bridges was hired to perform pre-construction land preparation for a new 50-home subdivision to be built off of Derrick Road in College Park, Georgia. Bridges's contract for the project required it to move dirt from the high portions of the site to fill in the low portions of the site, grade the dirt to the proper elevations, lay the storm and sewer drainage pipes, and install the curbs and pavement (Tr. 259-260, 385).

On Friday, August 22, 2003, Rose Trujillo, who owns a house on Derrick Road two doors down from the worksite, observed a man working in an excavation on the site. It appeared to Trujillo that the excavation was unsafe and that the man was exposed to a hazardous condition. Trujillo informed Bridges foreman Merle Wells, who was on the site, that she was calling OSHA. She did so, and then called "911." A policeman responded to her call. He spoke with her and Wells, and Ed Buckley, one of the project developers who was on the site. In the meantime, the man in the trench (Bridges employee Ray Padilla¹) emerged from the excavation and joined the group (Tr. 20-25). Trujillo said to Padilla, "They are endangering your life" (Tr. 26). The policeman informed Trujillo that OSHA had jurisdiction over the matter and that he was not authorized to take action against Bridges. The policeman left. Trujillo went to her house and got her camera, then returned to the site and began taking pictures. Wells and Buckley yelled at her and told her to leave the project property (Tr. 31, 225-226). As Trujillo left, one of the men yelled to her that he was calling the police to arrest her for criminal trespass (Tr. 31-32). The same policeman that had previously responded to Trujillo's call returned to the site and issued a warning to Trujillo for criminal trespass (Tr. 45).

¹ The transcript records the employee's name as "Pedilla"; it is corrected in this decision to "Padilla."

Following Trujillo's telephone complaint, OSHA Assistant Area Director Patricia Morris assigned compliance officer David Lucas to investigate the complaint (Tr. 55-56). Lucas arrived at the site on Tuesday morning, August 26, 2003 (Tr. 57).

On that day, Bridges was laying storm pipe. The storm pipe was 24 inches in diameter and came in 20-foot long sections. A pipelayer in the excavation connected the pipe sections to each other with an aluminum band or socket that fit around the pipes' openings. The connected storm pipe sections ran uphill from a junction box to a manhole or catch basin at the top of the hill (Tr.161-164, 230-231, 277).

Merle Wells was Bridges's foreman on the project. He called in sick on the day of Lucas's inspection. Pipe crew leadman Tim Norton acted as foreman that day (Tr. 224). Generally, Bridges had a crew of four or five employees laying the pipe, two of whom would be operating equipment. On the day of the inspection, Norton was the only equipment operator and only three other employees were working on the trench. Norton had to operate both the excavator at one end of the excavation and the equipment to backfill the other end of the excavation (Tr. 241). Bridges's grading foreman Jamil Ford was present at the worksite that day, but he was working at another area of the site, away from the excavation at issue (Tr. 225, 493-494).

When Lucas arrived at the site, he observed Padilla in a trench box inside an excavation. Norton was in an excavator facing the excavation. Lucas looked for but did not see a ladder in the excavation, which measured approximately 50 feet long (Tr. 83, 144). The spoil pile rose steeply on the left side of the excavation, close to the edge of the excavation (Tr. 93, 97).

Lucas held an opening conference with Norton, who identified himself as the foreman and competent person (Tr. 64). After a few minutes, Norton called Jamil Ford on his cell phone. Ford arrived approximately fifteen minutes later and spoke with Lucas. Ford then called Bridges's safety director Robert Birkeland to the site. Birkeland spoke with Lucas and subsequently wrote a report regarding the OSHA inspection (Exh. C-9; Tr. 65-69).

As a result of Lucas's inspection, the Secretary issued the citation that gave rise to the instant case.

The Citation

The Secretary alleges that Bridges violated three of OSHA's construction standards.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

The parties submitted an agreed prehearing statement on February 17, 2004, in which they stipulated that the cited standards apply to the cited conditions. They also stipulated that the excavation at issue was greater than 8 feet in depth on August 26, 2004.

Item 1: Alleged Serious Violation of § 1926.651(c)(2)

The Secretary charges Bridges with violating § 1926.651(c)(2), which provides:

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.

The citation alleges that “[a]n employee was standing inside a trench [], which was 18 feet deep on one side and 33 feet on the other side, with no ladder or other means of egress from the excavation.” As noted, the trench was approximately 50 feet long (Tr. 144).

Padilla was working in the trench in the presence of foreman Norton on the day of the inspection. The only issue in item 1 is whether the Secretary proved that Bridges did not provide a safe means of egress from the excavation. Bridges concedes that the fixed ladder at the front of the trench box was inadequate to achieve compliance with § 1926.651(c)(2) (Bridges's post-hearing brief, p. 23).

When Lucas was asked at the hearing whether there was a ladder in the excavation, he responded, “There was no ladder in the trench that I could see” (Tr. 83). Lucas took a picture of Padilla working in the excavation, with no ladder visible (Exh. C-2, photo 1). Lucas's testimony establishes a prima facie case that Bridges violated § 1926.651(c)(2).

In its posthearing brief, Bridges argues that Lucas's qualified phrasing, “not that I could see,” is equivocal, leaving open the possibility that there could have been a ladder in the excavation that

he did not see (Bridges's posthearing brief, p. 24). Bridges also emphasizes Lucas's testimony that he did not watch Padilla exit the trench after Norton instructed him to exit, and that he could not say how Padilla got out (Tr. 135).

Padilla testified at the hearing. Spanish is his native language; he is not fluent in English. Padilla testified in Spanish with the aid of a translator, who posed counsels' and the undersigned's questions to him in Spanish, and who then translated his Spanish responses into English. Padilla stated that there was a ladder approximately 2 feet behind the trench box which he used the morning of the inspection to enter and exit the excavation (Tr. 184-185). Padilla's testimony on this point was confused (Tr. 199-201):

Q. Where is that ladder?

Padilla: It doesn't show on the photograph.

Q. Is it in the back of the trench?

Padilla: Yes, sir, all the time the ladder is in the back.

Q. Who puts the ladder in the back of the trench?

Padilla: The other worker there at work.

Q. What is his name?

Padilla: Joel.

...

Q. Let me ask this: You said that the ladder for this photo C-2, was behind the trench box, is that correct?

Padilla: The ladder is in the back of the trench box?

Q. That's what I'm asking you. Is it in back of the trench box?

Padilla: Yes, ma'am.

Q. Well, why can't I see it?

Padilla: Oh, at this time? . . . Right here in the picture not because I attempt to –there was a guy working with me, the top man, can do—I need more feet to extend the ladder. I needed two feet extension.

Q. To extend the ladder?

Padilla: That is why the ladder does not show on that photograph.

. . .

Q. And, then, you had somebody pull the ladder up?

Padilla: Yes.

Padilla went on to say that after Joel extended the ladder, he put it back into the excavation, and Padilla used it to exit the trench after Lucas took the first photograph (Exh. C-2). After exiting the excavation, Padilla testified, he put the ladder on the truck. When asked why he put the ladder on the truck the morning of a workday, Padilla responded that Norton instructed him to do so because the OSHA compliance officer was on the site (Tr. 202-204). Testimony translated from one language to another presents inherent difficulties. Nevertheless, Padilla demonstrated marked confusion that cannot be attributed to translation difficulties alone in his testimony regarding the ladder. His demeanor, his evident frustration when pressed on the issue, and his palpable discomfort during this particular portion of his testimony did nothing to lend credence to his statements. Padilla’s explanation of when, why, and how the ladder was removed from the excavation is not supported by any other evidence.

Norton failed to corroborate Padilla’s testimony. When asked whether there was a ladder in the excavation that morning, Norton stated, “I do not recall seeing one, no sir” (Tr. 544). He does not mention instructing Padilla to remove the ladder from the excavation and place it on the truck. Bridges relies on Norton’s testimony that it was part of Bridges’s “normal procedure” to use a ladder in an excavation (Tr. 523-526), but ignores Norton’s more specific testimony that he cannot recall whether a ladder was actually in the excavation on the day of the inspection (Tr. 524, 544).

Even if the undersigned credited Padilla’s testimony regarding the ladder, which she does not, Padilla concedes that he was in the excavation without a ladder at the time Lucas took the

photograph in Exhibit C-2. Padilla does not state how long it took Joel allegedly to extend the ladder and put it back, but not having a safe means of egress from an excavation exposed Padilla to the hazard of being crushed in a cave-in. At the time Lucas took the photograph of Padilla (at which time Padilla admits there was no ladder in the trench), Joel was not in the process of extending the ladder. Rather, he was using a cut-off saw (Tr. 587-588).

Birkeland, who was not on the site at the time the photograph was taken, suggested that Padilla could have walked up the dirt sloped at the rear of the trench (Tr. 470-471). This statement was contradicted by Padilla himself, who stated that he could not have walked up the slope because the dirt was not firm enough. He testified that the dirt was loose, and he could have fallen if he had attempted to exit the excavation by that means (Tr. 185-186).

The Secretary has established that Bridges failed to provide a ladder or any other safe means of egress from the excavation. Padilla was exposed to the potential hazard of a cave-in, an event that frequently results in death. Bridges committed a serious violation of § 1926.651(c)(2).

Item 2: Alleged Serious Violation of § 1926.651(j)(2)

The Secretary alleges that Bridges violated § 1926.651(j)(2), which provides:

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

The citation alleges that Padilla “was standing in an excavation over 33 feet deep, where the spill [sic] pile and equipment were not kept 2 feet from the edge to prevent falling or rolling into the excavation.”

The cited standard is written in the disjunctive; the employer can either set the spoil pile and equipment at least 2 feet from the edge of the excavation *or* use a retaining device. A trench box is an acceptable retaining device, provided it extends above the top of the excavation so that dirt and equipment cannot fall back into the excavation (Exh. R-13). Bridges argues that the spoil pile was set at least 2 feet from the edge of the excavation and that it used the trench box as an adequate retaining device.

Location of the Spoil Pile

As noted earlier, Bridges had performed extensive site preparation for the subdivision by moving dirt from the high portions of the site to fill the lower portions. As a result, the entire site was covered with loose dirt. It was unlike most excavation sites where an excavation is dug and the excavated dirt is readily discernible from the undisturbed soil.

Lucas testified that he could not distinguish the spoil pile from the excavation wall (Tr. 92-93, 103). Both Birkeland and Norton testified that they could tell where the spoil pile began and that it was set back at least 2 feet from the excavation (Tr. 420, 530).

The Secretary took Birkeland's deposition prior to the hearing. During his deposition, the Secretary asked Birkeland to mark a copy of a photograph of the excavation, showing where he believed the spoil pile began (Exh. C-4; Tr. 456). At the hearing, the Secretary asked him to mark the same place on an identical (except for the vividness of the color) copy of the same photograph (Exh. C-2, p. 1; Tr. 455-456). A comparison of the two copies of the photograph demonstrates a significant gap between Birkeland's two marks.²

When asked how he could determine where the spoil pile began, Birkeland responded, "By being on the job repeatedly, I had seen the process from the initial ground all the way up to filling the house lots and then back down to where they were digging the trench to put in the pipe, I knew where the drain was" (Tr. 420-421). Bridges reiterates this line of argument in its posthearing brief where it states, "The record shows that the witnesses most familiar with the site were able to distinguish between the start of the spoil pile and the excavation and could identify that the spoil pile was maintained two feet from the edge of the excavation" (Bridges's brief, p. 13), and "It was only the CO, who was unfamiliar with the placement, lowering of grade, and subsequent excavation, that was unable to make this distinction" (Bridges brief, p. 14).

²

Each copy of the photograph is 6 inches long and 4½ inches wide. If a straight-edged ruler is placed vertically on the photograph, the upper left-hand corner of the trench box measures 1 7/16 inches from the bottom edge of both copies. Continuing up on that vertical line, the mark Birkeland made at his deposition showed where the spoil pile measured 2 13/16 inches from the bottom of the photograph (Exh. C-4). On Exhibit C-2, marked at the hearing, Birkeland indicates that the spoil pile began at 1 14/16 inches from the bottom. The two marks vary to a substantial degree. Given the scope of the area captured in the 6- by 4½-inch photograph, the almost 1-inch discrepancy represents a much larger gap.

Determination of whether a spoil pile is set back 2 feet from the edge of an excavation is not predicated on one's familiarity with the work process or frequency on the site. The previously hilly terrain was reconfigured during the site preparation. An employee who had been on the site from the beginning of the project might know which of the redistributed mounds of dirt had been excavated for the placement of utilities. This is not the point of the standard. A first-time visitor to a site should be able to tell whether a spoil pile is set back from the excavation by looking at it, and to find the setback distance by measuring it. At least 2 feet of level ground needs to exist between the edge of the excavation and the bottom of the spoil pile. Lucas testified that there was no such demarcation and the photographs bear him out: the excavation wall rises 33 feet in a continual slope, with no discernible break indicating a spoil pile (Exh. C-2, pp. 1-3).

It is determined that the spoil pile was not set back from the excavation edge but, in fact, was incorporated into the excavation wall.

Trench Box as Retaining Device

Lucas testified, "The trench box was not sitting level with the trench. It was sitting cockeyed in the trench to the left" (Tr. 84-85). The copy of the photograph on page 2 of Exhibit C-2 shows the trench box in the excavation, leaning at a pronounced angle.

According to Appendix B to Subpart P of the § 1926 standards, a trench box would have to extend at least 18 inches above the vertical wall of the trench, and the trench would have to have a slope of 1.5 to 1 or greater to be considered sufficient to prevent materials or equipment from falling or rolling into the excavation.³ Mark Hornbuckle, Bridges's expert in OSHA's requirements for trenches and excavations (Tr. 561-562), agrees that the trench box must extend at least 18 inches above the excavation wall (Tr. 571-572).⁴

³ In its brief, Bridges argues that "the Secretary should be judicially estopped from" citing it for violating § 1926.651(j)(2) because she withdrew item 5, which alleged a violation of § 1926.652(b)(4)(i) (Bridges's brief, p. 17). Bridges cites no statute or case law supporting her argument. It is rejected.

⁴

At the hearing and in their briefs, the parties argued over the nuances in the definitions of "excavation" and "trench" (Secretary's brief, p 15; Bridges's brief, p. 15; Tr. 576-579). While in the past a distinction between "trench" and "excavation" would be determinative of the type of cave-in protection required by the Subpart P standards, since the 1989 revision, this has not been so. The parties' disagreement is irrelevant to the determination of item 2, and is disregarded.

Lucas testified, and Exhibit C-2 shows, that the top of the trench box at issue was only a few inches from the edge of the excavation wall (Tr. 92). The possibility that dirt could fall into the excavation is exacerbated by two factors: (1) the trench box is tilted toward the excavation wall, and (2) the excavation wall towers over the top of the trench box for approximately 25 feet. As noted in the previous section under item 1, the trench wall rose in an unbroken slope for 33 feet from the bottom of the excavation.

The Secretary has established that Bridges failed to set the spoil pile at least 2 feet back from the excavation and that it failed to use an adequate retaining device. Item 2 is affirmed.⁵

Item 3: Alleged Serious Violation of § 1926.651(k)(1)

The Secretary alleges that Bridges committed a serious violation of § 1926.651(k)(1), which provides:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

The citation alleges, “There was no competent person (having the knowledge and authority to take action) on the job site performing daily inspections in case of situations that could result in cave-ins or other hazardous conditions.” Section 1926.650(b) defines a competent person 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.”

5

At the hearing, testimony was elicited by both parties concerning an excavator parked on top of the spoil pile (Tr. 102, 114, 128, 232-234, 294, 502, 522). Bridges spent a considerable portion of its brief arguing why the parked excavator did not create a hazard of falling into the excavation (Bridges’s brief, pp. 19-23). It is noted that the Secretary did not refer to the excavator in the section of her brief dealing with item 2 (Secretary’s brief, pp. 13-16). The presence of the parked excavator was not a factor in the undersigned’s determination that Bridges violated § 1926.651(j)(2).

Lucas first spoke with Norton when he arrived on the site. Norton identified himself as the acting foreman and a competent person (Tr. 64). Lucas's testimony with regard to Norton is as follows (Tr. 64-65):

Q. What questions did you ask him—did you ask him any questions to determine if he was a competent person?

Lucas: Yes, I asked him if he had tested the soil, and he said—I don't recall what he said. My next question was if he knew what the responsibilities of a competent person was, and he didn't know. And at this point, he said he had to get another person on the site.

Q. Why did he have to get another person on the site?

Lucas: He didn't indicate to me why he had to get another person on the site. He was not answering my questions, and I thought that he was getting someone else on the site that could answer my questions.

The person that Norton contacted was Jamil Ford, Bridges's grading foreman. Lucas testified regarding his conversation with Ford (Tr. 67):

I explained to [Ford] who I was and why I was there, and that I had started to talk with Tim Norton, and he identified himself as the competent person, and then I started asking questions, and then he clammed up and said he had to call Mr. Ford. So I started asking questions like, "Are you the competent person on site?" And he said, "Yes." And I said, "Well, the competent person is supposed to be on the site," and he didn't respond to that.

Lucas asked Ford if he made daily inspections. Ford produced an inspection report from the previous day. After a few more questions, Lucas stated Ford "clammed up and stopped talking to me. He said he had to get the safety director on the site" (Tr. 67). After safety director Birkeland arrived, he told Lucas that he was also a competent person. Lucas stated that he "started asking him questions about why the competent person was not on the site and why there was no inspection for this day, but there was one for the previous day" (Tr. 70).

In his testimony, Lucas implied that the cited standard requires the competent person's continual presence on the site. The standard does not require that the competent person be present on the site during the entire work shift. Lucas also implied that the standard requires written

documentation of the competent person's daily inspection, although when questioned explicitly on this point, Lucas conceded that such documentation is not required (Tr. 72).

Lucas recommended that the Secretary cite Bridges for violating § 1926.651(k)(1) based on his belief that Norton was not a competent person within the meaning of the standard; that the other competent persons, Ford and Birkeland, were not on the site; and that no written inspection report was produced. As noted, Lucas is mistaken in his belief that a competent person must be present at all times on a site. Lucas based his belief that Norton was not a competent person on Norton's unwillingness to answer his questions. But, as Birkeland testified, Bridges's foremen are trained that it is company policy that they contact an officer of the company when OSHA personnel arrive on the site and let that person handle the opening conference and inspection (Exh. R-7; Tr. 404-405).

In concluding that Bridges violated § 1926.651(k)(1), Lucas made several assumptions. He stated that Ford "never explained to me why he had to get the safety director on the site. I just presumed that he, too, could not answer my questions. . . ." (Tr. 67). After Birkeland arrived on the site, Lucas did not attempt to further interview Norton or Ford because he stated, "I just figured they could[n't] answer my questions, so I had to get someone else on site to answer the questions" (Tr. 70).

Lucas's biggest assumption was that Bridges's failure to produce documentation of an inspection for August 26 established that Norton had not, in fact, conducted an inspection that day (Tr. 72): "I concluded that there was no inspection done because they didn't tell me that they—they didn't produce any written documentation, they did not tell me that, 'We did but we just didn't document it,' so I had to conclude that they did not conduct an inspection." Lucas emphasized Bridges's failure to produce written documentation (Tr. 135): "I reached the conclusion that they didn't produce it so, therefore, they must not have had it to produce because they were given ample opportunities to produce them."

Lucas focused on the written report (Tr. 139-140):

Q. And, when you were talking to Norton and Ford, trying to get the inspection sheet, you never explicitly asked them the question, "Did you do a daily inspection today?" did you?

Lucas: I didn't ask them in that way, but I asked them, "What about today's inspection? What about today? This is for yesterday. What about today?"

Q. Right, in reference to the document.

Lucas: Yes.

Q. But again, you never asked them did they do an inspection today, correct?

Lucas: Again, I asked them in a different way.

Q. You asked them for the document?

Lucas: Yes, "What about today's inspection?"

Q. "Where's the document?" Right?

Lucas: Correct.

As Bridges notes, the nonresponsiveness of the foremen is insufficient to establish noncompliance with § 1926.651(k)(1), especially since the questions Lucas asked were not whether an inspection had been conducted (a requirement of the standard), but whether the foremen had generated a written report (not a requirement of the standard).

Norton had received extensive general excavation safety training, as well as competent person training in excavation and trenching safety (Exh. R-9). He testified that he was the foreman the day of the OSHA inspection and that he was responsible for conducting the daily inspection of the excavation (Tr. 226-227). Norton stated that he conducted an inspection of the excavation once it was dug that morning (Tr. 527). Bridges allegedly treats all soil as Type C soil, so its competent persons do not test for soil type (Tr. 304). Norton stated that he visually checked the excavation throughout the day, checking for hazardous conditions (Tr. 528).

The Secretary has failed to establish that Bridges did not have a competent person making the required daily inspections of the excavation. The record establishes that Norton was trained as a competent person and was capable of identifying existing and predictable hazards, and that he conducted an inspection of the excavation the morning of August 26, 2003. Item 3 is vacated.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business,

history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Bridges employed 34 employees at the time of the inspection (Tr. 109). The company has no history of previous violations (Tr. 110). Bridges demonstrated good faith with its safety training program.

The gravity of the two affirmed violations is high. Padilla was working in an excavation without a safe means of egress, with a towering pile of previously disturbed soil above him. It is determined that the penalty of \$2,500.00 is appropriate for each of the violations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, alleging a violation of § 1926.651(c)(2), is affirmed, and a penalty of \$ 2,500.00 is assessed;
2. Item 2, alleging a violation of § 1926.651(j)(2), is affirmed, and a penalty of \$2,500.00 is assessed;
3. Item 3, alleging a violation of § 1926.651(k)(1), is vacated and no penalty is assessed;
4. Item 4, alleging a violation of § 1926.652(a)(1), is withdrawn by the Secretary pursuant to the parties' partial stipulation agreement; and
5. Item 5, alleging a violation of § 1926.652(b)(4)(i), is withdrawn by the Secretary pursuant to the parties' partial stipulation agreement.

/s/

NANCY J. SPIES

Judge

Date: June 28, 2004

