

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.

Straight Ahead Construction, Inc.,
Respondent.

OSHRC Docket No. 12-0047

Appearances: Melanie L. Paul, Esq., U. S. Department of Labor, Office of the Solicitor
Atlanta, Georgia
For the Complainant

Vincent F. Vaccarella, Esq., and Starkey DeSoto, Esq.
Ft. Lauderdale, Florida
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Straight Ahead Construction, Inc. (Straight Ahead), performs roadwork construction, including the installation of underground utilities. On October 18, 2011, an Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) conducted an inspection of Straight Ahead's worksite at the intersection of NW 31st Street and NW 27th Avenue in Miami, Florida. As a result of OSHA's inspection, the Secretary issued a citation to Straight Ahead on November 11, 2011, alleging Straight Ahead committed violations of two OSHA construction standards.

Item 1 of the Citation alleges Straight Ahead committed a serious violation of 29 C. F. R. § 1926.651(h)(1), by permitting its employees to work in an excavation in which water had accumulated. Item 2 of the Citation alleges Straight Ahead committed a serious violation of 29 C. F. R. § 1926.652(a)(1), by failing to provide adequate protection from a cave-in for employees working in an excavation that was more than 5 feet deep. The Secretary proposed a penalty of \$4,200.00 for each item.

Straight Ahead timely contested the citation. This case was designated for Simplified Proceedings under Subpart M, § 2200.203(a), of the Commission Rules. The undersigned held a hearing in this matter on April 26, 2012, in Miami, Florida. Straight Ahead stipulated to jurisdiction and coverage (Tr. 10). The parties have filed post-hearing briefs.

Straight Ahead argues the Secretary failed to prove the alleged violations. Prior to the hearing, Straight Ahead raised the affirmative defense of greater hazard, but did not pursue that defense at the hearing or in its post-hearing brief. The undersigned deems the affirmative defense to be abandoned. At the hearing, the Secretary moved to amend the classification of the alleged violations from serious to willful. The undersigned denied the motion (Tr. 245). In her post-hearing brief, the Secretary renews that motion, which the undersigned again denies.

For the reasons discussed below, the undersigned finds the Secretary failed to prove Straight Ahead violated the cited standards. Items 1 and 2 of the Citation are vacated, and no penalties are assessed.

Background

Straight Ahead is a construction company specializing in roadwork. Owner Michael MacDonell started the company in 2006. Prior to forming his own company, MacDonnell had worked for almost 20 years for The DeMoya Group, a large highway construction company in south Florida, where he was a project superintendent. MacDonell was a designated competent person for The DeMoya Group (Tr. 16-18, 20).

At the time of the inspection, Straight Ahead employed approximately ten employees. Straight Ahead did not own a trench box, but rented one when it believed one was required (Tr. 17, 23).

In October of 2011, Straight Ahead took on the small project of installing new drainage structures on an existing pipe located at the intersection of NW 27th Avenue and NW 31st Street in Miami, Florida (Tr. 38). In order to install the structures, Straight Ahead dug an excavation in the street. The length of the excavation ran in the north/south direction. Straight Ahead's crew began work on the excavation at approximately 7:30 the morning of October 18, 2011. Rain fell intermittently during the day. MacDonell was on the site, as were two foremen, leadman Kellin Stuhlmiller, and three laborers (Tr. 32, 36-37, 54). MacDonell was the designated competent person that day (Tr. 38).

At the hearing, MacDonell estimated the excavation was 28 to 30 feet long, 10 feet wide, and 4 to 5 feet deep (Tr. 42). He acknowledged the excavation was deeper than 5 feet at the areas where Straight Ahead set the concrete drainage boxes. MacDonell stated that employees did not enter the excavation to set the drainage boxes: “The employees don’t set the structures. They weigh tens of thousands of pounds. Those are set with machinery” (Tr. 43). The walls of the excavation were vertical (Tr. 72).

At approximately 9:30 a.m., Lieutenant Frank Mainade arrived at the worksite. Lieutenant Mainade is a firefighter/paramedic with the Miami Fire Rescue Department (Tr. 62). A fellow firefighter had requested Lieutenant Mainade visit Straight Ahead’s worksite due to his concerns regarding the safety of the worksite conditions (Tr. 69). When Lieutenant Mainade arrived at the site, Straight Ahead’s employees were working in the excavation. He observed water in the excavation. Lieutenant Mainade saw that the excavation was not shored or sloped, and did not contain any form of cave-in protection. He stated, “[T]he depth was difficult to determine because of the fact that there was anywhere between a foot and a half to two feet of water within the trench. It could have been seven feet; it could have been eight feet” (Tr. 70). Lieutenant Mainade did not take measurements of the excavation (Tr. 78). Later in his testimony, Lieutenant Mainade stated that the water came up to “somewhere between the knee and his foot” of one of the employees he observed in the excavation” (Tr. 81). Lieutenant Mainade made these observations from outside the worksite; he did not cross the caution tape Straight Ahead had placed around the construction site (Tr. 220).

Lieutenant Mainade observed two employees working in the excavation. He testified the northern wall of the excavation was above the head of one of the employees he observed (Tr. 71). He concluded the excavation was in Type C soil because, “We treat everything down here as Class C soil” (Tr. 72). He spoke with MacDonell, who disagreed with Lieutenant Mainade’s assessment (Tr. 41, 71-74). Lieutenant Mainade left the site and called the local OSHA office to report the worksite (Tr. 75).

In response to Lieutenant Mainade’s telephone call, the CSHO arrived at the worksite at approximately 1:30 p.m. Straight Ahead was in the process of backfilling the excavation, moving from south to north. The CSHO testified he observed an employee (whom he later learned was Kellin Stuhlmiller) in the northern part of the excavation (Tr. 94-95). He estimated he was 30 feet from the Stuhlmiller when he observed him in the excavation (Tr. 128).

The CSHO described the excavation:

[T]he trench was the width of the street. The south end was being backfilled. That was approximately 4 feet deep at the time of my arrival. The area that Kellin was in we measured it with a ladder, and it came out to be 7 feet deep. Where Kellin was standing was approximately 6 feet deep, so that it sloped down to the collection box area. . . . The asphalt was a little bit higher than his helmet. So, that made it a couple of inches above him, and he's about the same height as I am [5 feet, 10 inches]. So, I'm saying 6 feet.

(Tr. 95).

The CSHO explained his method of measuring the excavation with the ladder. He assumed the rungs of the ladder were 12 inches apart. He counted five rungs from the water line to the top of the asphalt. He then asked Stuhlmiller to pull the ladder out of the water, and saw that two rungs had been submerged. From this he extrapolated that the northern excavation wall was 7 feet (Tr. 96).

The CSHO took photographs of the site (Exhs. C-3A through C-3E). He testified he was unable to photograph employees working in the deepest part of the excavation because the lens of the camera fogged up (Exhibit C-3A was taken with a fogged lens) (Tr. 101). At the hearing, the CSHO marked with an "X" on Exhibit C-3D the location where he stated he observed Stuhlmiller in the excavation. The X is near the northeast part of the excavation, on dry ground between the water surrounding the concrete structure and the northern wall. Three employees can be seen in the background, next to the southern wall, which appears to come to approximately waist level on them.

The CSHO held an opening conference with MacDonell. He testified MacDonell told him the excavation was 50¹ feet long, 6 feet wide, and 7 feet deep (Tr. 103). He asked MacDonell about soil testing. MacDonell handed the CSHO two soil reports issued by the Florida Department of Transportation (FDOT), for a soil sample that had been taken on September 27, 2011 (Tr. 44-45, 110).

The CSHO was concerned about the water in the excavation. Straight Ahead had a water pump on site. The CSHO asked MacDonell to send employees into the excavation to use the pump to dewater it. The CSHO took the photograph shown at Exhibit C-3D to document Straight Ahead's abatement of the perceived water accumulation hazard. Three Straight Ahead

¹ The transcript states the excavation was "five foot in length" (Tr. 105). Either the CSHO misspoke or his testimony was incorrectly transcribed. The context makes it clear "50 feet" is the measurement the CSHO intended.

employees can be seen in the excavation across from where the CSHO marked the X showing where he observed Stuhlmiller (Tr. 111). The CSHO testified it took Straight Ahead's employees 30 to 45 minutes to dewater the excavation (Tr. 144).

The CSHO stated, "I wasn't worried too much about the cave-in protection at that point. What I was worried about was the water in the excavation because I knew that could lead to a cave-in. I asked Mr. MacDonell if they could dewater it. If you look at Photograph C-3[D], that was to prove that they complied with what I asked them to do" (Tr. 111). The CSHO took no measurements of the excavation. The CSHO held a closing conference with MacDonell. He told MacDonell OSHA would likely cite Straight Ahead for the water accumulation in the excavation. At that time, the CSHO did not intend to recommend a citation for failure to provide cave-in protection because he "felt pretty comfortable" that the excavation walls were stable (Tr. 137). The CSHO then left the site at approximately 3:10 p.m. (Tr. 53, 224).

Straight Ahead finished backfilling the excavation. MacDonell was upset that Lieutenant Mainade had contacted OSHA. He went to a local firehouse looking for Lieutenant Mainade. Lieutenant Mainade was not there, but a firefighter directed MacDonell to a second firehouse, where MacDonell found Lieutenant Mainade. MacDonell expressed his displeasure to Lieutenant Mainade, who told MacDonell that he was not targeting him personally, but was concerned about the safety of the employees at the worksite (Tr. 53, 76).

When the CSHO returned to the OSHA office, he reviewed the inspection with his supervisor, who asked him if he had taken a soil sample. When the CSHO responded that he had not, his supervisor instructed him to return to the site and obtain one. The CSHO waited until the following day. Straight Ahead's crew was not working that day, due to heavy rain. The CSHO took a soil sample from the spoil pile located on the east side of where the excavation had been dug (Tr. 114-115). He sent the sample to OSHA's laboratory at its Salt Lake City Technical Center in Utah (Tr. 116). OSHA's Technical Center classified the soil sample as Type C soil (Exh. C-4; Tr. 165). Upon receipt of the lab's results, the CSHO called MacDonell and told him to expect to be cited for failing to provide cave-in protection. MacDonell disagreed with the lab's analysis, and told the CSHO that the excavation had been dug in stable rock (Tr. 116).

On November 10, 2011, the Secretary issued the instant Citation.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard.

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) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.651(h)(1)

Item 1 of the Citation alleges that on or about October 18, 2011, employees of Straight Ahead “were working in an excavation repositioning street drains while there was approximately two feet of water in it.”

Section 1926.651(h)(1) provides:

Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

Both Lieutenant Mainade and the CSHO testified they observed accumulated water in the excavation. Straight Ahead argues the amount of water in the excavation was minimal and did not pose a hazard to employees, and that it was in the process of controlling the level of the water when the CSHO arrived at the site.

(1) Applicability of the Cited Standard

In its post-hearing brief, Straight Ahead argues that § 1926.651(h)(1) does not apply to its worksite because the level of water accumulated in the trench did not pose a hazard to its employees. This argument goes more to the element of compliance with the terms of the standard, and will be addressed in the next section.

Section 1926.651(h)(1) appears in “Subpart P—Excavations” of the 1926 Construction Standards. Section 1926.650(a) provides that Subpart P “applies to all open excavations made in the earth’s surface. Excavations are defined to include trenches.”

It is undisputed that Straight Ahead dug an excavation at the intersection of NW 31st Street and NW 27th Avenue in Miami, Florida, on October 18, 2011. Exhibits C-3A through C-3E are copies of photographs taken by the CSHO at the site. They show an excavation in which

water is accumulated in one area. The Secretary has established § 1926.651(h)(1) applies to Straight Ahead's worksite on October 18, 2011.

(2) Compliance with the Terms of the Cited Standard

The Secretary cannot establish a violation of § 1926.651(h)(1) by proving water was merely present in the excavation; she must prove the accumulated water posed a hazard to employees. Lieutenant Mainade estimated the level of water in the excavation to be "anywhere between a foot and a half to two feet" (Tr. 70). He based this estimate on the fact that he could not see the employees' feet as they stood in the water (Tr. 81). The CSHO estimated the level of water to be 2 feet, because two rungs of the ladder he observed leaning against the wall of the excavation were submerged (Tr. 96). He did not measure the angle of the ladder in the excavation (Tr. 151-152; 239). MacDonell estimated the water accumulated in the excavation amounted to "a few inches" (Tr. 42).

No one on the site used a calibrated measuring instrument to accurately determine the depth of the accumulated water. The photographs entered as Exhibit C-3A through E show that there is water visible in the excavation. Beyond that, it is not possible to estimate with any accuracy the depth of the water.

In order to comply with the requirements of the standard, the employer must take "adequate precautions" to "protect employees against the hazards posed by water accumulation." The cited standard does not prescribe the use of specific precautions, recognizing that such hazards are situational and the "precautions necessary to protect employees adequately vary."

Frank Alexander is a foreman for Straight Ahead. He was at the worksite at issue on October 18, 2011, operating the excavator (Tr. 194). Alexander testified he was aware of the water that had accumulated in the excavation. It had been raining all day. He explained that the water level was at its maximum height when the CSHO took the photographs entered as Exhibit C-3A through E because Straight Ahead had begun the process of backfilling. In order to keep the backfill material dry, the excavator operator "charges" the water towards the inlet box, where it will drain (the inlet box is the square concrete structure visible in Exhs. C-3B, C-3C, C-3D, and C-3E). No employees were in the area of the excavation where Alexander was charging the water (Tr. 202).

MacDonell corroborated Alexander's testimony. He explained Straight Ahead's approach to handling the water accumulation:

The amount of water in the bottom of the excavation during the time before backfill was minimal on the bottom, but in starting at the south end of the excavation and adding the material, and we were literally charging the material to go into the inlet box on the other side. So, in charging, you can see that the water level is rising. It would have eventually risen enough to go directly into the box without pumping, which was our original intent, but when [the CSHO] showed up, things changed. We tried to be accommodating and abate like he asked. We did it with a pump rather than just charging the material in.

(Tr. 225).

MacDonell elaborated on his testimony later: “[E]ven if it’s wet material, in placing it, you’ve got to place it properly and charge the water forward to try and keep any pockets of water from accumulating inside it so we can more quickly do the next steps of backfill and restoration” (Tr. 227). The CSHO testified that Straight Ahead was engaged in backfilling the excavation when he arrived at the site. He verified that the water accumulation was at the north end of the excavation, the direction in which Straight Ahead was charging the water (Tr. 96).

The undersigned determines the Secretary failed to establish Straight Ahead was not in compliance with the terms of § 1926.651(h)(1), for two reasons. First, the Secretary did not show the accumulated water in the excavation posed a hazard to employees. The Secretary did not adduce an accurate estimate of the depth of the water. Lieutenant Mainade was standing outside the construction site, observing the excavation from an unspecified distance. He stated the water was at a level somewhere between the employees’ knees and their feet, an inexact measurement. The CSHO estimated the water was 2 feet deep, based on the ladder he observed leaning at an angle in the excavation. This estimate lacks reliability. The Secretary failed to show the presence of water in the excavation posed a hazard to the employees. Lieutenant Mainade testified generally as to the effect the presence of water has on the stability of an excavation, but the Secretary made no showing that the undetermined amount of water present here posed a hazard.

Secondly, the Secretary does not dispute Straight Ahead’s contention that it was in the process of removing the water from the excavation when the CSHO arrived at the site. The testimony of Alexander and MacDonell, explaining that Straight Ahead was charging the water towards the inlet box where it would drain, is uncontested. The Secretary’s counsel did not question either witness regarding the charging process and she did not address the issue in her post-hearing brief. Rather than violating the terms of the cited standard at the time of the

inspection, it appears that Straight Ahead was in the process of taking adequate precautions to prevent any hazard posed by accumulated water when the CSHO arrived.

The Secretary has failed to establish Straight Ahead violated the terms of § 1926.651(h)(1). Item 1 of the Citation is vacated.

Item 2: Alleged Serious Violation of 29 C. F. R. § 1926.652(a)(1)

Item 2 of the Citation alleges:

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

On or about 10/18/2011, at NW 27 Avenue at the corner of NW 31 Street, Miami, FL; employees were working in an excavation repositioning street drains without cave-in protection in place.

Section 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) 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.

Section 1926.652(b)(1)(i) provides in pertinent part:

Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal)[.]

Applicability of Cited Standard

Straight Ahead argues § 1926.652(a)(1) does not apply to the conditions existing at its worksite on October 18, 2011. Straight Ahead claims its excavation at the site met both of the exceptions found in § 1926.652(a)(1)(i) and (ii), because the excavation was (i) made entirely in stable rock; and (ii) was less than 5 feet in depth and its competent person determined there was no indication of a potential cave-in.

As the party seeking the benefit of an exception to a legal requirement, Straight Ahead has the burden of proof to show that it qualifies for the exception. *A.E.Y Enterprises*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006) (the Commission remanded the case to the ALJ, stating,

“When determining whether AEY meets the exception to § 1926.652(a)(1), the judge shall place on AEY the burden of proving that (1) the excavation was less than 5 feet, and (2) an examination of the ground by a competent person provided no indication of a potential cave-in.”).

Stable Rock Exception

Appendix A of 1926 Subpart P defines stable rock as “natural solid mineral matter that can be excavated with vertical sides and remain intact while exposed.” Straight Ahead contends that was the condition of the material it excavated at its worksite on October 18, 2011. Foreman Alexander testified he needed to use a special rock bucket with teeth on his excavator in order to dig out the excavation. He stated, “It took above and beyond what it normally does to excavate the trench. The material was very hard, more so than normal excavations in my experience” (Tr. 195). Alexander asserted he was digging through “hard rock material. I don’t know how else to describe it. It was some of the hardest rock I’ve ever dug” (Tr. 210). The CSHO agreed that the vertical walls of the excavation appeared stable to him (Tr. 137).

Science, however, tells a different story. Steven Anderson works as an analytical chemist specializing in soils and explosive dust at OSHA’s Technical Center in Salt Lake City (Tr. 154). He was qualified at the hearing as an expert in soil analysis (Tr. 158). Anderson analyzed the soil sample sent to him by the CSHO. He testified he classified the soil sample as Type C, stating that the material had no plasticity and lacked cohesion (Exh. C-4; Tr. 158-163). Anderson stated he classified the soil as Type C because of water seepage in the sample. Had there been no water in the sample, he would have classified the soil as Type B, but only one percentage point away from being Type C due to its sand and gravel composition (Tr. 165).

Straight Ahead called Mayur Patel as a witness. Patel works as a District Materials Engineer for the FDOT (Tr. 181). Patel testified the FDOT classifies the soil in the area of Straight Ahead’s worksite as “S” for “select,” (a classification not recognized by OSHA) which indicates the soil is considered favorable for highway construction (Tr. 185). Patel stated, “Select soil is considered a good soil for construction of the highways, and it supports the roadway better” (Tr. 185). Straight Ahead elicited this testimony in order to support its contention that the excavation was dug in stable rock.

Patel undercut Straight Ahead’s argument, however, when he testified that the select soil taken from the area of Straight Ahead’s worksite “is a mixture of sand and lime rock” (Tr. 188).

He stated the soil sample was nonplastic, meaning it did not hold together well (Tr. 188). Patel testified, “Select soils are typically sand material. It could be beach sand or larger stones with it. Sometimes it is finer sand also” (Tr. 190). Patel clarified that the FDOT prefers select soil because it is best for drainage (Tr. 191).

Steven Anderson, an analytical chemist who is an expert in soil analysis, and Mayur Patel, a materials engineer for the FDOT, agree that the soil in the area of Straight Ahead’s worksite was sandy and lacked cohesion. The undersigned determines Straight Ahead has failed to establish the excavation at issue was dug in stable rock.

Excavation Less Than 5 Feet Deep Exception

No one involved in this proceeding took measurements of the excavation at issue. This includes the CSHO, who was assigned to inspect the excavation after his office received the referral from Lieutenant Mainade. Because no measurements were made, the undersigned must determine whether Straight Ahead established the excavation was less than 5 feet in depth in the area where the employees were working, based on the credibility of the witnesses and an examination of the photographic exhibits.

Lieutenant Mainade estimated the excavation was 7 to 8 feet deep. He never entered the construction site, but observed the excavation from outside the posted caution tape at some undetermined distance. Lieutenant Mainade acknowledged it was difficult to determine the depth of the excavation from where he was (Tr. 70). He could not state whether the excavation was deeper than it was wide (Tr. 78).

Lieutenant Mainade’s recollection of the events relating to the instant case appears to be confused. When asked why he went to Straight Ahead’s worksite, Lieutenant Mainade responded, “It was referred to me by another firefighter on duty. . . . The referral was a request to drive by the site to look at it because they felt that there was an unsafe work environment” (Tr. 69). On cross-examination, Lieutenant Mainade stated the firefighter “referred me from the duty day prior, driving by, when I wasn’t on duty” (Tr. 78). When asked if he was aware that Straight Ahead had not been on the site the day before the inspection, and that it had only started work on the site that morning, Lieutenant Mainade responded, “I’m not aware of that, no” (Tr. 79). He also stated that MacDonell confronted him at the firehouse “[s]ometime early afternoon, maybe at noon, maybe a little after that” (Tr. 77). The record establishes, however, that the CSHO was

inspecting Straight Ahead's worksite from approximately 1:30 p.m. to 3:10 p.m., and MacDonell was on site during that time.

Lieutenant Mainade appeared to be a sincere witness who was attempting to perform a civic duty in referring Straight Ahead's worksite to OSHA. The circumstances of his observation of the worksite, however, compromised the accuracy of his testimony. Lieutenant Mainade made his observation from outside of the worksite. He conceded it was difficult to determine measurements from his vantage point. Lieutenant Mainade also confused the timing of events relating to the day of the inspection. The undersigned determines that Lieutenant Mainade's estimate of the depth of the excavation is unreliable and it is given no weight.

The CSHO's testimony is also unreliable. Although he stated at the hearing that he estimated the northern wall of the excavation was 7 feet deep based on the ladder leaning against the wall, the CSHO initially did not intend to recommend a citation for inadequate trench protection. He was concerned only with the accumulated water in the excavation.

The CSHO's claim that he observed Kellin Stuhlmiller standing at an area of the excavation that was 6 feet deep is rejected. The CSHO did not photograph Stuhlmiller standing in the purported 6 foot deep area, nor were any other employees photographed there. The CSHO marked an X on Exhibit C-3D showing the spot where he observed Stuhlmiller standing as he approached the site. MacDonell questioned the accuracy of the CSHO's estimate. While looking at Exhibit C-3D, MacDonell testified:

I was just confused by the fact of where he said that Kellin was standing and had clear trench over his head and not being in the water at the same time. I personally don't know how that could happen. . . Let's look at C-3A which is the little bit cloudy one. That is, as I understand it, the picture that was taken as he first walked up right after getting out of his car. You can see at the bottom, left corner the top of the structure, and you can see the water next to it, and I'm going to guesstimate that the box is sticking up maybe 6 inches higher than the water.

In using that, if you go back to the picture C-3E and you see the gentleman standing there, there's water, and his feet are roughly at or maybe a little bit below the top of that structure, and he's obviously waist deep in that hole. If you have a look at C-3D where the X is placed, that material is dry to the water and appears to be roughly at the same elevation of the top of the structure. I just don't know how you can be there, be dry and be 7 feet down.

(Tr. 221-222).

The undersigned shares MacDonell's confusion. I have examined Exhibit C-3D at length, and cannot see how the area marked with an X could be 6 feet below the asphalt that is at the top of the excavation. Three employees are visible standing next to the south wall of the excavation. The south wall appears to be at approximately waist height on the three men. The area marked X is higher than central part of the excavation, where the drainage box is located, because it is dry while the surrounding area is wet. In all of the photographs, it appears that the walls of the excavation, in relation to the employees visible in the excavations, are less than 5 feet deep. The undersigned understands that the angle at which a photograph is taken can create a misleading image, and that forced perspective may distort the scale of objects. Absent actual measurements, however, the photographs present the clearest evidence of the condition of the excavation. The CSHO took the photographs. He had control over the placement of the camera. Based on the photographs, Exhibits C-3A through C-3E, the undersigned determines the excavation was less than 5 feet deep.

The CSHO's conduct at the inspection supports this determination. He requested Straight Ahead dewater the excavation while he was there. The three employees shown in Exhibit C-3D entered the excavation, in the CSHO's presence and at his request, to pump out the accumulated water. The CSHO testified he took the photograph to document Straight Ahead's abatement of the perceived water accumulation hazard. The three employees are within a few feet of the area that the CSHO marked as deeper than 5 feet.

It is not likely that an OSHA CSHO would ask employees to enter an excavation that he believed to be deeper than 5 feet without cave-in protection. The most plausible explanation is that he believed the excavation was less than 5 feet deep and in a safe condition. This would also explain why he did not feel it necessary to take measurements of the excavation. It was only after the CSHO conferred with his supervisor and was told to return to the site and take a spoil sample that he began to second-guess himself. Straight Ahead has established by a preponderance of the evidence that the excavation was less than 5 feet deep in the areas where employees were required to work.

Straight Ahead must also establish a competent person examined the ground and found no indication of a potential cave-in. MacDonell was Straight Ahead's competent person. The Secretary acknowledges MacDonell is a competent person in her post-hearing brief (Secretary's brief, p. 19). MacDonell testified he made a visual examination of the ground and determined

