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SECRETARY OF LABOR, Complainant, v. BROSHEAR CONTRACTORS, INC., Respondent.	OSHRC Docket No. 91-2125

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue in this case are (1) whether the Secretary's inspection of Broshear's worksite violated the Fourth Amendment and, if not, (2) whether Broshear Contractors, Inc., committed serious violations of two excavation standards: one requiring employers to provide a "safe means of egress" from a trench under section 1926.651(c)(2) and the other requiring employees to install an adequate protective system against collapse under 29 C.F.R. § 1926.652(a)(1). For the following reasons, we affirm Administrative Law Judge Paul L. Brady's decision affirming both alleged items and reject Broshear's argument under the Fourth Amendment.[1]

On June 5, 1991, Occupational Safety and Health Administration ("OSHA") Compliance officer James Denton inspected Broshear's worksite in southern Ohio. Broshear

[1]In its brief to the Commission, Respondent also addresses an item that was not directed for review. Ordinarily, under Commission Rule 92(a), 29 C.F.R. § 2200.92(a), the Commission does not decide issues that were not directed for review. We find no reason to depart from that policy here.

had excavated a trench in order to place pipe running north/south connecting a new development to the existing water line which ran east/west along Princeton Road. The trench, deepest at the south end abutting Princeton Road where the tie-in with the main water line was located, was about 8 feet deep by 14 feet wide. As found below under the trench protection issue, the south-end wall was completely unsloped, *i.e.*, vertical, and also not shored, shielded or otherwise protected. The full length of the trench was approximately 37 feet and the north end was about 6 feet deep, building up to a dirt ramp out of the trench.

Validity of Inspection

As a preliminary matter, Broshear claims that consent to conduct the inspection was improperly obtained and that the search violated its rights under the Fourth Amendment. However, the Fourth Amendment only protects against intrusions into areas where an employer has a reasonable expectation of privacy. *Tri-State Steel Constr., Inc.*, 15 BNA OSHC 1903, 1909-10, 1991-1993 CCH OSHD ¶ 29,852, p. 40,733-34 (No. 89-2611, 1992)(consolidated), *aff'd on other grounds*, 26 F.3d 173 (D.C. Cir. 1994). Here, the compliance officer noticed the open trench while driving along Princeton Road toward another construction site. He saw the trench, and the respondent's employees in it, from a place he was legally justified in being, a public road not blocked off or otherwise off limits to the public. Under the "open fields" exception to the Fourth Amendment, there is no reasonable expectation of privacy when activities are conducted out of doors and not closed off to the public. *Id.* We therefore conclude that there is no basis for Broshear's claim that an unlawful search took place.

In light of our disposition of the consent issue, we need not reach or resolve Broshear's contention that the compliance officer misrepresented to foreman Alan Lakes that there were "no problems" with the trench, thereby dissuading Lakes from calling Broshear's safety officer, Gerald Broshear, in accordance with company policy.[2] Lakes

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[2]The compliance officer testified that he never told the foreman that it was not necessary to contact his home office concerning the inspection because what he observed was "minor," nor did he assure him that the investigation would be over quickly. He did inform the (continued...)

backfilled the trench later that day without having spoken to Mr. Broshear, who was not informed about the inspection until the next day.

Safe Egress Issue

The Secretary alleges that Broshear failed to provide a "safe means of egress" in accordance with section 1926.651(c)(2)[3] because employees working at the south end of the 37-foot-long trench had to travel more than 25 feet to the earthen ramp at the north end of the trench to exit safely. Compliance officer Denton testified that the ramp at the north end was the only safe way to exit the trench that he observed. Foreman Lakes and two Broshear employees testified, however, that they had entered and exited the trench at the south end. The record indicates that there may have been a space between the sewer pipe and the bank directly beneath the edge of the road at the south end through which an employee could climb. While the angle at which the photograph of the south end is taken shows a sewer pipe, it appears that an employee could not use the pipe to exit without great effort, perhaps having to pull himself or herself up and out of the trench. Based apparently upon this difficulty in egress, the judge found that "[t]here is no indication in the record that there was any other *safe* means of egress from the excavation except the ramp on the north end" (emphasis added).

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[2](...continued)
foreman that he would not wait very long for someone to come out to the site. While this issue need not be decided here, Commissioner Foulke would note his concern over the allegation. He believes that no compliance officer or OSHA official should make any statements or comments which may be construed to suggest, recommend or encourage an employer to waive or not to utilize any rights which the Act gives to employers.

[3]That standard provides:

> **§ 1926.651 General requirements.**
>
> . . . .
>
> (c) *Access and egress* . . . .
>
> . . . .
>
> (2) *Means of egress from trench excavations.* A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

We find that the compliance officer's testimony, bolstered to some extent by the photograph, establishes that Broshear failed to comply with the terms of the standard. Particularly since, as found below, the south wall of the trench was not properly sloped or otherwise protected, we find that the preponderance of the evidence does not support a finding that employees could safely exit the south end of the trench "using" the sewer pipe that jutted out from the trench wall near the south wall of the trench. We therefore agree with the judge and find that Broshear failed to comply with section 1926.651(c)(2).[4]

Trench Protection Issue

The other alleged violation involved the excavation standard at 29 C.F.R. § 1926.652(a)(1).[5] The compliance officer testified that based on his observations and use of an engineering rod, the 8-foot-high, 14-foot-wide wall at the south end of the trench was not sloped ½ to 1 as required by the standard, but was vertical, and was unshielded. He

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[4]The remainder of the Secretary's prima facie case of violation was established and is not in issue. *See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981)(Secretary must establish applicability of cited standard, existence of violative condition, employee exposure thereto, and employer knowledge thereof), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

[5]That section 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 . . . .

Broshear was charged with failure to comply with paragraph (b)(1)(i) which provides:

> (b) *Design of sloping and benching systems* . . . .
> . . . .
> (1) *Option (1)--Allowable configurations and slopes.* (i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical . . . unless the employer uses one of the other options listed below.

The other options include determination of slopes using appendices in the standard, using tabulated data, using a registered professional engineer, or using shoring and shield systems.

further testified that "there was really no room for them to slope out toward Princeton Road, so that wall wasn't able to be sloped." The compliance officer's testimony constitutes prima facie evidence of a violation.

In rebuttal, Broshear relied on the testimony of foreman Lakes, the only other witness testifying on this issue who was at the site at the time of the inspection, and on expert testimony accompanied by a report that resulted from its later re-excavation of the trench. Lakes testified that to the best of his knowledge, the south wall of the trench was sloped "to the best safety."[6] However, he admitted that he did not measure the slope. When asked whether he did any shoring, he replied, "Not with the slopes that we had."

Broshear's expert witnesses testified that the re-excavation was a valid re-creation and proved that the original wall was sloped at a ratio of ½ to 1. The judge, however, found that the measurements and soil testing at the re-excavation were "not sufficient to overcome the prima facie violation as shown by the Secretary's evidence." He noted that neither Mr. Broshear, the safety officer, nor Francis Krieger, the geotechnical engineer responsible for producing the Westinghouse report, was present at the original excavation, and that no one who *was* present at the original excavation saw the re-excavation.[7] The judge found that "[t]he issue . . . relates to sloping of the trench at the time of the initial inspection." Unconvinced that the re-excavated trench wall was an accurate re-creation of the original wall, he found that "there was no evidence to refute Denton's testimony that the wall was not sloped, as he had determined by placing his 'engineering rod straight down along the wall.'"

We concur with the judge's findings. The Commission has in the past accepted testimony regarding re-excavations in trenching cases, but only with respect to soil type, not slope measurements. *See, e.g., Concrete Construction*, 15 BNA OSHC 1614, 1620, 1991-93 CCH OSHD 29,681, p. 40,243-44 (No. 89-2019, 1992)(employer re-excavated a few days

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[6]The long east- and west-side walls of the trench were adequately sloped. It is the south-end wall that is at issue.

[7]The Secretary was never notified of the re-excavation, and Broshear did not introduce its foreman or any employees who were at the original site to testify that they had been summoned to the re-excavation and could attest to the fact that locations of the trench wall were identical.

after the inspection to distinguish old backfill from new); *Trumid Constr. Co.*, 14 BNA OSHC 1784, 1787, 1987-90 CCH OSHD ¶ 29,078, p. 38,858 (No. 86-1139, 1990) (OSHA relied on a soil map and visit to site one year after accident because employer failed to report fatality). In allowing both employers and the Secretary to retrieve information from a backfilled trench, however, the Commission has taken the following criteria into account in determining how much weight, if any, should be extended to evidence collected at a re-excavation: (1) whether the location of the re-excavated trench is identical or substantially the same as the location of the original trench, (2) whether the length of time between the original excavation and the re-excavation is such that physical conditions may have changed, and (3) whether anyone can testify based on personal knowledge that the re-excavation is a reasonable re-creation of the original excavation.

While we reserve judgment on whether a party may prove the dimensions of a trench and the sloping of its walls by re-excavation, Broshear clearly did not achieve that here. Mr. Broshear testified that the re-excavation was not done at precisely the same spot as the original excavation. This is borne out by two photographs of the re-excavation. Based on the location of Princeton Road in one photograph, the exposed wall is not in exactly the same place as in the original excavation. Moreover, the failure of the re-excavation to uncover a valve shown in photographs of the original excavation strongly suggests that the re-excavation was not as deep as the earlier one. The Secretary's expert, Cannon, who testified only on the basis of having reviewed the photographs, stated that "there is something wrong somewhere," in reference to the location of the pipes and valves showing in the photographs. "It leads me to wonder if they actually had the same location." Also, Broshear's expert, Krieger, admitted that his findings were "valid for the conditions that [he] determined that day," meaning the day of the re-excavation.

Based on this testimony, our comparison of the photographic exhibits showing the original and the re-excavated trenches, and the absence at the re-excavation of anyone who had witnessed the inspection of the original site, we find that Broshear's re-excavation evidence was equivocal at best. Aside from the re-excavation evidence, the only evidence from the time and place of the inspection to rebut the Secretary's prima facie case is the foreman's insistence that the wall was sloped enough to be safe. That testimony is

insufficient to rebut the compliance officer's testimony that the south wall of the trench was not sloped ½ to 1 as required.

We therefore conclude that Broshear failed to comply with section 1926.651(a)(1).[8]

Penalty

The Secretary proposed a penalty of $2500 for the safe egress violation. For the sloping violation, which he initially characterized as willful, he proposed a penalty of $17,500. The only testimony from the compliance officer on the derivation of the penalty proposals was that "size, good faith, and history of the company were considered in coming to those penalties that you see there." The judge assessed a $1000 penalty for the safe egress violation and a $5000 penalty for the sloping violation, which he recharacterized as serious. Neither party addressed the judge's assessments on review. The company employed five employees at the site. In light of the slight probability of an accident but high seriousness of any injuries in the event of one, we find the gravity of this 8-foot-deep trench violation to be moderate. Giving due consideration to the factors in section 17(j) of the Act, 29 U.S.C. § 666(j), we see no reason to disturb the judge's assessed penalties.

ORDER

Accordingly, we affirm the judge's decision and assess a total penalty of $6000.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: November 1, 1994

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[8]*See* note 4 *supra*.

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-2125
BROSHEAR CONTRACTORS, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on November 1, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

November 1, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-2125

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
BROSHEAR CONTRACTORS, INC.
Respondent.

OSHRC DOCKET
NO. 91-2125

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 4, 1993. The decision of the Judge will become a final order of the Commission on July 6, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before June 24, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: June 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2125

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SECRETARY OF LABOR, Complainant, v. BROSHEAR CONTRACTORS, INC., Respondent.	OSHRC Docket No. 91-2125

Appearances:

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For Complainant

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

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to § 10 of the Occupational Safety and Health Act of 1970 (Act) to contest two citations and proposed penalties issued by the Secretary of Labor (Secretary) pursuant to § 9(a) of the Act.

Following an initial hearing, the record was reopened pursuant to a remand order of the Occupational Safety and Health Review Commission. The purpose of the remand was

to allow Broshear Contractors, Inc.'s (Broshear), expert to testify fully about a re-excavated trench and to admit into evidence the expert's report.

The basic facts are not in dispute that Mr. James Denton, Compliance Officer, conducted an inspection of Broshear's worksite on Princeton Road in Mora, Ohio. Broshear was engaged in the excavation of the trench to place pipe for completion of a water line.

Broshear argues that the inspection was not conducted in compliance with basic due process requirements. It is asserted that the compliance officer misled the company foreman in order to conduct the inspection, resulting in the company's inability to defend against the citations.

Broshear contends the foreman initially requested permission to contact his office, but was assured that there were no problems with the excavation, and there was no need to have the company safety officer present. Denton admitted that the foreman mentioned he thought he should contact someone in his home office (Tr. 55). Mr. Alan Lakes, the foreman, testified, however, that Denton told him it was not necessary for the safety director to be present. Lakes said he then stated, "Well, he does like to be here on these occasions, when these problems do come up." Further, "I asked him several times that there would [be] no problem in my boss coming because he does like that, so, and he acted like there was no problem at all" (Tr. 55, 119-120). Although Lakes had been instructed that "no matter what the problem, whatever, my boss wanted to be there," he did not summon any company official during the inspection (Tr. 153).

In order to show that voluntary consent was not given to conduct the inspection, Broshear must establish the inspector affirmatively misrepresented the nature of the inspection. *See United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970). Certainly, voluntary consent is to be adjudged from "the totality of all the surrounding circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The record discloses that Mr. Lakes was the foreman at the worksite; that he knew the company policy regarding the presence of other officials at OSHA inspections and he could have freely contacted those officials (Tr. 119, 121). The record aptly supports the conclusion that Broshear's consent to the inspection was freely and voluntarily given.

Alleged Violation of 29 C.F.R. § 1926.59(e)(1) and (g)(1)

The standards require in pertinent part as follows:

(e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the workplace a written hazard communication program for their workplaces. . . .

(g) *Material safety data sheets.* (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

The alleged violations are described in the citation as follows:

29 CFR 1926.59(e)(1): Employer had not developed or implemented a written hazard communication program which at least describes how the criteria in 29 CFR 1926.59(f), (g) and (h) will be met:

(a) At the Princeton Road excavation project, employees were using gasoline for a cut off saw with the company having no written hazard communication program on the site.

29 CFR 1926.59(g)(1): Employer did not have a material safety data sheet for each hazardous chemical which is used in the workplace:

(a) At the Princeton Road excavation project, employees were using gasoline for a cut-off saw with there being no material safety data sheet on the project.

Compliance officer Denton testified that foreman Lakes told him Broshear did not have a written hazard communication program on the worksite, and there was no material safety data sheets (MSDSs) for gasoline. He stated that gasoline, classified as a hazardous material, was being used in a portable saw to cut pipe (Tr. 15, 16, 46).

Foreman Alan Lakes did not deny a written hazard communication program was not at the workplace. He also acknowledged a MSDS for gasoline was not present (Tr. 133). Mr. John Lakes, a laborer, testified there was a written hazard communication in Broshear's office (Tr. 175). He also stated there was an MSDS for gasoline on the worksite at the time of the inspection (Tr. 182-183).

The standard requires that a written hazard communication program be maintained at the workplace. The testimony of the compliance officer that such a program was not present is not refuted. Although John Lakes testified that the program was in the office, it is not shown it was maintained at the workplace. The standard was violated as alleged.

The evidence also shows that Broshear did not have a MSDS for the gasoline which was being used. The testimony of the foreman who was present during the inspection is clear on this point. The knowledge of the foreman, as Broshear's representative on the site, is deemed superior to that of other employees on this matter.

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

The standard requires in pertinent part as follows:

> *Means of egress from trench excavations.* A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 (7.62 m) of lateral travel for employees.

The alleged violation is described in the citation as follows:

> A stairway, ladder ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees:
>
> (a) At the excavation project located along Princeton Road, employees were working in a trench 37' long with there being no access ladder, stairway or ramp provided.

Mr. Denton testified that the excavation measured from 6'3" to 8'2" in depth. He stated he observed employees working in the south end of the trench. They walked 37' to a ramp on the other end, which was the only means of egress from the excavation (Tr. 20-24).

Broshear agrees there was a ramp at the north end of the excavation, but argues employees were also able to exit by means of a pipe at the south end. Reference is made to the testimony of foreman Lakes, who stated that he and his employees utilized the storm line at the south end (Tr. 124-125). Employee John Lakes also stated he could enter and exit the excavation by using a ramp along the storm pipe (Tr. 181-182). Employee Timothy

Courtney stated the same means could be used to get in and out of the excavation (Tr. 188-189).

In support of its position, Broshear refers to two cases as precedent. In *Tank Builders, Inc.*, 13 BNA OSHC 2027, 1988 CCH OSHD ¶ 28,369 (No. 88-8, 1988), a 48-inch pipe provided an adequate means of exit, and in *Super Excavators, Inc.*, 12 BNA OSHC 1067, 1984 CCH OSHD ¶ 26,807 (No. 80-5220, 1984), the evidence showed employees could easily exit the trench at one end by running atop a pipe.

In this case, the compliance officer measured the length of the trench with his tape measure (Tr. 22). He obviously had ample opportunity to observe the entire excavation before determining one ramp was in compliance with the standard. Broshear maintains that other means of exit were available. The testimony of its witnesses related to the means employees could utilize to exit the excavation. Likewise, the cases cited as precedent related to available means of exit. Also, those cases arose under the standard at 29 C.F.R. § 1926.652(h), which required "adequate means" of exit. In this case, the standard is concerned with the "*safe* means of egress." There is no indication in the record that there was any other safe means of egress from the excavation except the ramp on the north end. The standard was violated as alleged.

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

The standard provides in pertinent part as follows:

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

Paragraph (b)(i) provides:

> Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options. . . .

The citation alleges that:

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):

(a) At the Princeton Road excavation project, employees were installing a new 8" water line in a 6'3" to 8'2" deep trench that did not have the side and end walls properly sloped or otherwise supported to prevent a cave-in.

Mr. Denton testified that the trench in question measured 37' long and was 6'3" deep at the north end and 8'2" deep at Princeton Road or the south end. He observed employees working in the trench (Tr. 22-23). Denton stated that the wall on Princeton Road was not sloped because there was no room. The east wall was sloped at a 60° angle. He determined that the soil in the trench had been previously disturbed, since water and sewer lines were present. A type C soil was indicated because of the prior disturbances, roadway vibrations and penetrometer tests. He added that regardless of the soil classification, a vertical wall is not permissible, since no other form of protection was used (Tr. 29-33). His main concern was the last seven feet of the excavation along Princeton Road (Tr. 60). The Secretary also points out that while foreman Lakes insisted the trench was sloped, he could not approximate a degree but stated it was sloped "to the best safely that I seen fit" (Tr. 123). Employees J. Lakes and Courtney also testified they considered the trench safe (Tr. 180, 189).

Subsequent to the inspection by compliance officer Denton, Broshear re-excavated the trench. Mr. Francis Krieger, a soils expert, conducted an analysis of undisturbed soil in the trench. Using a penetrometer, a torvane device and a pilcon shear vane device, he concluded the soil--mottled, light brown and gray, silty clay--was type A (Tr. 255-261). In addition to the soil classification, Broshear argues that Denton's measurements regarding sloping of the trench are also inaccurate. Mr. Jerry Broshear testified that he used a rule, level and tape measure to determine the slope of the Princeton Road wall while he was in the re-excavated trench. He stated the sloping was greater than one-half to one (Tr. 207).

Prior to rendering a decision in this case, the Review Commission granted a petition for interlocutory review. On remand the record was re-opened to allow Broshear's soils expert to testify fully about the re-excavated trench and to admit his report into evidence.

The report, Respondent's Exhibit 11, set forth a detailed soil analysis and confirmed the prior testimony of Mr. Krieger that it was type A soil. The report also showed the slope of the trench wall measured 1½ on 1 (Fig. 2).

Mr. Krieger explained, using the report, how he arrived at the assumed depth of the trench of 6.3 feet. His computations showed safety factors involving seismic or vibration effects were well within accepted values (Tr. 118-119). The report indicated that the re-excavated trench wall was 2 feet from Princeton Road (Fig. 1). This measurement conflicted with Mr. Denton's measurement of 5 feet (Tr. 32-32).

Broshear contends that the methods used for measurement and its detailed analysis is more reliable than the measurements of the inspecting officer. Mr. Ralph Cannon, the Secretary's expert in trenching, did not dispute the measurements and findings contained in the report as to conditions found on re-excavation (Tr. 325-326). This is consistent with Mr. Krieger's statement that the findings were valid "for conditions that I determine on that day" [October 9, 1991] (Tr. 215). The issue, therefore, relates to sloping of the trench at the time of the initial inspection. Mr. Krieger testified that the original limits of the excavation could be determined because of the difference in the backfill and trench soils (Tr. 265). Mr. Broshear explained that the backfill was removed from the middle of the excavation to reach the trench wall (Tr. 206).

The Secretary's basic contention is that the re-excavation took place at a different location and under different conditions from the original excavation. There is no dispute that none of the persons present for the re-excavation were present at the time of the inspection, and those persons present at the original excavation were not present at the time of the re-excavation. Mr. Broshear stated he could not say the re-excavated trench looked like the first one "since I did not see the original excavation." He also was not sure of the condition of the road adjacent to the trench or the exact location of the pavement edge on the day of the inspection. A road was built over the water valve installed in the original excavation (RTr. 55, 56, 95). Mr. Krieger explained that he had no personal knowledge of the exact location of the original excavation, but relied on others to tell him where it was (RTr. 152). When asked if he could with certainty define the limits of the second trench as being the same as those of the original trench he responded, "I don't think anybody could

say that unless they were there at the time that the original trench was dug and they were there at the time I did it. Neither one of us were there at that time, both times" (RTr. 182).

The measurements and findings in the re-excavated trench were considerably different from those made by Mr. Denton during the inspection. The question is whether the Secretary has established the violation as alleged. The Commission has held that in order to prove a violation, one of the elements the Secretary must show by a preponderance of the evidence is that the terms of the cited standard were not met. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,422, p. 39,678 (No. 88-821, 1991).

The scientific analysis of the soil taken from the trench establishes it as type A soil. However, this finding, as well as measurements made in the re-excavated trench, are not sufficient to overcome the prima facie violation as shown by the Secretary's evidence. There was no evidence to refute Denton's testimony that the wall was not sloped, as he had determined by placing his "engineering rod straight down along the wall" (Tr. 29). In addition, the rod had an angle indicator attached to it which showed a 60° slope on the opposite trench wall (Tr. 67). He stated Broshear's exhibits do not show the same cut of the soil, and conditions he found at the time of his inspection (Tr. 378-379). Both Denton and Cannon testified that whether the soil is A, B or C type, a vertical wall as in this case constitutes a violation (Tr. 32, 363). The evidence discloses that Broshear violated the standard which the Secretary alleged is willful.

A willful violation is one that is "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Asbestos Textile Co., Inc.*, 12 BNA OSHC 1062, 1063, 1984 CCH OSHD ¶ 27,101 (No. 79-3831, 1984), *appeal filed and withdrawn.*

A number of factors have been considered by the Commission in deciding the issue of willfulness. These factors include not only the evidence of knowledge or plain indifference, but also factors which argue in an employer's favor, *e.g.*, good faith efforts at compliance. Such factors include an employer's knowledge of the standard, his reason for non-compliance, and good faith efforts to comply. *See, e.g., Asbestos Textile Co., Inc., supra;*

D A & L Caruso, Inc., 11 BNA OSHC 2138, 1984 CCH OSHD ¶ 26,985 (No. 79-5676, 1984); *Mobil Oil Corp.*, 11 BNA OSHC 1700, 1983-84 CCH OSHD ¶ 26,699 (No. 79-4802, 1983). There must be evidence, apart from establishing knowledge of the hazard, from which it can be reasonably concluded that the employer intentionally disregarded or was indifferent to the safety of the workplace. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1981 CCH OSHD ¶ 25,738 (No. 76-2644, 1981).

The record discloses the safety officer and foreman attended classes and were trained in the trenching standards. It is, therefore, argued that with his knowledge, which is imputed to the foreman, Broshear failed to determine the degree of the sloping in the trench he dug, that his decision to take no steps to protect employees in the trench was conscious and intentional. Foreman Lakes testified that he had dug the trench in a way that was safe, and employees also considered the trench safe.

While the evidence shows Broshear had knowledge of the standard and the trench was dug in violation of the standard, it cannot be concluded there was an intentional disregard for or indifference to the safety of employees. Broshear's familiarity with the standard does not establish willfulness. Such knowledge must be combined with either an actual awareness that the violative act was "unlawful," or a "state of mind . . . such that if he were informed of the [standard], he would not care." *Brock v. Morello Bros. Construction*, 809 F.2d 161, 164 (1st Cir. 1987).

The violations under citation No. 1 were alleged to be of a serious nature. For a violation to be determined serious under § 17(k) of the Act, there must be a substantial probability that death or serious physical harm could result therefrom. The violations of 29 C.F.R. § 1926.59 could result in serious burns to an employee, which adequately establishes their serious nature. The evidence also shows violation of § 1926.651(c)(2) could result in death or serious injury from collapse of the trench wall.

The Commission, in all contested cases, has the authority to assess civil penalties for violations of the Act. Section 17(j) of the Act provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the

gravity of the violation, the good faith of the employer, and the history of previous violations.

The determination of what constitutes an appropriate penalty is within the discretion of the Commission and the foregoing factors do not necessarily accord equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Industry, Inc.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992); *Astra Pharmaceutical Prods., Inc.*, 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum, supra.*

Having considered the foregoing factors and that one employee was exposed, it is determined that an appropriate penalty for violation of § 1926.59 is $250.00. An appropriate penalty for violation of § 1926.651(c)(2), where two employees were exposed, is $1,000; and § 1926.652(a)(1) is $5,000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1 alleging violations of 29 C.F.R. § 1926.59 are affirmed and a penalty in the amount of $250.00 is hereby assessed.

2. Citation No. 1 alleging violations of 29 C.F.R. § 1926.651(c)(2) is affirmed and a penalty in the amount of $1,000 is hereby assessed.

3. Citation No. 2 alleging violation of 29 C.F.R. § 1926.652(a)(1) is affirmed and a penalty in the amount of $5,000 is hereby assessed.

Paul L. Brady

PAUL L. BRADY
Judge

Date: May 27, 1993