

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

J. Mess Plumbing Co., Inc.,

Respondent.

OSHRC Docket No. **04-0197**

Appearances:

For Complainant: Aaron Rittmaster, Esq., Department of Labor, Office of the Solicitor,
Kansas City, Missouri

For Respondent: Gerald M. Dunne, Esq., Kodner, Watkins, Muchnick, Dunne & Weigley,
St. Louis, Missouri

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

J. Mess Plumbing Co., Inc. (JMPC), is a plumbing contractor operating in the state of Missouri. On October 30 and 31, 2003, Occupational Safety and Health Administration (OSHA) compliance officer Samuel Stuck conducted a referral inspection of a JMPC worksite located in a residential neighborhood in Oakville, Missouri. As a result of Stuck's inspection, the Secretary issued two citations to JMPC on December 15, 2003.

Citation No. 1 contains four items. Item 1 alleges a serious violation of 29 C.F.R. § 1926.202 for failure to use traffic barricades for employees working near a street. Item 2 alleges a serious violation of 29 C.F.R. § 1926.651(d) for failing to provide employees exposed to vehicular traffic with warning vests. Item 3 alleges a serious violation of 29 C.F.R. § 1926.651(g)(1)(i) for failure to test for oxygen deficiency in an excavation. Item 4 alleges a serious violation of 29 C.F.R. § 1926.651(j)(2) for failure to keep the spoil pile at least 2 feet from the edge of an excavation. The Secretary proposed penalties of \$ 1,000.00 each for Items 1 and 2, and of \$ 2,000.00 each for Items 3 and 4.

Citation No. 2 contains three items, for which the Secretary proposed penalties of \$ 4,000.00 each. Item 1 alleges a repeat violation of 29 C.F.R. § 1926.21(b)(2) for failure to train employees in the recognition and avoidance of unsafe conditions. Item 2 alleges a repeat violation of 29 C.F.R. § 1926.651(k)(1) for failure to have a competent person inspect a trench prior to the start of work and as needed throughout the shift. Item 3 alleges a repeat violation of 29 C.F.R. § 1926.652(a)(1) for failure to protect employees working in an excavation from a cave-in.

A hearing was held in this matter on May 20, 2004, in St. Louis, Missouri. The Secretary filed a post-hearing brief. JMPC has declined to file a brief. In her brief, the Secretary states that JMPC's argument that it did not violate 29 C.F.R. § 1926.202 cited in Item 1 of Citation No. 1 is supported by "sufficient analogous authority" and that she "hereby abandons all claims relative to" Item 1 (Secretary's brief, p. 6). Item 1 of Citation No. 1 is, therefore, vacated.

In its answer, JMPC denies that it is engaged in a business affecting commerce; asserts that the Review Commission lacks jurisdiction over this matter because the Secretary filed her complaint after the court mandated deadline; and asserts the affirmative defense of employee misconduct.

For the reasons discussed below, it is determined that JMPC is engaged in a business affecting commerce, that the Commission has jurisdiction in this matter, and that JMPC failed to establish its employee misconduct defense. Item 1 of Citation No. 1 is vacated. Items 2, 3, and 4 of Citation No. 1 are affirmed. Items 1 and 2 of Citation No. 2 are affirmed, and Item 3 of Citation No. 2 is vacated.

Background

JMPC is a plumbing contractor. In October 2003, a homeowner on Oldewick Drive in Oakville, Missouri, contracted JMPC to repair a sewer line in his front yard. Generally, a separate company would locate underground utility lines by means of electronic location. JMPC, however, received an errant electronic reading for the location of the utilities on Oldewick Drive. In order to locate the buried utilities, JMPC sent out a crew on October 30, 2003, to manually dig in the yard to locate them.

That same day, OSHA compliance officer Stuck received an assignment from his area office to inspect JMPC's excavation on Oldewick Drive. When Stuck arrived at the jobsite, he found the excavation in the front yard of the house. The excavation ran perpendicular to the street and

measured 10 feet long, 2 feet wide, and 9½ feet deep. Spoil piles were located to the right and left of the excavation. A ladder was in the excavation and Stuck could see footprints at the bottom of it. Stuck observed a brace in the excavation and two planks laying across the top of the excavation. No employees were present at the site.

Stuck returned to the site the next morning. Approximately 30 minutes after he arrived, JMPC's crew arrived. This crew was different from the one that had dug the excavation the day before. Stuck observed the crew working and took photographs of the site and the employees. He interviewed the employee who identified himself as the foreman of the crew, who was the only English speaking employee present.

As a result of Stuck's inspection, the Secretary issued the citations that gave rise to this proceeding.

Jurisdiction

JMPC Is Engaged in a Business Affecting Commerce

Section 10(c) of the Occupational Safety and Health Act of 1970 (Act) confers jurisdiction over employers contesting citations on the Review Commission. Section 3(5) of the Act defines "employer" as "a person engaged in a business affecting commerce who has employees. . ."

Paragraph 2 of the Secretary's complaint states:

Respondent employs approximately 4 employees in its various business activities including, at all times hereinafter mentioned, approximately 4 employees at the aforesaid workplace at 2940 Oldewick Drive, Oakville, Missouri. Respondent utilizes goods, equipment and materials shipped from outside the State of Missouri and is engaged in a business affecting commerce. Respondent is, therefore, an employer within the meaning of the Act.

In its answer, JMPC denies this paragraph without specifying with which sentence or clause it disagrees. The record establishes that JMPC employed between twelve and seventeen employees at any given time, rather than the four listed in the paragraph. Because JMPC has not favored the court with a post-hearing brief, the court is left to guess at what aspect of the Secretary's paragraph JMPC denies.

Assuming (as the Secretary does) that JMPC is denying that it is a business affecting commerce and thus the Commission is without jurisdiction over this proceeding, JMPC's claim is

rejected. The Commission has held that, as a matter of law, contractors engaged in construction work that use plumbing supplies, excavation equipment, and trucks affect interstate commerce due to the interstate market in construction materials and services. *Clarence M Jones*, 11 BNA OSHC 1529 (No. 77-3676, 1983). JMPC is an employer engaged in a business affecting commerce within the meaning of the Act. The Commission has jurisdiction over this proceeding.

The Secretary's Late Filing of the Complaint

JMPC argues as an affirmative defense that the Commission has no jurisdiction over this proceeding because the Secretary filed her complaint past the deadline set by an order of the Commission. It is noted that, while JMPC argues this as a jurisdictional issue, dismissal of a case based on the late filing of a complaint is a discretionary decision for the judge to make and is not a jurisdictional matter. Commission Rule 2200.41(a).

On February 11, 2004, Commission Chief Judge Irving Sommer issued an order granting the Secretary's motion for an extension of time in which to file a complaint "until and including March 1, 2004" and stamped the order "NO FURTHER EXTENSIONS." March 1 was a Monday. On Tuesday, March 2, 2004, the Secretary, without explanation for the one day delay, filed her complaint.

At the hearing, counsel for JMPC argued that the one day delay prejudiced its case by making it difficult to locate witnesses. The court ruled that the one day delay did not result in any prejudice to JMPC, and reiterates that ruling here. While missing the deadline for filing the complaint (after requesting several extensions of time) without apology reflects a certain cavalier attitude that the Secretary would do well to curb, JMPC has failed to show that 24 hours in March of 2004 made any difference in its ability to locate witnesses who had worked for it in October of 2003. JMPC's affirmative defense regarding the late filing of the complaint is rejected.

Citation No. 1

The Secretary issued a citation alleging four serious violations of the 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).

At the hearing, JMPC stipulated that it does not contest the facts of the violations cited in Items 1 through 4 of Citation No. 1. JMPC disputes the serious classification of the violations and asserts the affirmative defense of employee misconduct. As noted, the Secretary withdrew Item 1 of Citation No. 1 in her post-hearing brief.

JMPC contends that any violations of the cited standards result from misconduct on the part of its employees. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997). However, “[w]hen the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee.” *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1989).

JMPC’s crew members were immigrants from Bosnia and Albania who did not speak English. JMPC’s management personnel conducted safety training. They did not speak the languages of the crew members. No effective communication was possible under these circumstances. The foreman, Shemsi Qerimi, was present on October 31 and engaged in violative conduct.¹ His presence indicates that JMPC did not enforce any work rules it did have. JMPC’s management personnel testified that the company did not have a set procedure to deal with safety infractions. JMPC’s affirmative defense of employee misconduct is rejected.

Alleged Serious Violation of 29 C.F.R. § 1926.651(d)

The standard at 29 C.F.R. § 1926.651(d) provides:

Employees exposed to public vehicular traffic should be provided with, and shall wear, warning vests or other suitable garments marked with or made of reflectorized or high-visibility material.

¹ Although JMPC disputes the Secretary’s characterization of this employee as the foreman, claiming that he was a backhoe operator with no supervisory authority, the Court finds the compliance officer credible on this issue. Stuck observed the employee supervising the employees and the employee identified himself as foreman.

JMPC's employees were working adjacent to a public roadway and were exposed to vehicular traffic. The standard applies to the cited condition.

In Citation No. 1, Item 2, the Secretary alleges: "Employees were walking back and forth across a street and operating equipment in a street and were not provided vests or other suitable garments, and did not wear such garments." Stuck testified that when the employees showed up for work on October 31, they were not wearing warning vests. Warning vests raise the visibility of employees for drivers of passing vehicles.

Stuck interviewed the employee who appeared to be supervising the other three crew members. The employee identified himself as the foreman. The foreman was one of the employees not wearing a warning vest. His knowledge of the violation is imputed to JMPC. "The knowledge of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing the knowledge." *Ormet Corp.*, 14 BNA OSHC 2134, 2138-39 (No. 85-531, 1991).

The Secretary has established that JMPC violated 29 C.F.R. § 1926.651(d). Respondent stipulated to the facts of this violation. The Secretary classified the violation as serious. In order to establish that a violation is serious, the Secretary must show that, in the event the violation causes an accident, death or serious physical harm could result. *Flintco Inc.*, 16 BNA OSHC 1404 (No. 92-1396, 1993). The hazard the standard is designed to prevent is that of an employee being struck by a vehicle. Such an event would likely result in serious physical injury, if not death. The violation is properly classified as serious.

Alleged Serious Violation of 29 C.F.R. § 1926.651(g)(1)(i)

The standard at 29 C.F.R. § 1926.651(g)(1)(i) provides:

Where oxygen deficiency (atmospheres containing less than 19.5 percent oxygen) or a hazardous atmosphere exists or could reasonably be expected to exist, such as in excavations in landfill areas or excavations in areas where hazardous substances are stored nearby, the atmospheres in the excavation shall be tested before employees enter excavations greater than 4 feet (1.22 m) in depth.

In Citation No. 1, Item 3, the Secretary alleges:

a/ Employees were preparing to enter a trench that had been open since the previous day in which sewer gases could be smelled at the surface, but did not have a means to sample the atmosphere to determine if the air was oxygen deficient.

b/ An employee reached down into a trench to prepare to remove a cross brace, but did not know if the air he was breathing was oxygen deficient or contained poisonous gases from the damaged sewer.

JMPC's job at the site was to repair a collapsed sewer pipe. The excavation was greater than 4 feet in depth. Stuck testified that when he was inspecting the site, he could smell sewer gas. Stuck stated, "There's a potential for gases to appear in the trench either from the sewer that was damaged or from natural sources such as decaying material in the ground, hydrogen sulfide and sewer gas can appear. Methane is another gas that can appear" (Tr. 27). JMPC stipulated that it did not test for an oxygen deficiency in the excavation.

Stuck observed the foreman twice reach into the excavation with his head below the surface of the ground in order to remove the brace from the bottom of the excavation. Thus the foreman himself was exposed to the potentially oxygen-deficient or hazardous atmosphere.

Although JMPC stipulated to the facts of this violation and that it was contesting only the classification of the violation at the beginning of the hearing, the company subsequently moved to dismiss this item at the close of the Secretary's case in chief. Counsel for JMPC stated, "[W]e stipulated to the existence of the citation. I think the evidence is clear that based on the testimony of the Secretary's witness that there wasn't any gas, sewer gas coming from within the trench" (Tr. 105). Counsel for JMPC does not dispute that the company did not test for an oxygen deficiency, but argues that one was not necessary because there was no evidence that an oxygen-deficient or hazardous atmosphere existed, and because it was not contemplated that anyone would enter the trench.

The standard does not require evidence that a hazardous atmosphere exists before it requires atmospheric testing. The standard requires atmospheric testing when a hazardous atmosphere "could reasonably be expected to exist." Such is the case here. JMPC's crew was digging in the vicinity of a collapsed sewer line. The odor of sewer gas was detectable at the site. Under these circumstances, a hazardous atmosphere could reasonably be expected to exist.

As to JMPC's contention that no employees entered the excavation, Stuck observed the foreman place his head below ground level while reaching into the excavation. Because the hazard at issue is oxygen deficiency or a hazardous atmosphere, the foreman ducking his head below ground level is "entering" the excavation for purposes of the standard. The record does not indicate that employees were preparing to climb into the excavation on October 31. However, at the beginning of the hearing, counsel for JMCP agreed to the court's statement that JMCP "does not contest the facts of the violations alleged in [items] 1, 2, 3, and 4, but has affirmative defenses to those items" (Tr. 8). Exposure of the employees to the untested atmosphere of the excavation is one of the facts asserted by the Secretary of the violation of 29 C.F.R. § 1926.651(g)(1)(i). Without JMCP's explicit stipulation, the Secretary may have adduced more evidence.

The Secretary has established a violation of 29 C.F.R. § 1926.651(g)(1)(i). JMPC disputes its classification as serious. Stuck testified regarding results of exposure to a high concentration of sewer gas. He stated under oath that "death could result in high enough concentration. Lower concentrations could result in dizziness, causing a person to lose their balance and fall" (Tr. 28). This testimony was uncontroverted. The violation is properly classified as serious.

Alleged Serious Violation of 29 C.F.R. § 1926.651(j)(2)

The standard at 29 C.F.R. § 1926.651(j)(2) 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.

In Citation No. 1, Item 4, the Secretary alleges: "Employees hand dug an excavation and placed the excavated materials above them on the edge of the excavation. The spoil was not kept back 2 feet or more from the edge of the excavation." Stuck testified that the spoil piles were about 8 to 10 inches from either side of the trench. No retaining device was used to prevent the soil from falling into the excavation. Exhibits C-3, C-4 and R-3 are copies of photographs showing the proximity of the spoil piles to the excavation. Respondent stipulated to the facts of this violation.

Employees in Respondent's first crew on October 30 were hand digging the excavation. The excavation was 9½ feet deep. Toward the end of the work day, they would have been bent over in an excavation that extended at least 3 feet above their standing height. If the spoil pile had fallen in, the employees could have been injured.

Although there is no evidence that employees entered the excavation on October 31, it has been established that the foreman bent over the edge and placed his head below ground level. Dirt could have fallen from the spoil pile while the foreman was leaning over the edge into the excavation. The falling dirt could have caused the foreman to lose his balance, falling into the excavation head first.

The Secretary has established a violation of 29 C.F.R. § 1926.651(j)(2). If the foreman had fallen into the excavation due to dirt falling from the spoil pile, the likely result would be serious physical injury. The violation is serious.

Citation No. 2

Alleged Repeat Violation of 29 C.F.R. § 1926.21(b)(2)

The standard at 29 C.F.R. § 1926.21(b)(2) provides:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

In Citation No. 2, Item 1, the Secretary alleges:

a/ Employees who hand dug a trench over 9 feet deep were not instructed on the hazards of being in an unshored trench or how to properly protect the trench from collapse and other hazards such as sluffing [sic] from the trench walls.

b/ Employees who were going to enter a trench that had been hand dug the previous day and where there was a potential for the collection of sewer gas from the damaged sewer line were not instructed on how to sample for hazardous atmospheres or potential lack of oxygen.

JMPC's foreman informed Stuck that he and his crew had received no training from JMPC. JMPC owner John Mess disputed this characterization, stating that his company did provide training to its employees. Mess explained when it was the employees received safety training (Tr. 121):

Basically in the yard with the men making sure they got their vests, their shoring, their boards before they leave for the job. They are directed to not get in holes over 4 feet deep, when it's unsafe to use the proper shoring.

JMPC adduced no documentary evidence of a training program. Mess conceded that most of his employees had immigrated from Bosnia and Albania, and could not speak English. Mess testified that he did not know if the crew had been able to translate any of the safety instruction provided to them in English. Mess stated that if an employee could not speak English, another co-worker would translate the materials to him. The foreman himself did not know to test for an oxygen deficiency or hazardous atmosphere when entering the excavation, so he could not have instructed this crew on this safety issue.

The Secretary has established a violation of 29 C.F.R. § 1926.21(b)(2). The Secretary classified this as a repeat violation. A violation is considered a repeat violation “if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). “A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard.” *Superior Electric Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996).

JMPC stipulated at the hearing that it had been cited previously for a violation of the same standard. On February 13, 2001, the Secretary issued a citation to JMPC for a violation of 29 C.F.R. § 1926.21(b)(2), which became a final order on May 29, 2001. Citation No. 2, Item 1 is properly classified as a repeat violation.

Alleged Repeat Violation of 29 C.F.R. § 1926.651(k)(1)

The standard at 29 C.F.R. § 1926.651(k)(1) 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 reasonably be anticipated.

In Citation No. 2, Item 2, the Secretary alleges:

a/ A trench that was hand dug by two employees over 9 feet deep was not inspected by the competent person as the work progressed to insure that the trench was properly protected from collapse and that the employees were protected from other hazards such as sluffing [sic] from the trench walls.

b/ A trench that had been hand dug the previous day was not inspected by the competent person the next day prior to employees starting work.

Richard Roseland works in a management position with JMPC. It was his job to oversee the sewer repair project at issue. Roseland was the designated competent person. His testimony demonstrates that no competent person inspected the excavation prior to the start of work or as needed throughout the shift. He did not view the excavation until the afternoon of October 30, after the crew had left for the day (Tr. 164-166):

Q. [Y]ou said that when you looked at the trench for the first time it was 9 feet deep; is that correct?

Roseland: On Thursday afternoon, that's correct. . . .

. . .

Q. Okay. So, you didn't see the trench at all from the time that they broke ground until they reached approximately 9 feet in depth; is that accurate?

Roseland: That's correct.

Q. You also never saw shoring in use, is that correct?

Roseland: That's correct.

Q. So, does it mean that there was never a competent person inspection done during the job?

. . .

Were you the competent person on the job?

Roseland: After the job--after the hole became 9 feet deep, yes.

Q. Who was the competent person on this job before it was 9 feet deep?

Roseland: There wasn't one.

. . .

Q. [W]as that trench [dug on Thursday] ever inspected by a competent person before they reached full depth?

Roseland: No, they were in the process of digging it.

Q. Okay.

Roseland: They never reached full depth until they finished.

Q. Was it inspected during progression to that point?

Roseland: No.

It is clear that a competent person did not inspect the excavation as required by the cited standard on October 30. The competent person did not see the excavation until the work shift was over and the possibility for employee exposure was past. Roseland contends that he believed the crew would only dig to the utility lines 4 feet below the surface, and that no inspection would be necessary. However, Roseland never instructed the crew to stop digging when they reached 4 feet; they were instructed to dig until they uncovered the utility lines. Roseland had experienced problems before with his crews failing to progress as instructed. Roseland testified that when he arrived at the site on October 30, he stated, "Here we go again. We got another bad location" (Tr. 155). Under these circumstances, it was unreasonable for Roseland to conclude that he did not have to be present to inspect the site until after the employees had left for the day.

The Secretary also established that the competent person failed to inspect the excavation prior to the start of work on October 31. Roseland stated that he did not feel the need to inspect the excavation the morning of the 31st because he had instructed the crew to backfill the excavation and he did not anticipate any of the crew entering the excavation. But Roseland knew from being on the site the day before that there was a brace at the bottom of the 9 foot deep excavation that the crew would need to remove before backfilling it. A reasonable person would have determined that at least one crew member would be required to either enter the excavation or lean down into it, as the foreman did, in order to remove the brace. The Secretary has established that JMPC violated 29 C.F.R. § 1926.651(k)(1).

JMPC stipulated that it had been cited previously for violating the same standard. The Secretary issued a citation to JMPC on February 13, 2001, for a violation of 29 C.F.R.

§ 1926.651(k)(1), which became a final order of the Commission on May 29, 2001. Citation No. 2, Item 2 is properly classified as repeat.

Alleged Repeat Violation of 29 C.F.R. § 1926.652(a)(1)

The standard at 29 C.F.R. § 1926.652(a)(1) provides:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) . . .

In Citation No. 2, Item 3, the Secretary alleges:

A single board on each side of the trench held in place by a single cross brace was used as the sole protective system for a hand dug trench 9 and 6/10 feet deep. The bracing was not in compliance with 29 CFR 1926.652(c)(1) and Appendix C of the trenching standard and did not provide the protection needed to prevent the trench from collapsing.

It is undisputed that the excavation at issue was more than 9 feet deep and was dug in previously disturbed soil. At the time of Stuck's inspection, there was a brace and two boards in the excavation. From this, Stuck deduced that employees had been in the excavation without adequate fall protection.

Roseland testified that he believed that the first crew had shoring in place in the excavation while they were in it. He based this belief on the fact that there was adequate equipment on the crew's truck to shore an excavation, and that it is JMCP' standard operating procedure to shore excavations deeper than 4 feet. Roseland testified that he believed that the employees removed the shoring from the excavation when they left the site for the day.

The record is inconclusive as to whether adequate shoring was in the excavation on October 30 while employees were working in it. No employees were present when Stuck and Roseland observed the site. No employees from the first crew testified at the hearing. Stuck had no interview statements from any members of the first crew. The Secretary did not produce sufficient evidence to establish that the terms of the standard were not met. Citation No. 2, 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. Generally, gravity is the principal factor to be considered.

At the time of the inspection, JMPC employed between 12 and 17 employees. JMPC had a history of previous violations. The record indicates no evidence of bad faith.

The gravity of the violation of 29 C.F.R. § 1926.651(d), cited in Item 1 of Citation No. 1 (failure to wear warning vests) is low. The employees were not working in the street. They parked their truck across the street from the excavation site and walked from the truck to get there. Crossing a residential street in daylight hours does not expose employees to an extraordinary risk of being struck by vehicles. It is determined that the appropriate penalty for Item 1 is \$100.00.

The gravity of Citation No. 1, Item 3, for the violation of 29 C.F.R. § 1926.651(g)(1) (failure to test for oxygen deficiency), is low. Employees were not required to bodily enter the excavation on October 31. The foreman ducked his head below ground level twice while attempting to retrieve the brace. His exposure was minimal in duration. A penalty of \$200.00 is appropriate.

The gravity of Citation No. 1, Item 4, for the violation of 29 C.F.R. § 1926.651(j)(2) (failure to keep the spoil pile at least 2 feet from the edge of the excavation), is high. The first crew placed spoil piles on two sides of an excavation that was over 9 feet deep with vertical walls. Employees digging in the trench at the end of the work day were in over their heads. Employees were exposed to the hazard of being struck or buried by falling dirt. A penalty of \$1,000.00 is appropriate.

The gravity of Items 1 and 2 of Citation No. 2 (for the violations of 29 C.F.R. §§ 1926.21(b)(2) and 1926.651(k)(1) respectively) is high. Excavation work is hazardous by nature, and it is essential that employees who routinely dig excavations receive safety training and that the designated competent persons make the required inspections. JMCP hired workers who are not fluent in English, and then failed to ensure that they understood the minimal training they received. As the designated competent person, Roseland was not diligent in conducting inspections of JMCP's excavations, even though he was aware there were continuing problems with some of JMCP's employees. A penalty of \$2,500.00 each is assessed for Items 1 and 2 of Citation No. 2.

**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 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.202, is withdrawn by the Secretary and is vacated. No penalty is assessed;

2. Item 2 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.651(d), is affirmed and a penalty of \$100.00 is assessed;

3. Item 3 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1926.651(g)(1)(i), is affirmed and a penalty of \$200.00 is assessed;

4. Item 4 of Citation No.1, alleging a serious violation of 29 C.F.R. § 1926.651(j)(2), is affirmed and a penalty of \$1,000.00 is assessed;

5. Item 1 of Citation No. 2, alleging a repeat violation of 29 C.F.R. § 1926.21(b)(2), is affirmed and a penalty of \$2,500.00 is assessed;

6. Item 2 of Citation No. 2, alleging a repeat violation of 29 C.F.R. § 1926.651(k)(1), is affirmed and a penalty of \$2,500.00 is assessed; and

7. Item 3 of Citation No. 2, alleging a repeat violation of 29 C.F.R. § 1926.652(a)(1), is vacated.

 /s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: September 9, 2004