SECRETARY OF LABOR,

Complainant,

v.

DRUM CONSTRUCTION CO., INC.,

Respondent.

DOCKET NO. 98-1501

Appearances:

Anthony G. O'Malley, Jr., Esquire
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

Gregory F. Mitsch, Esquire
John M. McClure, Esquire
John M. McClure & Associates
Doylestown, Pennsylvania
For the Respondent.

Before: Administrative Law Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Respondent Drum Construction Company ("Drum") at all times relevant to this action maintained a job site at Four Seasons Saucon Valley, Skibo Road, Hellertown, Pennsylvania, where it was engaged in trenching operations. Drum admits that it is an employer engaged in a business affecting interstate commerce and that it is subject to the Act.

On July 28, 1998, OSHA compliance officer ("CO") Mark Stelmack conducted an inspection because of observations he made while driving past the site. As a result of his inspection, on August 12, 1998, OSHA issued Drum a serious citation alleging violations of 29 C.F.R. 1926.652(a)(1) and proposing total penalty of $3,500.00. Drum brought this proceeding before the Commission by filing a timely notice of contest, and a hearing was held on March 29, 1999, in Philadelphia, Pennsylvania. Both parties have submitted post-hearing briefs and reply briefs.

Stipulations of Fact and Law

At the commencement of the hearing, the parties stipulated to the following:

a. The Commission has jurisdiction in this matter.

b. Drum utilizes tools, equipment, machinery, goods and supplies originating in whole or in part from locations outside the Commonwealth of Pennsylvania.

c. Drum is an employer engaged in business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C.§ 652(5).

d. OSHA inspected Drum's workplace on July 28, 1998.

e. During the course of the OSHA inspection on July 28, 1998, two employees of Drum were observed in an excavation outside of their protective trench box.

f. Drum did not discipline any of its employees with respect to any of the allegations of unsafe work practices at the subject work site.

g. Drum did question its employees regarding the alleged violative conditions set out in the OSHA citation issued on August 12, 1998.

h. The depth of the excavation in question, as measured by the OSHA CO at the time of the inspection, was 5 to 10 feet.

i. Dr. Alan Peck of the OSHA Salt Lake City Technical Center analyzed a soil sample taken from the subject excavation and determined that it was "Type B" soil.

j. Melick-Tully and Associates, P.C., on behalf of Drum, also analyzed a soil sample taken from the subject excavation and determined it to be "Type B" or "Type C" soil.

The Inspection

CO Stelmack testified that as he was driving to his office on July 28, 1998, he observed two excavators working on a site adjacent to the road and a section of pipe being lowered into the ground. Pursuant to OSHA's national emphasis program regarding trenching, he parked and proceeded to the site. He walked past one of the excavators, which was moving material around. He then went to the area where the second excavator was working, where the pipe was being lowered into the ground. The CO asked who was in charge, and a person in the trench pointed to an individual standing alongside the trench. The CO presented his credentials to that individual, who was identified as Daniel Eisenhauer. CO Stelmack explained why he was there, upon which Eisenhauer acknowledged that he was the foreman; Eisenhauer then asked the CO what he needed

and discussed the operation with him. (Tr. 14-18, 62).

CO Stelmack further testified that he observed two employees working in the trench and that Eisenhauer identified both as Drum employees. One employee was wearing a white hard hat and was standing in between a trench box located at one end of the excavation and a manhole, which was designated "Manhole 14" at the site. This employee was directing the operator of a front-end loader that had its bucket extended over the trench to dump bedding material over the pipe that had been laid in the trench. The other employee was wearing a blue hard hat and was standing on the opposite side of the manhole and near a compactor, and he was using a shovel to spread backfill material in the trench. CO Stelmack also saw a ladder against one of the trench walls that was located in between the trench box and the manhole, and he observed the employee with the white hard hat use the ladder to exit the trench. The CO photographed his observations and measured the depth of the trench; the depth in the area between the manhole and the ladder was 10 feet, while the depth in the area where the employee with the blue hard hat was working was 5 feet. The CO also learned from the employee in the blue hard hat, who had been using the compactor, that the backfill was not put in all at once.[1] Rather, it was put in 2 to 3 feet in depth at a time, after which it was compacted and the process repeated. The employee indicated to the CO that he had completed this process once or twice, which meant he had worked at a depth of more than 5 feet in the trench. The employee also indicated that no protective system was in place when he did this work and that while no cave-ins had occurred, chunks of soil had fallen from the sides of the trench. (Tr. 19-36, 53-55; Exs. C-1-4).

The CO noted the trench walls were essentially vertical, that the employees were working outside of the trench box, and that no other protection was in place in the areas where they were working. He further noted that the ladder was also outside of the trench box and that the employees were unprotected when they entered and exited the trench. The CO said the employees were exposed to a cave-in hazard, which could have caused serious injury or death, and that the hazard was exacerbated by the operation of the compactor and the front-end loader. (Tr. 22-26, 36-38, 48-55).

[1]The CO testified that a compactor is used to pack down backfill by means of a worker walking behind it and operating the controls and that it compacts the material by its weight and vibrating function. (Tr. 31-32).

Validity of the Inspection

Drum contends that CO Stelmack failed to present credentials to any of its employees prior to or upon entry onto the work site on July 28, 1998. (Tr. 8; Respondent's Brief, pp. 7-10). The CO testified that upon arriving at the site, he observed no job site trailer or central location where work crews were located; thus, he walked to the location where he had seen excavation activity. The CO also testified that he proceeded past one excavator and then went to Manhole 14. He asked a crew member who was in charge and was given Eisenhauer's name, whereupon he showed his credentials to Eisenhauer and explained why he was there.[2] (Tr. 15-17). Drum asserts that because the CO did not announce himself prior to asking the identity of the person in charge, Eisenhauer was put in the untenable position of trying to monitor the work at the same time he was having to deal with the CO; Drum also asserts that the CO in effect came onto the site unannounced. (Tr. 91-94). Drum's position is that the CO's actions violated section 8(a) of the Act, 29 U.S.C. § 657(a), which requires the presentation of credentials upon entering the work site.[3] I disagree, for the following reasons.

The Commission has stated that it "construes section 8(a) concerning presentation of credentials to be mandatory only when the Fourth Amendment would bar a warrantless search and thus when notice of authority is required." *See Hamilton Fixtures*, 16 BNA OSHC 1073, 1078 (No. 88-1720, 1993). It is therefore necessary for an employer to show that it is subject to the Fourth Amendment's reasonable expectation of privacy at the work site. However, when an area is outdoors and open to public view, there is no reasonable expectation of privacy. *See GEM Indus. Inc.*, 17 BNA OSHC 1184, 1186 (No. 93-1122, 1995), and cases cited therein. The record establishes that

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[2]Eisenhauer conceded that CO Stelmack, upon arriving at the trench, presented himself as an OSHA inspector, but could not recall whether the CO showed him his credentials. (Tr. 137). I find that this testimony does not refute that of the CO.

[3]Section 8 provides as follows: (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

the subject site was open to the public and not closed off in any manner. The record also establishes that Eisenhauer was fully cooperative during the entire inspection and that he never objected to the CO's presence. (Tr. 18, 118-19). Accordingly, there was no violation of the Fourth Amendment in this case. Moreover, I find that the CO's manner of presenting his credentials upon his arrival at the site was reasonable and that it conformed to the requirements of section 8(a) of the Act.

Drum further contends that it was prejudiced in presenting a defense because its authorized representative and site supervisor, Edward Ayoub, was denied the opportunity to accompany the CO during his inspection; Drum notes that although Ayoub was on the site at the time, the CO made no attempt to locate him and began his inspection immediately upon his introduction to Eisenhauer.[4] Again, I disagree with Drum's contention. First, as noted *supra*, Eisenhauer cooperated fully during the inspection and did not object to the CO's presence. Second, there is nothing in the record to indicate that Eisenhauer ever asked the CO to not begin his inspection until Ayoub was present. Finally, Commission precedent has established that even if an employer is able to prove a violation of section 8 of the Act, to obtain relief it must show that it was actually prejudiced in the preparation or presentation of its defense on the merits. The record demonstrates that Eisenhauer provided CO Stelmack with a surveyor's rod to perform his measurements, which indicates that he could have made his own measurements of the trench depth at the same time. (Tr. 30, 64, 128, 153). Moreover, Eisenhauer was present when the CO made his measurements, the CO discussed the measurements with him, and Eisenhauer did not dispute them. (Tr. 20, 30, 64, 84). Based on the record, Drum's challenge to the inspection is rejected.

The Citation

The cited standard, 29 C.F.R. § 1926.652(a)(1), provides as follows:

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

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[4]Section 8(e) of the Act, 29 C.F.R. § 657(e), states as follows: Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection.

The citation alleges four violative instances of the foregoing standard, as follows:

a) Four Seasons Saucon Valley, area of Manhole 14 - Employees worked outside of the confines of the trench box to signal the loader operator when dumping screenings into the trench and to spread screenings over the pipe. No protective system was in place where employees performed these operations. Employees were thus exposed to a cave-in hazard.

b) Four Seasons Saucon Valley, area of Manhole 14 - Employees accessed/egressed the trench by means of an extension ladder.[5] The ladder was set against the side wall of the trench outside of the trench box. No protective system was in place where the ladder was set. Employees were thus exposed to a cave-in hazard.

c) Four Seasons Saucon Valley, area of Manhole 14 - Employees worked outside of the confines of the trench box when installing the manhole. Operations such as leveling the stone, installing the manhole base, and setting the pipe in the manhole were conducted without the protection of the trench box. No protective system was in place where employees performed these operations. Employees were thus exposed to a cave-in hazard.

d) Four Seasons Saucon Valley, area of Manhole 14 - Backfill operations were conducted in the trench without a protective system in place. Manual spreading of backfill with a shovel and the manual operation of the compactor within the trench exposed employee to a cave in hazard.

The Secretary's Burden of Proof

The Secretary has the burden of proving her case by a preponderance of the evidence. In order to establish a violation of an OSHA standard, the Secretary must show (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

The Alleged Violative Instances

Section 1926.652 was promulgated to ensure that employees working in excavations and trenches are protected from cave-ins by an adequate system, such as sloping, benching, shoring or

[5]The record shows that the ladder was a 12-foot fixed ladder, and not an extension ladder, as set out in the citation. (Tr. 63, 131).

trench boxes. The standard contains an exception to this requirement that applies to excavations made "entirely of stable rock" and to excavations "less than five feet ... in depth and examination of the ground by a competent person provides no indication of a potential cave-in." *See* 29 C.F.R. §§ 1926.652(a)(1)(i)-(ii). Drum contends that no protective system was required in the area of Manhole 14 where backfilling was being done as the trench in that area was less than 5 feet deep. (Respondent's Brief, p. 13). However, the Commission has held that the party claiming the benefit of an exception bears the burden of proving that its case falls within that exception. *Ford Dev. Corp.*, 15 BNA OSHA 2003, 2010 (No. 90-1505, 1992). I find that Drum has not met its burden of proof in regard to the exception set out in 29 C.F.R. § 199296.652(a)(1)(ii), for the reasons that follow.

First, the subject exception applies to excavations that are less than 5 feet deep, and the parties stipulated that the depth of the trench in the areas where the CO took his measurements was 5 feet to 10 feet. *See* Stipulation h, *supra*. Second, as noted in the preceding discussion, Eisenhauer was present when the CO made his measurements, the CO discussed the measurements with him, and Eisenhauer did not dispute them. (Tr. 20, 30, 64, 84). Third, Eisenhauer essentially agreed that the depth measurement in the subject area was 5 feet.[6] (Tr. 129-30). Fourth, Eisenhauer's testimony about the stone and backfill that had been laid and compacted in that area corroborated what the employee who had been doing that work had told the CO, and Eisenhauer himself agreed that the employee had been working in that area when the depth was about 8 feet. (Tr. 137-39). Finally, the record is devoid of any evidence that Eisenhauer had examined the ground for an indication of a potential cave-in. His testimony that the soil was "tight clay" and presented "hard digging" does not meet this requirement, particularly in light of his concession that he did not have any information regarding the classification of the soil in this area. (Tr. 59, 149-51). Drum's contention is rejected.

Drum next contends that the area around Manhole 14 was properly sloped for Type B soil.

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[6]Q Were you with Mr. Stelmack when he had occasion to measure any other portions of the trench?

A He was measuring in the back on the other side of the manhole where the men were tamping and backfilling.

Q Were you with him when he ...

A I was close by, I wasn't right next to him.

Q Did he say anything to you regarding that measurement of the depth?

A I think at that point the men were -- the trench was about five and a half foot deep where they were tamping.

(Respondent's Brief, p. 15). According to the record, the soil at the site was in fact Type B. *See* Stipulation i, *supra*. Table B-1 in Appendix B to the standard sets out the maximum allowable slopes for excavations less then 20 feet deep in the following soil types:

Stable Rock	Vertical	(90 degrees)
Type A	3/4:1	(63 degrees)
Type B	1:1	(45 degrees)
Type C	1 1/5:1	(34 degrees)

As support for its position that the trench was sloped at an angle of 45 degrees, as required for Type B soil, Drum points to certain testimony of Charles Dries, the backhoe operator at the site. Dries described the process of creating a trench, indicating that his general practice was to "line the top part as much as [he could] and taper it down to ... a fairly decent slope on the banks." (Tr. 103). Dries at first indicated that he had sloped the area around Manhole 14, but he then admitted that he had not done so to any specification and that he could not provide any estimate of what the slope had been. (Tr. 104). Drum also points to certain testimony of Eisenhauer. However, contrary to Drum's assertion that Eisenhauer testified that the trench walls were sloped at an angle of 45 degrees, my review of the record convinces me that Eisenhauer's reference to a 45-degree angle was in response to a question about the condition of the ladder in the trench.[7] (Tr. 132-33). Moreover, although Eisenhauer went on to indicate that the trench was in fact sloped, his testimony in this regard is simply not credible in light of the record as a whole.[8] (Tr. 133-34).

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[7] BY MR. MITSCH:
Q Can you describe the condition of the ladder as it's in and out of the trench box?
A The condition of the ladder as it's in and out of the trench box?
MR. MITSCH: I'm thinking of a way not to be leading.
JUDGE ROONEY: I don't think the witness is going to be able to tell us the condition of the ladder, counsel, I think you have to come up with some other word.
BY MR. MITSCH:
Q Can you describe the angle, if any, of the ladder?
A It looks like almost a 45 -- between a 45 and straight-up perpendicular.
Q 45 what?
A A 45-degree angle. The ladder is between a 45-degree angle and being straight up and down in that picture.

[8]Eisenhauer's competency with respect to soil classification is also questionable. He testified that if the soil type is unknown, it should be assumed to be Type B and sloped ½ to 1. (Tr. 150-51). However, the standard requires sloping in Type B soil to be 1 to 1; it also requires sloping as indicated for Type C soil in cases where no soil classification has been made. *See* 29

As set out at the beginning of this decision, CO Stelmack consistently described the sidewalls of the subject trench as essentially vertical; he also specifically testified that the walls were not sloped at an angle of 45 degrees as required for Type B soil. (Tr. 25, 37-38, 46). The CO's photographs of the trench, Exhibits C-1-4, support his testimony, and Drum's witnesses, for the reasons set out above, did not refute it. Based on the CO's testimony and Exhibits C-1-4, I conclude that the walls of the trench where the employees were working at the time of the inspection were essentially vertical. I further conclude, in view of the evidence of record, that the area of the trench where the employee in the blue hard hat was working was 5 feet deep when the CO was there, that that area was approximately 8 feet deep earlier in the day, and that the area where the employee in the white hard hat was working was approximately 10 feet deep.[9] Finally, I conclude that Drum's employees were exposed to a cave-in hazard during the times that they were working outside the confines of the trench box, that there was no other protective system in use in the trench, and that Daniel Eisenhauer, Drum's job site foreman, was aware of the violative conditions.[10] The Secretary has therefore met all the required elements, that is, the applicability of the standard, noncompliance with its terms, employee exposure, and employer knowledge of the condition, to establish the alleged violative instances of the cited standard. Item 1 of Citation 1 is accordingly affirmed.

Classification of the Violation

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result." In order to establish that a violation is serious, the Secretary need not show that an accident is likely to occur, but, rather,

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C.F.R. § 1926.652(b)(1). *See also* Table B-1 of Appendix B to the standard..

[9]In so concluding, I have considered Drum's contention that the depth in the area of the manhole was 8 feet. (Respondent's Brief, p. 15). I have reviewed the record in this regard, and note that while Drum's witnesses at times indicated this was the case, at other times the CO's measurement of 10 feet was corroborated. (Tr. 108-09, 119, 129).

[10]Drum's knowledge of the violation is shown by the CO's testimony that he learned from Eisenhauer that the trench box had only been used for installing the pipe and that it had not been used for installing the manhole or for backfill operations; Eisenhauer also told him it was sometimes not possible to use a trench box and that while he had requested a manhole box it was not delivered and he had had to get the job done. (Tr. 38-40, 59). Commission precedent is well settled that a supervisor's knowledge of a violative condition is imputable to the employer. *See, e.g., Pride Oil Well Svc.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992), and cases cited therein.

that an accident is possible and that it is probable that death or serious physical harm could occur. *Flintco, Inc.*, 16 BNA OSHA 1404, 1405 (No. 92-1396, 1993). CO Stelmack testified that in view of the depth of the trench and the fact that the average weight of soil is 100 pounds per cubic foot, he believed that death was a likely result in the event of a cave-in at the site. (Tr. 54). Based on the record, I conclude that the violation was properly characterized as serious.

Penalty

Once a contested case is before the Commission, the penalty proposed by the Secretary is just that -- a proposal. What constitutes an appropriate penalty is a determination that the Commission, as the final arbiter of penalties, must make. In determining appropriate penalties, "due consideration" must be give to the four criteria under section 17(j) of the Act, 29 U.S.C. § 666(j), that is, the gravity of the violation and the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and the gravity of a violation is generally the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, *supra.*

The gravity of the violation here was high. The probability of a cave-in was great, due to the fact that employees worked and used a ladder in areas of the trench where no protective systems were present. Further, there were vibrating pieces of equipment operating both in and outside of the trench, which could have loosened the sidewalls. The severity was also great because, in the event of a cave-in, death was a likely result. The gravity-based penalty was adjusted for size and history, since the company had only 84 employees and no history of previous serious OSHA violations; however, no credit for good faith was given due to the gravity of the violation. (Tr. 53-56, 83). On the basis of the record, I conclude that the proposed penalty of $3,500.00 is appropriate.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED, and a total penalty of $3,500.00 is assessed.

Covette Rooney
Judge, OSHRC

Dated:
Washington, D.C.