UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SCAFAR CONTRACTING, INC., Respondent.	OSHRC Docket No. 97-0960

APPEARANCES: Steven D. Riskin, Esq.
Office of the Solicitor of Labor
New York, NY
For Complainant

Joseph P. Paranac, Esq.
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Newark, NJ
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a Compliance Officer of the Occupational Safety and Health Administration, Scafar Contracting, Inc., ("Respondent") was issued two citations alleging

willful and serious violations of the Act. Penalties totaling $103,000.00 were proposed by the Secretary. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in New York City. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in construction work and related activities. It is undisputed that at the time of this inspection Respondent was engaged in trenching operations and replacement of an underground sewer line. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Respondent was participating in the Brick Sewer Rehabilitation Program for the City of Newark, New Jersey. It was removing an old clay tile sewer line eight inches in diameter and, in its place, installing a new 24" diameter, pvc (plastic) sewer. The portion of the contract which is the subject of this case was known as Replacement of 10thWard Ditch. It called for the sewer line replacement along E. Kinney Street in an easterly direction from Railroad Avenue to the existing 10th Ward Ditch, a distance of approximately 393 feet. (Tr. 72-73, Ex. R-1)

Because the new plastic sewer pipe was manufactured in specific lengths, the job was done essentially by creating a series of trenches, end to end, one after the other.[2] The general procedure

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[1] Title 29 U.S.C. § 652(5).

[2] Each of the separate trenches which are parts of the overall trenching project are referred to as
(continued...)

Respondent used was to remove a length of the old sewer line by cutting through the asphalt and concrete street surface, digging a section and taking out the old clay pipe sewer line with a backhoe. Each trench section was approximately 15' to 20' in length, long enough to accommodate a piece of new sewer pipe with sufficient room at either end to work on the joints between the newly installed pipe and the preceding and following lengths of pipe. Once a section was opened, a trench box would be lowered into the resulting excavation which would then be dug out by the back hoe to the proper depth. A crushed stone base, approximately 6" in depth to provide a solid base for the new sewer pipe was placed into the section. The crushed stone base was then leveled off to the appropriate elevation and grade by an employee entering the trench and completing the leveling using a shovel. The level was checked with a laser. (Tr. 20-22, 64, 280-81) Then the length of new pvc pipe was lowered into place, connected to the previously installed pipe and the alignment checked with a laser. (Tr. 405-06). The section was then backfilled.

The eight inch clay sewer Respondent was removing had been installed in about 1886. (Tr. 364-66) Thus, it had been in place for over 100 years at the time of the inspection. At some time much more recently, two utility lines (water and electric) had been added, one on either side of the sewer line. The two utility lines left about eight feet of space between them. (Tr. 16-19) The two utility lines were originally thought to be parallel for the length of E. Kinney Street, which would have allowed Respondent a consistent width of eight feet to do the removal and replacement of the sewer line. On November 12, 1997, the day before the inspection, however, it was realized that the two utility lines actually converged towards one another. In order to avoid hitting one or another of the utility lines, the sewer line had to be re-aligned (Tr. 19). To accomplish such realignment Respondent, in a change in the planned work, had to construct a manhole about 222' east of Railroad Avenue (about one-half way between Railroad Avenue and the 10th Street Ditch), in order to allow a change in the direction of the new sewer line. (Tr. 20, 323, 357-58). The manhole itself , constructed out of masonry, was approximately a 4' diameter circle. It was built in an excavation about 12' square.

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[2](...continued)
"sections" for the purposes of this decision. In order to place the alleged violations in perspective, a visual presentation of the location of each alleged violation would be of assistance. (See Appendix 1.)

Respondent continued the trenching operation east of the manhole (between the manhole and the 10th Ward Ditch) in a somewhat different manner than that used to the west of the manhole (between Railroad Avenue and the manhole.) East of the manhole Respondent decided that there was not enough clearance between the two utility lines to use a trench box as it had done West of the manhole, so it determined to use wood timber shoring as each section of the trench was dug and the old sewer removed and new sewer installed.

On November 13, 1996, an OSHA Compliance Officer Richard Torree, happened on to the construction scene while driving to another destination. He saw trenching activity "halfway down the block" (Tr. 137), which he believed was in violation of OSHA Standards. He sought and obtained the OSHA Area Director's telephone permission to inspect the worksite (Tr. 137). Due to the Compliance Officer's illness and surgery, a closing conference was not held until April 1998. (Tr. 170). Based upon his inspection and interviews with employees, two citations were issued on or about April 30, 1997. The Secretary's Complaint amended the citations.

Respondent is now charged with two instances of serious violation of the standard at 29 C.F.R. § 1926.652(a)(1)[3] in that it allegedly failed to use adequate protection from cave-in at two locations (the manhole excavation and section "G." See Appendix 1). (Citation I, Items 1a and 1b[4], as amended.) In addition, it is alleged that Respondent was in willful violation of the same standard at three other sections in that employees worked in the trenches without any cave-in protection at all. (Citation II, Items 1a, 1b and 1c)(Sections "F," "D" and "E," respectively. See Appendix 1)

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[3] The standard cited, 20 C.F.R. § 1925.652(a)(1), provides:

> (a)(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:
> (a)(1)(I) Excavations are made entirely in stable rock; or
> (a)(1)(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

[4] Alternatively, Citation I, Item 1(b) charges Respondent with using timber shoring which failed to meet the requirements of 29 C.F.R. § 1926.652(c)(1) because the design for the timber shoring did not meet the minimum specifications contained in Appendices A and C of the standard.

Citation I, Item 1a.
29 C.F.R. § 1926.652(a)(1)

Citation I, Item 1a, alleges that at "Station 2 + 15 to 2 + 23," there was a completely unprotected wall (north side) of an excavation measuring 12' long by 11'4" wide by 7'6" deep, in which Respondent's employees were building a manhole. (Complaint, ¶ V.A).

The Compliance Officer described measuring the manhole excavation as 7' deep, 11'4" wide and 12' in length. (Tr. 154.) He noted that there was a gap of 18" between the north wall of the excavation, which was completely vertical, and the north edge of the manhole "ring." The manhole "ring" was 5' from outside to outside (Id.) The Compliance Officer testified that a foreman, Mr. Fereria, helped him take the measurements at that location. (Tr. 158) and went on to note that the west and south sides of the excavation were protected but that the north side should have also been protected. (Tr. 159). He maintained that when the lack of appropriate sloping of the north wall of the excavation was brought to Mr. Fereira's attention, Respondent claimed that the north wall could not be sloped at that location because there was a utility line close to the wall. (Tr. 159-60). The Compliance Officer opined that a trench box which was on the site "a few blocks away" would have fit into the manhole excavation and should have been used. (Tr. 161-62).

Mr. Carlos Farihnas, one of the owners of Respondent (Tr. 320), testified they had constructed the manhole on November 13th in an excavation which was dug to a depth of 5'10" with sloped walls on the west and south sides. (Tr. 328-29). The north side, according to Mr. Farihnas, consisted of "hard clay" topped off by the roadbed which consisted of 4" of black top, 8" of "Belgian block" and an additional 4" of concrete. (Tr. 330-31). He considered it to be "class A" type soil, having taken a "grab test." (Tr. 331-32). He stated that the width of the manhole was 4' and its depth was 5'10". (Tr. 334, 340). Apparently referring to the trench box identified by the Compliance Officer, this witness stated that they could not use the trench box because the power company (owner of the high-voltage utility line) told him that "they don't want any metal at all close to the pipe of the electrical line." (Tr. 345-46).

Mr. Mario Valihnas testified (through a translator) that he had been the backhoe operator at the site and that he dug the excavation for the manhole. He knew the excavation was "a little bit less than six feet" because he was there when the foreman (Mr. Ferreira) measured it. (Tr. 389).

The man who actually built the manhole, Mr. Jose Fonesca, also testified (through a translator) that the manhole depth was 5'10" having been measured by placing a piece of lumber across the opening then measuring from the bottom of the piece of lumber to the bottom of the excavation. It was also measured by the foreman. (Tr. 394). This witness described the north wall of the excavation as "strong clay" which was unlikely to cave-in. (Tr. 394-95). He maintained that he had seen the Compliance Officer at the excavation at the time of the inspection and that the Compliance Officer did not take any measurements. (Tr. 397).

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

The cited standard applies to all excavations with specified exceptions. In pertinent part, it requires that "[e]ach employee in an excavation shall be protected...except when....the excavation is made entirely in solid rock or the excavation is less than 5' deep and... there is no indication...of a cave-in."

A review of the evidence regarding the depth of the excavation at and around the area of the manhole installation demonstrates that it was greater than 5 feet.

All witnesses, even those who identified the area as being the most shallow, are in agreement that the depth of the excavation, when measured from the upper most surface (the surface of the street), exceeded 5'. Mr. Farihnas, Mr. Valihnas and Mr. Fonesca all describe an excavation being dug to a depth of a little less than 6' while the Compliance Officer and Mr. Fisher, the resident observer for the general contractor, describe a deeper excavation. Respondent, however, would measure the depth from the deepest point of the excavation only up to the under surface of the roadbed. The roadbed added 16" (4" of black top, 8" of "Belgian block" and an additional 4" of concrete) to the overall depth. Thus, Respondent's measurement of the "depth" is 16" less than that of the Secretary. Respondent's argument is rejected. First, it has shown no regulatory or logical rationale supporting

its method of calculation. Second, the only witness to consider the question, Complainant's expert witness, Dr. Peck, opined that depth is determined by measuring the distance from the surface of the ground, not starting below the pavement layer. (Tr. 461. See, Ex. C-3). Third, the Secretary is entitled to deference in her interpretation of the meaning of a standard where, as here, the interpretation she proffers is not unreasonable. *Secretary of Labor v. OSHRC* (C.F. & I. Steel), 499 U.S. 144 (1991). I thus find that the excavation was over 5' in depth.

Excavations of this size must be protected by sloping or by some other protective system. In this case, in the absence of any protective system having been installed, the question becomes whether the sides of the excavation were sloped in accordance with the requirements of § 1926.652(b). To determine what sloping configuration was required, the classification of the soil must first be reached. *Appendix A to Subpart P - Soil Classification* ("Appendix A") and *Appendix B to Subpart P - Sloping and Benching.* ("Appendix B"). In descending order of strength, soils are classified under Appendix A as "A", "B" or "C." A soil cannot be classified as type "A" if "it has been previously disturbed." Appendix A, (Tr. 454.)

Complainant maintains that "previously disturbed" means precisely that, without any modification. Respondent points out that the sewer line which it was replacing was installed in approximately 1886 and had thus been in the ground for over 100 years. (Tr. 444-68). Respondent's expert, Mr. Busicchia, agreed that OSHA had taken the position that soil, once excavated, must forever more be classified as "previously disturbed" but argues that OSHA's position is incorrect because soil which was opened many years ago (over 100 years in this case) could recompress to its original stability and if originally a type "A" soil, could regain that stability and strength. (Tr. 497). The issue is one of regulatory interpretation not choosing between two, opposing scientific theories. The test of whether the Secretary's interpretation warrants deference is whether the wording adopted by OSHA, in Appendix A, "...no soil is Type A if ... the soil has been previously disturbed," is unambiguous and clear. The test to be applied has been described as follows;

> [whether] the Secretary's construction...is [un]ambiguous and the Secretary's interpretation of it is reasonable....However, [deference is not warranted] to the Secretary's interpretation where an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.

Secretary v. General Motors Corporation, Delco Chassis Division, 89 F. 3d 313, ___ (6th Cir. 1996)(Citations Omitted). In this case, Respondent has not shown, nor does the record as a whole demonstrate, that the Secretary's interpretation is inconsistent with the plain language of the regulation or that it is unreasonable or is inconsistent with the Secretary's intent at the time the regulation was promulgated. Accordingly, for the purposes of this case, the soil in question is "previously disturbed" by virtue of the undisputed fact that a sewer line was placed in that location in approximately 1886. Thus, the soil cannot be classified at Type "A" regardless of whether it meets all other testing criteria for type "A" soils. Thus, because it was soil less stable than type "A," the excavation Respondent made for the installation of the manhole was required to have walls sloped at at least 45E (1 foot of slope for every 1 foot of depth).[5] Complainant's concern was the North wall which she claims was vertical (without sloping at all.) This claim is consistent with the Compliance Officer's measurements and with the somewhat unclear photographic evidence (Ex. C-3). Even if the testimony were considered in the light most favorable to Respondent, that is - - that the excavation at the north wall was 11' wide at the top and 6' wide at the bottom (Tr. 333) - the slope produced by those dimensions would be insufficient.[6] Accordingly, the excavation prepared for the installation of the manhole failed to comply with the cited standard.

Employees working in a trench which is improperly sloped run the risk of serious injury or death in the event of a cave-in. Accordingly, classification of the violation as "serious" is appropriate.[7]

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[5] The maximum allowable slopes for excavations less than 20 feet deep is 45E for Type B soil and 34E for Type C soil. Table B-1 of Part 1926, Subpart P, Appendix B.

[6] An excavation 6' deep would have to have at least 12' of width to attain a slope of 45E for each of its opposing walls.

[7] Under section 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident rather than the likelihood of the accident occurring which is considered in determining whether a violation is serious. *Dravo Corp.*, 7 BNA OSHC 2095, 2101, (No. 16317, 1980), *pet. for review denied*, 639 F.2d 772 (3d Cir. 1980). It is not necessary for the occurrence of the accident itself to be probable. It is sufficient if the accident is possible, and its probable result would be serious

(continued...)

The Commission has often held that in determining appropriate penalties for violations "due consideration" must be given to the four criteria under §17(j) of the Act, 29 U.S.C. § 666(j). Those factors include the size of the employer's business, gravity of the violation, good faith and prior history. While the Commission has noted that the gravity of the violation is generally "the primary element in the penalty assessment," it also recognizes that the factors "are not necessarily accorded equal weight." An administrative law judge is required "to state an adequate factual basis for his assessment of a penalty...." *J.A. Jones Construction CO.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). While the OSHA official responsible for calculating the proposed penalties testified as to how those amounts were reached (Tr. 111-120), once the issue is before the Commission the amount of penalty to be assessed is within the sole discretion of the Commission. *Nacirema Operating Co., Inc.*, 1 BNA OSHC 1001 (No. 4, 1972); *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621-23 (No. 88-1962, 1994).

The danger of trench collapse is significant and cannot be taken lightly, but under the facts of this case, it is ameriolated by the evidence that the excavation was open only for a short time, that the masonry manhole being constructed within the excavation would have slowed or reduced the impact of the unsloped north wall collapsing and that only one employee was exposed at any one time. On these factors, I find the gravity to be moderate. Respondent is a small company, with about 30 employees. Respondent's history is highly significant in that it includes prior trenching/excavation violations. With the emphasis on the known danger of open, unsloped excavations, I find that a penalty of $1,500 is appropriate.

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[7](...continued)
injury or death. *Brown & Root, Inc., Power Plant Div.*, 8 BNA OSHC 1055, 1060 (No. 76-3942, 1980).

Citation I, Item 1b.[8]
29 C.F.R. § 1926.652(a)(1) or, alternatively, 1926.652(c)(1)

Citation I, Item 1b, as amended, alleges that employees, on November 13, 1996, entered into a trench 13 to 15 feet long by 6 feet wide by 6 feet deep at Station 2 + 77 that was equipped with wooden timber shoring cave-in protection which was inadequate. (See, Appendix 1, Section "G".) Complainant maintains that the shoring in the trench consisting of 3 inch by 8 inch timber walers and cross braces and 4 foot by 8 foot sheets of 3/4 inch thick plywood in place of uprights, failed to meet the specifications required by Appendices A and C of subpart P of § 1926.

Respondent argues that the shoring in use met the requirements of the standard. In the alternative, Respondent claims that the shoring system, having been designed by a registered professional engineer, met the requirements of Option (4) of 1926.652(b)(4).[9] Since the plywood sheeting did not meet the specifications contained in the appropriate appendix and because the shoring system had been designed by a registered professional engineer for another trenching job, Respondent's arguments are rejected.

The Compliance Officer never saw the section of the trench (Appendix 1, Section "G") which is the subject of this alleged violation. After the Compliance Officer left the site on November 13, 1996, Respondent used wood timbers and plywood sheeting to shore the trench. The observer for the general contractor, Mr. Fisher, could only "guess" at the dimensions of the timbers and plywood used. (Tr. 48-9).[10] The Compliance Officer relied on his recollection of a December 24, 1996 conversation with Mr. Ferreira and Mr. Farihnas during which the Compliance Officer claims he was told the dimensions of the lumber used (Tr. 168-169). Respondent relies on an invoice for lumber

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[8] Originally cited as Citation II, Item 2. Amended by Complainant to be grouped under Citation I, Item1 and now identified as Citation I, Item 1(b).

[9] Subsection (b)(4) provides; "*Option (4) - Design by a registered professional engineer*. Sloping and benching systems not utilizing Option (1) or Option (2) or Option (3) under paragraph (b) of this section shall be approved by a registered professional engineer."

[10] Mr. Fisher's self-described "guess" is found to be so unreliable that it is not considered to have any evidentiary weight at all.

it purchased and which was received on June 16, 1996 (R-14). The invoice describes sheeting lumber measuring 3 inches by 10 inches (with tongue and groove edges) as well as 12 inch by 12 inch timbers. The backhoe operator who moved the timber from the storage area to the location where it was put into the trench described the lumber used as "[t]hree by 10's" and the plywood as "quarter of an inch four feet wide by eight feet long." (Tr. 376).

Complainant maintains that the three by eight timber and 3/4 inch plywood sheeting was insufficient for the trench under Appendix C to Subpart P - *Timber Shoring for Trenches.* Complainant is correct. The Appendix C listings do not allow the use of 3/4" thick plywood sheeting. Respondent's reliance on the invoice is misplaced in that even if such lumber were, in fact, on the site, the backhoe operator's testimony is specific to the effect that it was plywood sheeting which was brought to the men in the area of the trench and which was, in fact, used. (Tr. 375-76). I thus find that to the degree that wooden shoring was used, such shoring included, at least in part, plywood sheeting.

There is no dispute that the shoring system relied upon by Respondent as adequate for this project was, in fact, designed by the professional engineer for use on another, earlier project. It was only after the inspection in this case that the engineer determined that the system would be adequate for the site inspected. (Tr 418-420). Such *post hoc* engineering approval is the very antithesis of the intent of the regulation. Putting employees in a trench which is shored according to specifications developed for a previous job in no way constitutes engineering approval for the protection afforded those employees in their present situation. The purpose of allowing employers to rely on professional engineering design would be defeated if such retroactive application of the requirement were found to be acceptable. At the time the employees were in the trench, Respondent took the risk of using a shoring system designed for other conditions which might or might not be present.

Accordingly, I conclude that Respondent's employees worked in a trench while protected from cave-ins by wooden shoring which did not meet the applicable requirements. Respondent was thus in violation of an applicable standard.

While a serious violation exists where, as here, employees work in an inadequately protected trench, there is little or no evidence pointed to by Complainant as to the degree of employee exposure either in terms of the number of employees exposed or their time of exposure. Similarly, the record

is devoid of evidence as to the likelihood of trench collapse under the circumstances encountered at the inspected site. On this basis, only a minimal monetary penalty is appropriate. Accordingly, I find that $100 is appropriate for this violation.

Citation II, Items 1a,1b and 1c
29 C.F.R. § 1926.651(a)(1)

It is alleged in Citation II, Item 1a, that Respondent's employees were in an unprotected trench described as located at Station 2 + 53 to 2 + 77 and being 24' long, 6' wide and 6' deep. (Complaint, ¶ V.C.a)(See Appendix 1, Section "F")

Citation II, Item 1b, cites employees at Station 2 + 23 to 2 + 38 in an unprotected trench 13' to 15' long by 6' wide by 6' 3" deep "with vertical side walls for most of its length, without a protective system. (Complaint, ¶ V.C.b.)(See Appendix 1, Section "D").

Citation II, Item 1c, identifies the location at Station 2 + 38 to 2 + 53 as having employees working in an unprotected trench measuring 13' to 15' long by 6' wide by 6' 3". (Complaint, ¶ V.C.c.) (See Appendix 1, Section "E").

When the Compliance Officer arrived at the site, Respondent had already completed the installation of the new sewer pipe and had back filled the two sections immediately east of the manhole excavation (Appendix 1, Sections "D" and "E".) The next section of the trench, some 40' east of the manhole excavation, (Appendix 1, Section "F") was open. (Tr. 154.)

At the outset, since the Compliance Officer never saw the trench sections cited in Items 1b and 1c (Appendix 1, Sections "D" and "E") he had no measurements whatsoever of the depth, width or sloping that existed when they were open and employees worked in them. Nor is there any reliable record of any other source of data as to those measurements. Even if other evidence could supply a reasonable basis for inferring the depth of those sections, there is no indication as to their sloping.

Accordingly, the Secretary cannot show the alleged violation as to Items 1b and 1c of Citation II. These Items are VACATED.

There is somewhat more evidence to consider in regard to Item 1a of Citation II. The Compliance Officer testified that he saw an employee of Respondent, Francisco Mendes, in the open trench section aligning the length of new pvc sewer pipe which had just been installed. The

Compliance Officer stated that he measured this section of trench as 6 feet deep (north wall only, Tr. 148), and 6 feet wide with vertical sides. (Tr.145, 146-47; Exhs. C-2 and R-2). He noted that Mr. Ferreira assisted him in measuring the depth. He also explained that a photograph (Ex. C-2) did not accurately depict the scene in that "sun hitting the top portion of the trench ...may give the appearance that it's sloped, but it wasn't." (Tr. 148) Mr. Fisher recalled that the sections of the trench east of the manhole had to be less than 7' wide because they could not use a trench box in that location inasmuch as the box itself was 7' wide (Tr. 32). He also opined that these sections of trench (Appendix 1, Sections "D," "E" and "F" were "more than five feet deep" (Tr. 39) and that all of the trench sections east of the manhole were between 6' and 5'8" or 5'9" (Tr. 46.) He was less than clear as to whether there was sloping in that area, testifying equivocally, "I seem to feel that one side was vertical and the other side had a slope to it." (Tr. 45. See also, Tr. 48).

Respondent maintains that east of the manhole the depth of the trench was never greater than 5'. Respondent's owner claimed that the cited sections of trench were 4½' deep, 6' wide at the top and 4' wide at the bottom. (Tr. 325, 339. See also, Tr. 338-39) and that they had planned to use a small trench box in 4' wide sections east of the manhole (Tr. 325-26.) He said the trench box was not used because the power utility representative told him that they did not want any metal at all near the power line in the vicinity. (Tr.344-46.) The backhoe operator and one other employee described sections of trench as anywhere from 4½' to 3½' deep. (Tr. 389, 390, 402).

Respondent challenges the efficacy of the Compliance Officer's testimony on several grounds. It points out that although he took a videotape of the inspection, the Secretary did not seek to enter the tape into evidence (even though the Compliance Officer testified that he relied on the tape to "revise" measurements he recorded in his field notes); that the Compliance Officer's measurements were taken with a flexible tape (implying that the lack of rigidity would render the results less persuasive); and that the Compliance Officer's field notes where he supposedly initially recorded his measurements were not available. In addition, Respondent takes exception to the Compliance Officer's assertion that he used an "angle indicator" to measure the slope of the trench wall, arguing that he could not recall what such a tool looked like and that in earlier testimony he failed to state that he had one with him. Respondent also finds it "curious" that the Secretary did not introduce soil samples into evidence even though they were taken by the Compliance Officer who admitted that he

made a mistake in recording the date the samples were taken. Respondent also notes that there is testimony that the top road surface had been removed at this location which, in essence, reduced the depth of the trench.

The Secretary, on the other hand, argues that the testimony of Respondent's part-owner and employees should not be accorded much weight because of their "interests in the outcome of the case." Merely claiming that the testimony of an employer is less reliable than that of a Compliance Officer because of the employer's interest in the outcome, without a specific showing that such testimony is exaggerated, misleading or false in any way, is an insufficient basis upon which to reject such testimony. The same may be said of employee testimony even where, as here, it is given in the presence of the employer. The Secretary's reliance on the "disinterested witness," Mr. Fisher, is not well placed when viewed against the specific language used by Mr. Fisher which is far less than conclusive or precise. The Secretary also argues that the cited sections could not possibly have been 4½' deep because the trenches west of the manhole were admittedly 6' deep and the grade (angle of decline) of the sewer line was only one inch per 100 linear feet. (Sec. Brief, p. 18). The Secretary's analysis is incorrect. The grade of the pipe being installed by Respondent refers to the downslope of the sewer pipe as compared to a perfectly level horizontal line. The "flat" referred to by Mr. Fisher and relied upon by the Secretary (Tr. 24-25) refers to the angle of the sewer pipe, not to the grade or slope of the street level. Due to the pitch or downslope, the surface of E. Kinney Street from Railroad Avenue to the 10th Ward Ditch , actually dropped about 5½' (Tr. 71-73). Thus, even if the sewer pipe were placed in an excavation the bottom of which was perfectly level, the pipe would be 5½' closer to the surface of the road at the 10th Ward Ditch than it was at Railroad Avenue.

In sum, the cited standard requires that reliable measurements be made, preserved and made part of the Secretary's case in chief. Fulfilling the Secretary's obligation to prove the existence of a violative condition by a preponderance of reliable evidence of record requires more than assumptions and inferences where the violation alleged is that of a standard with specific distances as an integral part of its requirements. The Secretary has not fulfilled that burden on this record. Accordingly, Item 1a of Citation II is VACATED.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of § 5(a)(2) of the Act as alleged in Citation I, Items 1a and 1b.

4. The violations of Items 1a and 1b of Citation I are serious.

5. Respondent was not in violation of § 5(a)(2) of the Act as alleged in Citation II, Items 1a, 1b and 1c.

6. Civil penalties of $1,500 and $100 are appropriate for the serious violations under Items 1a and 1b, of Citation I, respectively.

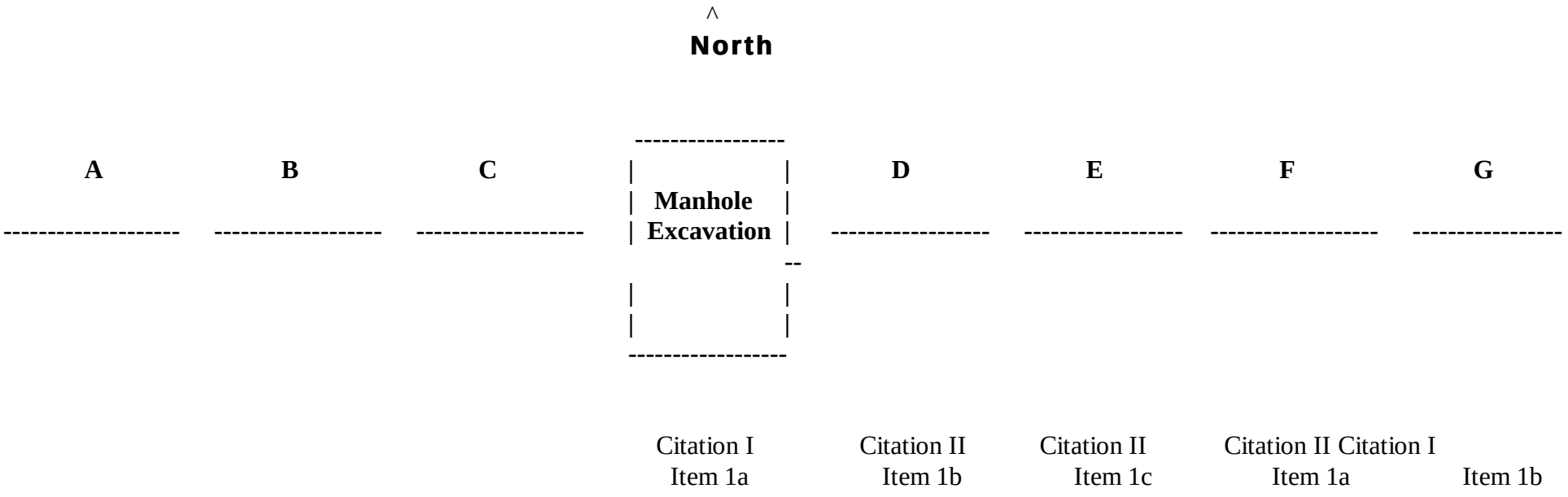
ORDER

1. Citation I, Items 1a and 1b are affirmed.
2. Citation II, Items 1a, 1b and 1c are VACATED.
3. A civil penalty of $ 1,600 is assessed.

Michael H. Schoenfeld
Judge, OSHRC

Dated:

Washington, D.C.



1. In the representation above, which is not to scale, each section of trench is represented by a letter. Numerous sections, including A, B and C were dug sequentially, starting at Railroad Avenue, from West to East until reaching the point where the manhole excavation was made. Sections D, E, F & G were dug sequentially from the manhole East.

2. There is no dispute that a trench box was used in the sections to the West of the manhole excavation, including A, B and C.

3. Citation I, Item 1a refers to the manhole excavation while Citation I, Item 1b refers to Section G.

4. Citation II, Item 1a refers to Section F; Citation II, Items 1b and 1c refer to Sections D and E, respectively.