UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. JOSEPH J. MAGNOLIA, INC., Respondent.	Docket No. 99-0770

Appearances: Troy E. Leitzel, Esq.
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U.S. Department of Labor
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For Complainant

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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). Respondent's work site in Washington, D.C. gives rise to this matter. As a result of an OSHA inspection, Joseph J. Magnolia, Inc., (Respondent) was issued citations on March 25, 1999 alleging one willful and two serious violations of various construction safety standards in Title 29 of the Code of Federal Regulations (CFR). Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in Annapolis, Maryland. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

The parties have stipulated that Respondent is an employer. It is undisputed that at the time of this inspection Respondent was engaged in excavating and installing sewer lines as part of a hospital expansion in Washington, D.C. It is also stipulated that Respondent 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. Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Willful Citation 2, Item 1

29 CFR § 1926.652(a)(1)[1]

The citation alleges that "[e]mployees were observed in an unprotected trench."

The item is affirmed because Respondent has not met the burden of proof imposed on it under the exceptions to the standard.

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) noncompliance with the terms of the standard, (3) employee exposure or access to the hazard created by the noncompliance, 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). Moreover, courts

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[1] The cited standard, 29 CFR § 1926.652(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.

have acknowledged that the Commission "has long recognized that the Secretary has the burden of proving any health and safety violations with which an employer is charged. *Cleveland Construction, Inc. v. OSHRC*, No. 99-3044, 6th Cir., 12/17/99 (Unpublished), 18 BNA OSHC 2028, 2032, 1999 U.S. App. Lexis 34071. Which party has the burden of proof becomes the deciding factor when necessary facts cannot be determined conclusively from the record. *Trinity Industries*, 15 BNA OSHC 1788, 1790 (No. 89-1791, 1992); *citing, Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776 (1986).

The cited standard unequivocally requires cave-in protection for employees working in all excavations. The following sub-parts, (i and ii), create exceptions for excavations "made entirely in stable rock" or for those "less than 5 feet. . . in depth. . . ." The Commission has held that the principle regarding allocating burdens of proof with respect to exceptions is applicable to the cave-in protection requirements imposed by this particular standard. *C.J. Hughes Construction, Inc.,* 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996). Consequently, once the Secretary showed that Respondent's employees worked in an excavation[2], the standards in Subpart P are applicable[3] and the existence of the violative condition is established unless rebutted. In this case, it is undisputed that employees were in the excavation. Since the exception under subsection i depends on the depth of the excavation, specific measurements are an integral part of its requirements.[4] Thus, since Respondent seeks to come within an exception, it must bear the burden of proving the necessary elements of the exception, including the depth of the excavation. Fulfilling Respondent's obligation to prove the exception by a preponderance of the evidence of record requires reliable evidence on which to base factual conclusions as to the critical dimensions. Respondent has not fulfilled that burden on this record.

Despite the photographs, testimony from several eyewitnesses and the drawing and marking

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[2] "Excavation" is defined as "any man-made cut, cavity, trench or depression in an earth surface, formed by earth removal." 29 CFR § 1026.650(b).

[3] The Scope and Applicability provision for all of Subpart P is 29 CFR § 1926.650(a).

[4] There is no dispute that the excavation was not "entirely in stable rock." Thus, cave-in protection was required if it was either 5 feet or more deep, or, if less than 5 feet deep, an examination of the ground by a competent person provided no indication of a potential cave-in.

of a demonstrative exhibit during the hearing (ALJ-1), the relevant dimensions of the cited trench are still not discernable.

The record is fairly clear that the cited trench was between two other excavations, one of which had been backfilled after the insertion of a manhole. (Tr. 103-04) The distance of the overall opening was to have been 40 feet in length, with 25 feet from the center of one manhole to the center of the next. (Tr. 84, 105)[5] The two manholes were to be connected by pipe which was delivered in 13 ½ feet long standard sections. (Tr. 105).

Openings in the earth generally do not lend themselves to precise measurement, especially during the course of construction where, as here, the ground surface itself was uneven. (Tr. 37) The CO's testimony as to his measurements, made with a 25 foot steel tape measure, (Tr. 19-20) leaves much in doubt on this record. The CO stated several times that he had taken measurements of the depth of the trench. (Tr. 16, 18, 19-21, 54-55, 56) The number of measurements he described, however, varied from three or four (Tr. 20), to "several" (Tr. 54-55), to two (Tr. 56), to one. (Tr. 87) He conceded that a more accurate method of determining the depth of the trench was available to him but was not used. (Tr. Tr. 37-38) The locations at which the CO took his measurements along the length of the trench and excavation is also less than clear (Tr. 44, 54-55, 87), as is the location within the trench of the two "observed" employees shown in photographs. (GX-3,4; Tr. 39, 41-42, 44, 47, 55, 57, 85-86, 108-09) The CO described the trench as not sloped at all which is inconsistent with a photograph he took and with the testimony of the backhoe operator who dug the excavation. (Tr. 20-21, 94; GX-5) The CO's assertion that the portion of the trench where he saw employees was not sloped at all is also inconsistent with his statements that the width of the trench at the bottom was the width of the backhoe bucket, some 3 or 4 feet, and his later statement that it was 8 feet wide at the top. (Compare, Tr. 20-21 with Tr. 55)

Contrary to the CO's testimony, one of the assertedly exposed employees stated that the area of the trench in which he was working at the time of the photograph was less than 5 feet deep.(GX-4, Tr.108-09) The Foreman who was operating the backhoe at the site was consistent with that of the employee (Tr. 85-86, 88-89, 93, 96) even though his testimony as to the depth might be viewed as contradicting an earlier deposition if it were clear to which location along the length of the trench

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[5] The CO's testimony would have the overall length significantly greater. (Tr. 48)

the questioner was referring. (Tr. 100-01) Based upon my observations of the verbal and nonverbal behavior of all of the witnesses, and considering each subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements, as well as confused or nervous speech patterns, I find no reason to discount the credibility of the testimony of the CO, the foreman or the employee. In sum, the evidence as to the dimensions of the excavation are not such as to support a reliable finding of fact.

The existence of the violative condition has been established because Respondent failed to show that the trench was entirely in stable rock or was less than 5 feet deep. Employee exposure is established by the photographs and unrebutted testimony showing that employees were in the trench. Respondent's knowledge of the violative condition is established by the foreman's operation of the backhoe which dug the trench and his presence when employees were in the trench. *See, Dover Elevator Co.*, 16 BNA 1281, 1285-86 (No. 91-862, 1993)(Supervisor's knowledge of violative condition is imputed to the employer without demonstration that employer's safety program is inadequate or defective). Based on the above, I conclude a violation of the cited standard has been established.

Respondent raised the affirmative defense of unpreventable employee misconduct in its answer and presented evidence in this regard. The First Circuit Court of Appeals thoroughly analyzed the parameters of the affirmative defense as follows:

> The OSH Act requires that an employer do everything reasonably within its power to ensure that its personnel do not violate safety standards. But if an employer lives up to that billing and an employee nonetheless fails to use proper equipment or otherwise ignores firmly established safety measures, it seems unfair to hold the employer liable. To address this dilemma, both OSHRC and the courts have recognized the availability of the UEM defense.
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> The contours of the UEM defense are relatively well defined. To reach safe harbor, an employer must demonstrate that it (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it. See *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 105 (2d Cir.1996); *General Dynamics*, 599 F.2d at 458-59; *Jensen Constr. Co*., 7 O.S.H. Cas. (BNA) 1477, 1479 (1979). The employer must shoulder the burden of proving all

> four elements of the UEM defense. See *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir.1987); *General Dynamics*, 599 F.2d at 459. Sustaining this burden requires more than pious platitudes: "an employer must do all it feasibly can to prevent foreseeable hazards, including dangerous conduct by its employees." *General Dynamics*, 599 F.2d at 458; accord *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 818 (5th Cir.1981).
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> Even if an employer establishes work rules and communicates them to its employees, the defense of unpreventable employee misconduct cannot be sustained unless the employer also proves that it insists upon compliance with the rules and regularly enforces them. See *Centex-Rooney Constr. Co.,* 16 O.S.H. CAS. (BNA) 2127, 2130 (1994).

P. Gioioso & Sons, Inc. v. Secretary of Labor, 115 F.3d 100, 110 (1st Cir. 1997)(footnotes omitted.)

In this case, there is undisputed evidence that Respondent undertook a safety program with considerable vigor. Based on the following evidence, I find that Respondent has, in the words of the court, "do[ne] everything reasonably within its power to ensure that its personnel do not violate safety standards."

Respondent is a rather small, family-owned company with about 85 employees. (Tr. 62) It has a full-time safety person, has a long-time safety consultant firm, and has it taken an active role in formulating and instituting safety training in its industry. (Tr. 62-63). Respondent's vice president testified that the company conducts regular safety training, toolbox talks and safety seminars and the foreman at the inspected site testified that he held toolbox talks at the site and had received significant training in excavations, including the OSHA course, as well as other subjects. (Tr. 63, 66, 80) The Secretary concedes that Respondent provided training in excavation safety. (Sec. brief, p. 18) In addition, he conducted toolbox safety talks at the inspected site. (Tr. 66-69, 81). The foreman had conducted soil tests and was fully aware that trenches over 5 feet deep required cave-in protection. He was disciplined after this inspection. (Tr. 71-72, 91-92). Respondent has had a safety consultant firm for many years. (Tr. 76) Safety manuals have been produced, revised and distributed and a written safety program established. (*Id.*) The safety consulting firm conducts training programs and regularly inspects Respondent's job sites. (Tr. 76-77). The inspecting consultant has the authority to stop jobs to correct safety violations until corrective

measures are taken and to call in Respondent's superintendent to assist. (Tr. 78)

As a whole, I agree with Respondent's highly-experienced safety consultant, who opined that the company's interest in safety is probably "above the majority of contractors in the same type business." (Tr. 77-78) The CO also agreed that Respondent had undertaken all appropriate training for the personnel at the site. (Tr. 44) There is no evidence regarding Respondent's enforcement of safety rules before this citation. The lack of specific evidence regarding enforcement of safety rules by Respondent is, under the circumstances of this case, not a fatal defect for several reasons. Importantly, there is no evidence on this record that Respondent's employees had, in the past, violated Respondent's safety instructions warranting discipline.[6] Such evidence would have added considerable weight to balance against Respondent's failure to produce evidence that it disciplined employees for safety infractions. There is evidence that significant corrective action against the foreman was taken, albeit after Respondent's receipt of the citation. (Tr. 71-71) In addition, the evidence that Respondent had been inspected before and alleged violations found on only one inspection, is consistent with the inference that employees did not require discipline in the past. On balance, and considering all of the factors inherent in the defense of unpreventable employee misconduct and all of the positive evidence as to Respondent's safety concerns and actions, I conclude that Respondent has taken all reasonable steps to train its personnel and prevent trench cave-ins.

Finally, I note that the factual finding that the trench was over 5' deep resulted from the application the legal principle of assessing burdens of proof rather than a clear weight of the evidence. Thus, Respondent's foreman at the site, who was fully aware that trenches over 5' deep required cave-in protection, is found not to have been unreasonable in his belief that employees in the trench he had excavated were not in an area over 5' deep.

Because a preponderance of the evidence shows that Respondent did all it could reasonably be expected to do to ensure that its employees complied with safety standards, Respondent has

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[6] The Commission decision in *Centex-Rooney Constr. Co.,* 16 BNA OSHC 2127, 2130 (No. 98-0851, 1994), is distinguished from this matter because in that case the Commission clearly agreed with the administrative law judge in his reliance on evidence that the violative condition on a multi-employer construction site existed "for months" as evidence that the respondent did not enforce its work rules.

proven its defense of unpreventable employee misconduct. Citation 2, Item 1 is VACATED.

Citation 1, Item 1
§ 5(a)(1) of the Act[7]

The citation item alleges that Respondent was in violation of § 5(a)(1) of the Act, the so-called general duty clause, in that "[a]n employee was observed riding in the bucket of a crawler backhoe...over top of a trench center. . . ."

To establish a violation of § 5(a)(1) of the Act, the Secretary must prove that: (1) a condition or activity in the employer's workplace presented a hazard to its employees, (2) either the cited employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm , and (4) feasible means existed to eliminate or materially reduce the hazard. *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1963 (No. 84-546, 1991).

The facts are not in dispute. Upon approaching the work site, the CO saw an employee riding in the bucket of the backhoe suspended over the center of an excavation into which a manhole was to be placed. (Tr. 12-13, GX-2, 3) The employee, in the bucket for only a few minutes, was there to drop a "centerline" to determine the proper placement of the manhole. (Tr. 17, 82-83) The excavation at that point was some 9 feet deep. (Tr. 18) Respondent's foreman at the site, who was operating the backhoe, conceded that it was dangerous and a mistake to have the man in the bucket. (Tr. 96, 99) The CO testified without rebuttal that falling out of a moving bucket or being hit by it presented serious hazards (Tr. 26) and that Respondent could have placed timbers across the excavation for use by the employee in dropping a centerline or by using laser distance measuring equipment. (Tr. 17) All of the elements of a general duty clause violation are established on this evidence.

The Secretary proposed a penalty of $1750 for this violation. For the following reasons, I

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[7] Section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), provides as follows:

> Sec. 5. (a) Each employer -
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

find that a penalty of $ 1250 is appropriate.

Commission precedent is well settled 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, the gravity of the violation, the good faith of Respondent and its prior history. The Commission also recognizes that the factors are not necessarily accorded equal weight. *Nacierma Operating Co.*, 1 BNA OSHC 1001 (Docket No. 4, 1972). In this case, Respondent, with about 85 employees, is relatively small. The gravity of the violation is not particularly high in that falling from or being hit by a the backhoe bucket itself could, but would not likely triturate an employee. While broken bones are possible, they are not probable. The exposure to the hazardous condition was for a short time and was not a regular or ongoing procedure. Respondent's good faith, that is, its "efforts to assure...employees a safe and healthful workplace," is, as discussed *supra,* commendable. The CO testified that a reduction was given "if a company has not been inspected in the previous three years by a specific office" (Tr. 36) is inadequate. The testimony shows that Respondent has been in business for about 50 years, has five site utility crews and has done "thousands" of trenches. (Tr. 61-62) It has, on this record, a history of one serious violation in 1996. (GX-8) In addition, the CO's testimony that he has seen Respondent's crews on "various sites in the D.C. area on a regular basis" (Tr. 36) raises the inference that no violations were seen during those inspections.

Taken as a whole, the above considerations lead me to find that a penalty of $1,250 is appropriate for this citation item.

Serious Citation 1, Item 2(a)
29 CFR § 1926.651(c)(2)[8]

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[8] The cited standard provides:

> *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

This item alleges that Respondent did not have a ladder or equivalent safe means of egress from the trench at the work site. The item is vacated due to the Secretary's failure to show that the method used by the employees to exit the excavation, an earthen ramp, was not "safe" as required under the terms of the cited standard. As discussed in detail, *supra*, although 4 feet or deeper, the length of the trench in this matter cannot be ascertained with any reliability on this evidentiary record. The CO conceded, however, that even if up to 50 feet in length, only one safe means of egress was required. (Tr. 43) The CO initially stated that without a ladder, the men in the trench would have had to "scramble up the loose dirt." (Tr. 23) He did not testify that he actually saw any employees leaving the trench, so he had no opportunity to gauge the difficulty of exiting in that manner, nor did he relate any statements from employees indicating that exiting the trench presented any difficulties. The CO later testified that an appropriate means of egress, a ladder, was "laying beside the closed end of the trench." (Tr. 29) On cross-examination, however, he conceded that the men in the trench could have "walked" out of the trench. He then said that he did not consider it "to be a ramp," but he did not expand upon his comment. (Tr. 43) The fact that a better, faster or even safer means of access (the ladder) was available but not in use does not prove or even fairly raise the inference that the means of egress actually in use (the ramp) was not a safe means of leaving the trench. On this evidence, I cannot find that the ramp was not "a safe means of egress." Accordingly, Item 2a of Citation 1 is VACATED.

Serious Citation 1, Item 2b
29 CFR § 1926.651(j)(2)[9]

Respondent does not deny this alleged violation in its post-hearing brief. It has thus

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than 25 feet (7.62 m) of lateral travel for employees.

[9] The cited standard provides:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

abandoned its denial of the violation. Nonetheless, it is noted that the record, including CO testimony (Tr. 21), at least one photograph (GX-6), and the concession of Respondent's foreman (Tr. 90) establishes that the violative condition existed. The record also establishes Respondent's knowledge of the condition through its foreman, and that employees were exposed to the hazard. The item is, however, modified to an other-than-serious violation for the following reasons.

It is obvious that material falling from the spoils pile, or otherwise rolling into an excavation, creates some hazard to those in the trench. Although the CO relied on "an additional weight to the side of the trench" to show the standard applied, this argument would more logically be part of his justification for classifying this violation as serious. In either event, the argument is misplaced. The specific hazards contemplated by the cited standard are those of "excavated or other materials or equipment. . . falling or rolling into excavations." The hazard engendered by additional loads adjacent to a trench is covered explicitly by another standard, 29 CFR § 1926.652(a)(2). Also, the fact that a condition can be remedied with comparative ease, as considered by the CO (Tr. 30), is not support for the proposition that the condition would likely result in serious injury or death, which is the appropriate test for determining whether a particular violation is serious within the meaning of the Act. I thus find that the violative condition was other-than-serious. Considering all of the penalty factors previously discussed, with only two employees exposed for an undetermined length of time, I find that a penalty of $ 500 is appropriate.

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 serious violation of § 5(a)(1) of the Act as alleged in Citation 1, Item 1, and a civil penalty of $ 1250 is appropriate.
4. Respondent was not in violation of 29 CFR § 1926.651(c)(2), as alleged in Citation 1, Item 2a.
5. Respondent was in violation of 29 CFR § 1926.651(j)(2) as alleged in Citation 1, Item 2b; however, the violation was other-than-serious, and a civil penalty of $ 500 is appropriate.
6. Respondent was not in violation of 29 CFR 1926.652(a)(1), as alleged in Citation 2, Item 1.

ORDER

1. Citation 1, Item 1a is AFFIRMED and a civil penalty of $1250 is assessed.
2. Citation 1, Item 2a is VACATED.
3. Citation 1, Item 2b is MODIFIED and AFFIRMED as an other-than-serious violation, and a civil penalty of $500 is assessed.
4. Citation 2, Item 1 is VACATED.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated: August 14, 2000
Washington, D.C.