



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

MOSSER CONSTRUCTION, INC.,

Respondent.

OSHRC Docket No. 08-0631

APPEARANCES:

Ronald J. Gottlieb, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Carol A. De Deo, Deputy Solicitor for National Operations; U.S. Department of Labor, Washington, DC
For the Complainant

Roger L. Sabo, Esq.; Schottenstein, Zox & Dunn, LPA, Columbus, OH
For the Respondent

DECISION

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

STATEMENT OF THE CASE

Mosser Construction, Inc. (“Mosser”) contracted to perform excavation and concrete work in preparation for the construction of a new sports arena located in Toledo, Ohio. As a result of a March 17, 2008 inspection of Mosser’s excavation at the arena worksite, the Occupational Safety and Health Administration (“OSHA”) issued Mosser a serious citation under the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. §§ 651-78, alleging that Mosser failed to “ensure that employees in an excavation . . . were protected from cave[-]ins by a protective system, or by sloping or benching,” as prescribed by 29 C.F.R. § 1926.652(a)(1), and proposing a \$5,000 penalty.¹

¹ The cited excavation standard provision states, in pertinent part, that “[e]ach 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” A second citation item, pertaining to a competent person’s obligations under a different provision of the excavation standard, was vacated by the judge and is not before us on review.

Following a hearing, Administrative Law Judge G. Marvin Bober affirmed the citation based on his determination that Mosser's attempt to bench the excavation fell short of the required benching angle, but characterized the violation as other-than-serious, finding that "[i]f an accident had occurred . . . there was not a substantial probability that death or serious physical harm could result." The judge also lowered the penalty for the violation to \$500 based on his determination that employee exposure was limited to two hours and the excavation's benching, though inadequate, reduced the probability of a cave-in. For the reasons that follow, we reverse the judge's characterization determination, affirm the violation as serious, and assess a \$4,500 penalty.

ISSUES

Mosser does not contest the judge's affirmance of the violation, but the Secretary contends the judge improperly characterized it as other-than-serious. The Secretary argues that any failure to meet the specifications of the standard establishes that a cave-in was possible, and that cave-ins are serious violations because they pose a substantial risk of death or serious harm. The Secretary also contends that the judge's \$500 penalty assessment does not accurately reflect the gravity of the violation. Mosser responds that the excavation posed no cave-in hazard because it was subject only to a "slow-raveling" of surface material rather than a catastrophic failure, and that the raveling would flatten the slope and increase the safety factor. Mosser also argues that there is no basis to increase the \$500 penalty amount assessed by the judge.

At issue on review is only whether the judge properly characterized Mosser's violation of the cited excavation standard as other-than-serious, and whether his penalty assessment was appropriate.

FINDINGS OF FACT

Compliance Officer ("CO") Kip Reiher was looking out a window of the Toledo OSHA Area Office, which is located within view of the arena worksite, when he noticed an employee working inside an excavation. After leaving his office and going to the worksite, the CO discovered that a number of Mosser employees were working inside the excavation and at least one of them had performed work there for approximately two hours. The excavation was 56 feet long, 3 feet, 5 inches wide at the excavation floor, and 6 feet, 6 inches deep. Although the excavation was benched throughout, the CO testified that a portion of the benching appeared to lack the proper dimensions required under the excavation standard. The bench dimensions were as follows: 4 feet, 1 inch high from the excavation floor to the two horizontal bench cuts; 2 feet wide from the excavation walls to the end of each bench cut; and 2 feet, 5 inches high from the benches to the top of the excavation.

ANALYSIS

I. CHARACTERIZATION

The Commission has recognized that under the excavation standard, the Secretary need not specifically establish the existence of a cave-in hazard to prove a violation. *Austin Bridge Co.*, 7 BNA OSHC 1761, 1765-66, 1979 CCH OSHD ¶ 23,935, p. 29,021 (No. 76-93, 1979). Nonetheless, the presence of such a hazard and consequences of its occurrence would be relevant to determining whether a violation is serious. *Id.* at 1767. Indeed, under the Act a violation is serious “if there is a substantial probability that death or serious physical harm could result from [the violative] condition” OSH Act § 17(k), 29 C.F.R. § 666(k). “This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur.” *Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1330-31, 2002 CCH OSHD ¶ 32,697, p. 51,645 (No. 97-0469, 2003) (consolidated) (citation omitted).

Here, the judge characterized the violation as other-than-serious based on his findings that “one end of the trench was considered by OSHA to be in compliance, the height and width of the bench varied . . . , and [] Respondent made a substantial attempt to bench throughout the excavation.” The Secretary contends the judge erred, citing the CO’s testimony that he personally observed the conditions of the excavation and concluded that an employee could have sustained fatal mechanical asphyxia or serious physical injury had a cave-in occurred. Mosser maintains on review that the violation is not serious because in its expert’s opinion, the excavation was subject only to a “slow-raveling” of surface material rather than a catastrophic failure. Mosser’s expert witness specifically testified about the characteristics of the excavation soil as it pertained to classifying the soil under the standard’s appendix,² and whether the excavation posed a cave-in hazard. In his decision, the judge relied on the expert’s opinion about the excavation soil characteristics in addressing the merits of the violation, but never addressed the expert’s opinion that the excavation posed no cave-in hazard.

The Secretary has determined that “excavation work is one of the most hazardous types of work done in the construction industry [and] [t]he primary type of accident of concern in excavation-related work is [the] cave-in” *See Excavations; Construction; Trenching; Shoring; Sloping; Benching; Final Rule*, 54 Fed. Reg. 45,894, 45,897 (October 31, 1989). *See also Austin Bridge*, 7 BNA OSHC at 1761, 1979 CCH OSHD at p. 29,017. Despite Mosser’s claim that its expert’s opinion showed that no cave-in hazard existed here, we find that the expert’s opinions about the characteristics of the excavation soil do not support his ultimate conclusion that no cave-in hazard was presented by the noncompliant excavation. In discussing the soil’s characteristics, Mosser’s expert

² See 29 C.F.R. pt. 1926 subpt. P app. A.

stated that it was compacted and highly angular crushed limestone rock that “start[s] to recement.” But he did not indicate how long the recementing process might take, or whether his review of the excavation photographs—the only contemporaneous visual evidence of the cited condition on which he relied in forming his opinion about the excavation’s safety—showed that this particular soil had yet cemented. Moreover, Mosser’s own competent person at the worksite, who personally examined the excavation soil on the morning of the OSHA inspection, identified the soil as granular and not cohesive—a soil characteristic that may require greater protective measures than those taken by Mosser here. *See e.g.*, 29 C.F.R. pt. 1926 subpt. P app. A (defining Type A soil as “cohesive”); 29 C.F.R. pt. 1926 subpt. P app. B-1.2 (illustrating permissible benching for Type B “cohesive soil only”). And the competent person’s assessment of the excavation soil is consistent with that contained in the OSHA Technical Center’s analysis of a soil sample removed from the excavation that same day. We find that the expert failed to establish an adequate link between the soil characteristics and his opinion that the excavation was safe, particularly in view of his failure to account for the competent person’s contrary soil assessment in proffering that opinion.

In these circumstances, we find unpersuasive the expert’s opinion that there was no cave-in hazard presented by this noncompliant excavation that was six-feet, five-inches deep and, therefore, we conclude that Mosser’s failure here to meet the specifications of the standard posed a cave-in hazard that could have resulted in serious physical injury or death. 29 C.F.R. § 1926.650(b) (defining cave-in to include potentially serious or deadly consequences—the sudden “separation of . . . soil or rock . . . into the excavation . . . in sufficient quantity so that it could entrap, bury, or otherwise injure and immobilize a person”). Therefore, we conclude the violation is appropriately characterized as serious.³

II. PENALTY

In assessing a penalty, the Commission must give due consideration to four factors: (1) the employer’s size; (2) the gravity of the violation; (3) the employer’s good faith; and (4) the employer’s prior history of violations. OSH Act § 17(j), 29 U.S.C. § 666(j). When determining gravity, typically the principal factor, the Commission considers (1) the number of exposed employees; (2) the duration of their exposure; (3) whether precautions have been taken against injury; (4) the degree of probability

³ We find that the two cases in which the Commission characterized a violation for failing to provide cave-in protection as other-than-serious do not compel a different result. In *Lisbon Contractors, Inc.*, 5 BNA OSHC 1741, 1984-85 CCH OSHD ¶ 26,924, p. 34,497 (No. 11097, 1977), the Commission did not examine whether the facts precluded a complete cave-in but, rather, whether employees would have been harmed if just a small amount of excess soil at the top of the excavation were to have fallen in. And in *Hardy Constr. Co.*, 2 BNA OSHC 1169 (No. 1053, 1974), the Commission affirmed the judge’s decision, but did not specifically address the characterization of the violation which the Secretary did not brief on review.

that an accident would occur; and (5) the likelihood of injury. *Capform Inc.*, 19 BNA OSHC 1374, 1378, 2001 CCH OSHD ¶ 32,320 p. 49,478 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished).

Based on our review of the § 17(j) factors, we conclude that a penalty of \$4,500 is appropriate. The judge reduced the Secretary's \$5,000 proposed penalty to \$500 based, in part, on his determination that the excavation's partial benching reduced the probability of a cave-in. However, regardless of the probability of a cave-in, we find that the gravity of the violation remains moderate to high considering the serious consequences in the event a cave-in occurred. In addition, we find that Mosser's attempt to provide cave-in protection as part of its excavation safety program warrants some credit for good faith. Accordingly, we assess a \$4,500 penalty.

CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude that the excavation standard violation is properly characterized as serious. We also conclude that an appropriate penalty for this violation is \$4,500.

ORDER

We reverse the judge's characterization determination, affirm the violation as serious, and assess a \$4,500 penalty.

SO ORDERED.

/s/ _____
Thomasina V. Rogers
Chairman

/s/ _____
Horace A. Thompson III
Commissioner

/s/ _____
Cynthia L. Attwood
Commissioner

Dated: February 23, 2010



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Secretary of Labor,

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Mosser Construction, Inc.,

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OSHRC DOCKET NO. 08-0631

Appearances:

Paul G. Spanos, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio
For Complainant

Roger L. Sabo, Esq., Schottenstein, Zox & Dunn, LPA, Columbus, Ohio
For Respondent

Before: G. Marvin Bober, Administrative Law Judge

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* (“the Act”). On March 17, 2008, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Mosser Construction’s (“Respondent”) work site located at 401 Madison Avenue in Toledo, Ohio. (Tr. 156). As a result of that inspection, OSHA issued one citation to the Respondent alleging two violations of the Act. Citation 1 Item 1 alleges a serious violation of 29 C.F.R. §1926.651(k)(2) for the failure of a competent person to remove employees from an excavation after finding evidence of a cave-in or other hazardous condition. A penalty of \$5,000 was proposed for this violation. Citation 1 Item 2 alleges a serious violation of 29 C.F.R. §1926.652(a)(1) for failing to properly implement a protective system in an excavation more than five feet deep. A second penalty of \$5,000 was proposed for this violation. Respondent timely contested the citations

and an administrative trial was held on October 28, 2008 in Toledo, Ohio. Prior to the trial, the Court denied *Secretary's Motion for Partial Summary Judgment* on October 17, 2008. Both parties have filed post-trial briefs, and this case is ready for disposition.

Jurisdiction

The parties agree that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The parties also agree that at all times relevant to this action, Respondent was engaged in construction and maintained a place of business in Fremont, Ohio and a work place at 401 Madison Avenue in Toledo, Ohio. (Secretary's *Complaint* and Respondent's *Answer*). Respondent constructs hospitals, prisons, sports arenas, bridges, and water treatment facilities. It employs approximately 500 employees and conducts more than \$100 million in business annually. (Tr. 272). Therefore, I find that Respondent is engaged in a business affecting commerce and is a covered employer within the meaning of Section 3(5) of the Act. *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

The OSHA Inspection

On March 17, 2008, Respondent was engaged in the preparation of an excavation to install the foundation of a new sports arena. (Tr. 156). The worksite was located across the street from the local office of the Occupational Safety and Health Administration ("OSHA"). From the windows of the Toledo OSHA Office, compliance personnel observed individuals working on this jobsite. (Tr. 61). OSHA took several photographs of the site through their office windows. (Tr. 60; Ex. C-1, C-2). Compliance Safety and Health Officer Kip Reiher ("Compliance Officer") was subsequently assigned by OSHA to conduct an inspection of the site. (Tr. 61). The OSHA inspection lasted approximately 40 minutes. (Tr. 29). As a result, on March 31, 2008, OSHA issued a Citation and Notification of Penalty alleging two serious violations of the Act.

TESTIMONY

Kip Reiher

Mr. Reiher has been an OSHA Compliance Safety and Health Officer for seven years. (Tr. 24). During that time, he has conducted approximately 400 inspections, 20-30 of which involved trenches. (Tr. 25). When Mr. Reiher arrived at the worksite, he observed four of Respondent's employees working in the excavation at issue in this case. (Tr. 29). The employees had been working in the excavation for approximately two hours prior to OSHA coming on site. (Tr. 33).

The Compliance Officer did not take measurements of the trench himself. Instead, he asked the employees that were working in the excavation to measure the dimensions of the trench. (Tr. 43). Using a steel tape measure, they called out the dimensions of the various horizontal and vertical surfaces to the Compliance Officer. (Tr. 43). The excavation was measured at various points, however, only the narrow end of the excavation was considered to be in violation. (Tr. 44, 69-70). Although the dimensions of the trench varied tremendously throughout its length, the dimensions of the trench location at issue in this case were: 3 feet 6 inches wide horizontally at the bottom; 4 feet 1 inch high vertically from the bottom to the bench¹ level; 2 feet wide horizontally at the bench level; and then 2 feet 5 inches high vertically (sloped approximately 10°) to the ground surface level. (Tr. 45-46; Ex.C-6). These dimensions were not disputed by the Respondent. (Tr. 18).

To determine the type of soil in the excavation, the Compliance Officer submitted an approximately three -pound sample of soil from the excavation to OSHA's laboratory in Salt Lake City. (Tr. 68, 86, 125). OSHA's soil sample was collected by one of Respondent's on-site superintendents, Rod Meyer, from a spoils pile near the excavation. (Tr. 80-81). OSHA's laboratory analysis of the sample collected by the Compliance Officer determined that the soil was Type "C."² (Tr. 68).

¹ One of the acceptable excavation protective system methods identified in 29 C.F.R. §1926.652.

² Soil classifications as defined in Appendix A to Subpart P of 29 C.F.R. §1926

Although the Compliance Officer acknowledged during the trial that the excavation was benched, he does not believe that benching was appropriate in this particular excavation because it was Type “C” soil. (Tr. 51). He maintains that the regulations do not allow benching in Type “C” soil, and therefore, the excavation did not have an adequate protective system. (Tr. 54). This is the basis for Citation 1 Item 2. The Compliance Officer was concerned that the condition of the trench exposed employees to the hazards associated with a cave-in, including mechanical asphyxia. (Tr. 52, 54).

As additional support for his conclusions, the Compliance Officer points to Respondent’s Excavation Safety Checklist as well as disciplinary action against Respondent’s on-site superintendents: Rod Meyer and Keith Bostelman. The Excavation Safety Checklist was completed by Mr. Meyer about three hours before the OSHA inspection. (Tr. 38-39). Mr. Meyer indicated on the checklist that the soil in the excavation was Type “C.” (Ex. C-7). However, two days later during follow-up witness interviews, Mr. Meyer and Mr. Bostelman told the Compliance Officer that the soil in the excavation was actually Type “B.” (Tr. 40-41). After the inspection, Rod Meyer and Keith Bostelman were disciplined on the basis that Respondent’s “preliminary internal investigation has concluded that the excavation may not have met OSHA standards.” (Tr. 55; Ex. C-8, C-9).

The Compliance Officer testified that Citation 1 Item 1, which the Secretary referred to as the “competent person” violation, was based on the fact that Respondent conducted only a visual examination of the trench conditions but no manual examination. (Tr. 53-54). The only information the Compliance Officer obtained about the training of Mr. Meyer and Mr. Bostelman was that they both completed a 30-hour OSHA training course. (Tr. 71). The Compliance Officer had no knowledge of their length of employment with the Respondent, additional training received by either person, or their background in excavation work. (Tr. 72).

In calculating a penalty for each of the two citation items in this case, the Compliance Officer considered the fact that Respondent has more than 120 employees, and pursuant to OSHA policy, did

not reduce the proposed penalties for the employer's size. (Tr. 57-58). He further testified that because the violations were considered by OSHA to be high gravity serious violations, there was no penalty reduction for good faith. (Tr. 58). Nor did OSHA reduce the proposed penalty based on Respondent's violation history due to the fact that Respondent had a serious violation in "the recent past." (Tr. 58).

Clint Merrell

Clint Merrell is an Analytical Chemist in the OSHA Salt Lake Technical Center in Utah. (Tr. 100-101). He has been working in that position for approximately twenty-eight years. (Tr. 101). He has a bachelor's degree in chemistry and a master's degree in biochemistry. (Tr. 104). During his tenure with OSHA, Mr. Merrell has conducted more than 2,500 soil sample analyses. (Tr. 102). The court accepted Mr. Merrell as an expert in the area of laboratory testing of soil samples. (Tr. 106-108). Mr. Merrell analyzes the soil samples he receives in his laboratory using the ID-194 method. (Tr. 108). This method consists of placing the sample in a bread pan, recording visual observations of the sample, photographing the sample, testing the compressibility of the sample, placing the sample in an oven for two days, adding water to the sample, draining the water/sample mixture through a No. 200 sieve,³ placing the remaining sample back in the oven overnight, and then calculating the percentage of sand and gravel remaining in the sample. (Tr. 106-107). After this process, if the sample contains more than 85% sand and/or gravel, OSHA considers it to be Type "C" soil. (Tr. 113). Through this process, Mr. Merrell concluded that the soil sample provided to him by the Compliance Officer in this case was 94% sand and gravel. (Tr. 113). Consequently, he classified it as Type "C" soil. (Tr. 113).

As part of his visual observations, Mr. Merrell compared particles of the soil to a chart used in his office to determine whether the soil particles were "rounded" or "angular." (Tr. 120; Ex. C-11). Rounded gravel tends to fall apart. Angular gravel tends to cleave together and is more stable. (Tr. 137-138). He testified that angular particles indicate Type "B" soil and round particles indicate Type

³ A No. 200 sieve is basically a strainer with 200 openings per square inch (Tr. 216).

“C” soil. (Tr. 120). Referring to his chart, he testified that the particles in the soil sample he was provided by the Compliance Officer were “sub-rounded” or “rounded.” (Tr. 121; Ex. C-11). He conceded that his office does not test the compactness of the soil. (Tr. 147).

Keith Bostelman

Keith Bostelman was a superintendent on this jobsite for Respondent, and the designated competent person⁴ for this particular excavation. (Tr. 155, 165). Mr. Bostelman has been employed by Respondent for approximately twenty-five years. (Tr. 152). He was at the jobsite when the Compliance Officer arrived. (Tr. 156). It was the first day that the Respondent’s crew had been working at this location. (Tr. 157). When the Compliance Officer arrived, the crew was “digging grade beams for the first pour.” (Tr. 157). Mr. Bostelman testified that the crew was having difficulty digging in the excavation with shovels and the excavator machine because the soil was “very dense compacted material.” (Tr. 161). He testified at trial that he believes the soil was Type “B.” (Tr. 169). Bostelman testified that he performed visual observations of the soil as well as manual tests with shovels, the backhoe, and his finger. (Tr. 173). He did not observe any sloughing or falling off of soil. (Tr. 165). He does not believe that the conditions of the trench were unsafe or that his crew was in any jeopardy. (Tr. 182).

Rod Meyer

Rod Meyer was the General Superintendent for Respondent at this jobsite. (Tr. 183). He was also present on the day of the inspection. (Tr. 201). Mr. Meyer prepared the Excavation Safety Checklist for this trench at 10:00 a.m. on the morning of the inspection. (Ex. C-7). He admitted to categorizing the soil in the excavation as Type “C” on the form but testified at trial that he had made

⁴ “Competent person” is defined 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.” 29 C.F.R. 1926.650(b).

a mistake⁵ and that the classification should have been Type "B." (Tr. 191). Mr. Meyer also testified that the soil sample he obtained for OSHA was taken from the spoils pile, and that he intended the sample to be representative of the soil in the trench. (Tr. 202).

Richard Hoppenjas

Richard Hoppenjas is the Chief Civil Engineer for Bowser-Morner, a geotechnical engineering and testing laboratory with locations in several states. (Tr. 205-206). He has been employed with them for thirty-two years. (Tr. 206). He holds a bachelor's and master's degree in civil engineering and is a registered civil engineer in five states. (Tr. 207). He is a member of several civil engineering organizations and has served as an expert witness in various cases for approximately twenty years. (Tr. 209-211). His primary responsibilities with Bowser-Morner are to identify soil materials based on field samples, prepare engineering reports, and to make recommendations to other engineers regarding projects like building foundations, dams, and roadways. (Tr. 208). The court accepted Mr. Hoppenjas as an expert in the area of geotechnical and soil engineering, including soil typing. (Tr. 231-234).

Mr. Hoppenjas is the civil engineer who prepared the pre-construction engineering reports for this project and determined that the soil in the area should be removed and replaced with 304 material prior to setting the foundation for the new sports arena. (Tr. 211-213). He described 304 material as blasted solid limestone rock which is crushed and screened into various sizes. (Tr. 215). It is re-mixed with large and small particles so that there is little void space when it is packed. (Tr. 215). The particles range in size from 1 inch to smaller particles that will pass through a No. 200 sieve. (Tr. 216). The requirement for this project was that the 304 material used to replace the original soil had to be

⁵ Mr. Meyer and Mr. Bostelman were disciplined by Respondent for the condition of the trench at the time of the inspection. Mr. Bostelmann's disciplinary action was later rescinded. Mr. Meyer's was maintained for misclassifying the soil type as Type "C" instead of Type "B." (Tr. 274; Ex. C-8 & C-9).

packed so that it was at least 95% dense. (Tr. 223, 227-228). The 304 material was installed in 8-10 inch layers, then compacted after each layer to ensure high density. (Tr. 220). Following his engineering recommendations, a third party contractor removed all of the soil at this site down to a depth of approximately 10 feet and replaced it with compacted 304 material. (Tr. 158, 212).

Three months prior to the OSHA inspection, Mr. Hoppenjas conducted testing of the 304 material at the location of this excavation to verify that the soil met the minimum 95% density requirement for this project. (Tr. 249-251; Ex. R-12 Tab B). He analyzed soil samples taken from multiple locations on multiple days. After the OSHA inspection and at Respondent's request, Mr. Hoppenjas reviewed his original density test results, information about 304 material, and the soil classification descriptions in the regulations. He then prepared an opinion of the soil type for the Respondent. (Tr. 230, 235). Based on the angularity of the soil particles, the density of the compacted 304 material, and most importantly the fact that 304 material is crushed limestone rock, he determined that the soil was Type "B." (Tr. 230, 235; Ex. R-12). He focused heavily on the fact that the definition section of Appendix A to Subpart P of 29 C.F.R. §1926 describes Type "B" soil as "angular gravel (similar to crushed rock)." (Tr. 235). Mr. Hoppenjas went further to analyze the "frictional angle of the soil" and concluded that a safe slope angle for the 304 material in this excavation would be 1 to 1 (45°). (Tr. 244). No one from OSHA made any determination of the frictional angle of the 304 material in the excavation. (Tr. 96-97).

He disagrees with OSHA's conclusion that the soil is Type "C" primarily on the basis that the single three-pound soil sample taken from the spoils pile lacks any evidence that it is a representative sample of the soil in the excavation. (Tr. 257). To obtain a true representative sample, he testified that the ASTM's (American Society for Testing and Materials) standard for this type of soil analysis is 100 pounds of soil. (Tr. 258).

George Moore

George Moore is Director of Risk Management and Safety Director for Respondent. (Tr. 270). He has worked for Mosser Construction for seventeen years. (Tr. 270). He testified that Respondent employs Safety Officers who visit Respondent's job sites at least once weekly. (Tr. 272-273). They visit Respondent's larger job sites multiple times each week. (Tr. 273). Respondent has implemented a progressive discipline policy when safety violations are discovered. (Tr. 275).

DISCUSSION

To establish a *prima facie* violation of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Citation 1 Item 1

The cited regulation provides:

§1926.651 Specific excavation requirements:

* * *

(k) Inspections

* * *

(2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

This standard mandates the action a designated competent person must take when he or she observes hazardous conditions in an excavation. The standard clearly applies to the cited condition. The record also establishes that four of Respondent's employees were working in the trench and exposed to the condition. I further find that knowledge of the condition of the excavation can be

imputed to the Respondent through the immediate presence and supervision of Superintendent Bostelman. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991).

The Secretary argues that Respondent violated this standard because “Mr. Bostelman failed to perform a manual test of the soil in the trench.” *Secretary’s Post-Hearing Brief*, p.16. Mr. Bostelman denies this allegation and testified to making visual observations of the soil as well as manual tests with shovels, the backhoe, and his finger. The record reveals that the parties seem to have focused their evidence and argument on the language of 29 C.F.R. 1926.651(k)(1) rather than the cited subparagraph: 651(k)(2). The standard cited by the Secretary in this instance does not set out any requirement for manual testing of the soil in the trench. Nor does the cited subparagraph address the methodology for a competent person inspection or the qualifications of the competent person. On the contrary, the subparagraph cited by the Secretary requires an evidentiary showing that Respondent’s designated competent person found evidence of a situation in the trench that could have resulted in a cave-in, failure of a protective system, or other hazardous condition yet failed to remove employees from the area until the condition could be remedied. The record is devoid of any such evidence.

Testimony presented by both parties focused on the qualifications of Mr. Bostelman to serve as a competent person and the type of testing he performed. The Secretary has failed to establish that Mr. Bostelman personally recognized a situation that could result in a cave-in, the failure of a protective system, or the existence of other hazardous conditions and then failed to remove employees from the area. Consequently, there has been no showing that the language of the cited standard was violated.

Citation 1 Item 2

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

The cited standard mandates minimum employee protection that should be implemented when working in excavations. The citation alleges that the Respondent did not implement one of the acceptable methods of employee protection. Therefore, the standard applies to the cited condition. As with Citation 1 Item 1 above, the record establishes that four of Respondent's employees were working in the trench and exposed to the violative condition. It also establishes that knowledge of the condition of the excavation can be properly imputed to the Respondent through the immediate presence and supervision of Superintendent Bostelman. *A.P. O'Horo Co., supra.*

The primary issue in dispute is the proper classification of the soil in the excavation at the time of the OSHA inspection. The Secretary's expert witness argues that the soil was Type "C" which prohibits the angle of an excavation wall to exceed 1½ vertical to 1 horizontal (34°). *Appendix B to Subpart P for 29 C.F.R. §1926, Table B-1.* Respondent's expert witness argues that the soil was Type "B" which prohibits the angle of an excavation wall to exceed 1 vertical to 1 horizontal (45°). *Id.* It is undisputed that the method of protection used by Respondent at this excavation was benching.

I find that the Secretary has not presented sufficient evidence to establish that the single soil sample obtained by Respondent's employee at the direction of the Compliance Officer fairly and accurately represented the soil type located at this excavation. Respondent's expert was not simply retained to conduct a post-inspection analysis of the soil. Rather, Mr. Hoppenjas was the chief engineer for the pre-construction phase of this project, analyzed the pre-existing soil at this location, recommended that the 304 material replace the existing soil based on building specifications, and

conducted compaction and density analyses of the 304 material after it was placed in the area. *He further explained that the 304 material in which this excavation was created is simply crushed limestone rock and characterized it as “highly angular.”* Appendix A to Subpart P of Part 1926 - Soil Classification⁶ lists examples of Type “B” soil as “angular gravel (similar to crushed rock).” Therefore, the preponderance of the evidence presented at trial supports the conclusion that the soil in the excavation was Type “B.”

However, with regard to whether Respondent violated the cited standard, it makes little difference whether the soil was Type “B” or Type “C.” The dimensions of Respondent’s excavation did not satisfy the maximum sloping or benching angles for either soil type. The vertical wall of the first and only bench was 4 feet 1 inches from the bottom of the trench. Therefore, to fully comply with the 1 to 1 slope angle for Type “B” soil, the horizontal surface of the bench should have been 4 feet 1 inch. It was not. It was 2 feet wide, and therefore, 2 feet 1 inch too narrow. The Secretary has established that Respondent violated the terms of the cited standard.

To prove that a violation of the Act was serious, the Secretary must establish that there was a substantial probability that death or serious physical harm could result if an accident were to occur. 29 U.S.C. §666(k). It is not necessary to prove that there was a substantial probability that an accident would actually occur. *Thomas Industrial Coatings, Inc.*, 21 BNA OSHC 2283, 2008 CCH OSHD ¶32,937 (No. 97-1073, 2007) *citing Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1991-1993 CCH OSHD ¶29,500 (No. 86-0351, 1991); *see also Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127 (6th Cir. 1978). Based on the facts that one end of the trench was considered by OSHA to be in compliance, that the height and width of the bench varied as depicted in the photographs, and that

⁶ Respondent cites to 54 Federal Register 45894 as support for its argument that compliance with Appendix A is “not required in every instance.” The language cited by Respondent refers to the fact that 29 C.F.R. §1926.652 affords an employer choices in acceptable excavation protective systems. When an employer chooses to use sloping or benching, compliance with Appendix A is mandatory.

Respondent made a substantial attempt to bench throughout the excavation, I am not convinced that the violation is properly characterized as serious. The bench in this excavation was four feet high and two feet wide at one particular point, instead of 4 feet high and 4 feet wide as required in this soil. If an accident had occurred in this six foot deep excavation as a result of this condition, there was not a substantial probability that death or serious physical harm could result. *Oklahoma Natural Gas Co.*, 16 BNA OSHC 1278, 1993 CCH OSHD ¶30,062 (No. 90-1330, 1993). I find that the Secretary has established an other-than-serious violation of 29 C.F.R. §1926.652(a)(1).

Section 17(j) of the Act requires the Commission to give “due consideration” to four criteria when assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. *29 U.S.C. §666(j)*. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). This was the first day the Respondent was performing excavation work at this location. Respondent's four employees had been working in the excavation for approximately two hours prior to the OSHA inspection. Although not in full dimensional compliance, the trench was benched throughout the length of the excavation. The Commission has held that partial compliance with a standard can serve to reduce a determination of actual probability of an accident, and accordingly, the appropriate penalty for a violation. *Del-Cook Lumber Co.*, 6 BNA OSHC 1362, 1978 CCH OSHD ¶22,544 (No. 16093, 1978); *Lawrence B. Wohl*, 17 BNA OSHC 1004 (No. 92-2109, 1994). Considering these factors, I assess a penalty of \$500.00 for this violation.

Affirmative Defenses

Respondent pled the affirmative defense of unpreventable employee misconduct in its *Answer*. However, Respondent did not argue the merits of the alleged defense in its brief, and it is therefore deemed abandoned.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1 Item 1 is VACATED;
2. Citation 1 Item 2 is AFFIRMED as an other-than-serious violation of 29 C.F.R. 1926.652(a)(1) and a penalty of five hundred dollars (\$500.00) is ASSESSED.

_____/s/_____
Date: February, 3 2009
Washington, D.C.
G. MARVIN BOBER
Administrative Law Judge
