SECRETARY OF LABOR, Complainant, v. JALCO, INC., and its successors, Respondent.	OSHRC DOCKET NO. 99-2294

APPEARANCES:

For the Complainant:
Danielle L. Jaberg, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
R. Michael Moore, Esq., Fulbright & Jaworski, L.L.P., Houston, Texas

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Jalco, Inc., and its successors (Jalco), at all times relevant to this action maintained a place of business at the intersection of Monmack & Monte Christo, Edinburg, Texas, where it was installing a 42" water line. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 20, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Jalco's Edinburg work site. As a result of that inspection, Jalco was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Jalco brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 19, 2000, a hearing was held in Corpus Christi, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation of §1926.652(b)(2)

Serious citation 1, item 1 alleges:

29 CFR 1926.652(b)(2): Excavation with support or shield system did not extend at least 18 inches above the top of the vertical side:

> At the jobsite, near the southwest corner of the intersection formed by Monte Christi Road and Monmack Street, Edinburg, TX. Employees worked in a 10 foot high x 20 foot long trench shield whose top edge was 24 inches below ground level. The employees were exposed to being struck by spalling from the vertical walls above the trench shield.

Facts

Antonio Fuentes, OSHA's Compliance Officer (CO), testified that he conducted the inspection of Jalco's Edinburg work site on October 20, 1999 (Tr. 8). Fuentes testified that he initially observed the arm of a tractor-excavator cutting a trench through a roadbed; he saw dump trucks being loaded and driven off the job site (Tr. 9, 34, 77). The open trench was approximately 70 to 80 feet long, and had vertical sides (Tr. 10, 102). There were trench boxes in place, and Jalco employees Antonio Alvarez and Martine Garza were working within the trench boxes (Tr. 11, 23). Fuentes testified that the first trench box was improperly placed, in that it was placed in the trench on an angle. Fuentes measured the distance between the top of the low side of the trench box and ground level; the top of the trench box was 24 inches below the road surface (Tr. 18, 21, 33; Exh. C-13, R-1C).

Wayde Wendell, Jalco's project safety engineer (Tr. 23, 158-59) was aware of the cited condition (Tr. 167). Wendell testified, however, that he did not believe that any trench protection was required in this area (Tr. 177). Wendell stated that, in his capacity as the "competent person" on site, he was responsible for conducting daily inspections of the trench (Tr. 160). Wendell testified that on October 20, 1999 he performed a "thumb test" on the soil in the bottom of the trench (Tr. 162, 173). At a location approximately 15 feet in front of the 18" water main, three feet from the bottom of the trench, he found the soil to be Type A (Tr. 162, 175, 178). Wendell stated that he did not realize that previously excavated soil was always Type B, and did not re-test soils that might have been previously disturbed (Tr. 163). Wendell acknowledged that Jalco prepared a site safety plan for this job, and that the site plan indicated the soil type in the area was Type B (Tr. 161; Exh. C-15). Wendell argued that the testing utilized for the preparation of the site plan was done approximately four miles back on the

eight mile waterline project, and was not representative of the soil encountered on October 20, 1999 (Tr. 173-74).

Fuentes testified that the spoil piles from the trench consisted of a loose dry silty loam; there were no clumps of soil larger than his fist (Tr. 12, 31, 100). Though Fuentes did not detect any cracks or fissures in the soil, or note any sloughing or crumbling of the trench wall (Tr. 12, 76, 85), he noted that the soil in the area had been previously disturbed both to lay a road, and to install a pre-existing water main, which ran at a 90E angle across the trench (Tr. 12, 34, 84; Exh. C-13, C-14).

Fuentes testified that, based on his observation of the soil, evidence that the soil had been previously disturbed, and the presence of heavy equipment on the work site, he believed that the soil in the trench was Type B (Tr. 12, 33). Fuentes asked Wade Wendell, Jalco's project safety engineer (Tr. 23, 158-59), to collect a soil sample for him; he did not know where Wendell collected the sample (Tr. 13, 81). Wendell testified that he did not collect the sample himself; believed the sample came from a spoil pile but could not say from what portion of the trench those spoils came (Tr. 165-66). Fuentes sealed the soil sample and sent it to OSHA's Salt Lake City lab (Tr. 13-14).

David Armitage analyzed the soil sample from the Jalco inspection (Tr. 117). Armitage testified that he was unable to ascertain the compressive strength of the sample, as it crumbled when he attempted to take a penetrometer reading (Tr. 157). Based on the soil's plasticity and sieve test results, however, Armitage was able to conclude that the sample consisted of Type B soil (Tr. 117-48).

Discussion

The cited standard provides:

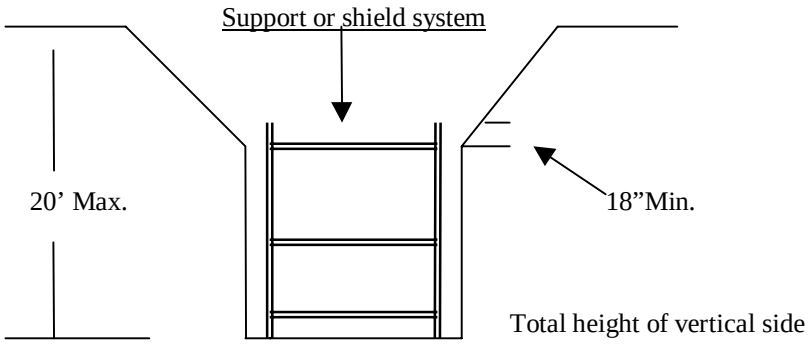
> *Design of sloping and benching systems.* The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of . . .*Option (2) Determination of slopes and configurations using Appendices A and B.* Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.

Jalco argues that the Secretary's application of Appendix B is unreasonable where, as here, the top of the trench box is located at ground level (Tr. 71; Brief for Jalco, Inc., at 6). Because the facts establish that the top of Jalco's trench box was positioned 24 inches below ground level on one side, its argument is inapposite.

It is unnecessary to ascertain the soil type before deciding this item. Appendix B applies to *all* excavations 20 feet or less in depth that have vertically sided lower portions, and which are supported

or shielded. Appendix B requires that the support or shield systems extend at least 18 inches above the top of the vertical portion. Unsupported trench walls extending above the top of the support or shield systems must be cut back. The slope must be cut to and measured from 18 inches below the top of the support system. The angle of repose for the upper slope of the excavation, measured from 18 inches below the top of the support system to ground level must equal 3/4:1 for Type A soil, and 1:1 for Type B soil.

> All excavations 20 feet or less in depth which have vertically sided lower portions that are supported or shielded shall have a maximum allowable slope of 3/4:1[1:1 or 1-1/2:1 for Type A, B and C soils, respectively]. The support or shield system must extend at least 18 inches above the top of the vertical side.



SUPPORTED OR SHIELDED VERTICALLY SIDED LOWER PORTION

Jalco maintains that Appendix B can be applied only to trenches with both a vertical lower portion and a sloped upper portion. Jalco maintains that because its entire trench was vertical the standard is inapplicable. Jalco's position is untenable in this case, where the vertical side of the trench in question extended 24 inches above the top of the trench box. This 24" cut constitutes the unsupported upper portion of the trench. Under the circumstances cited in this case, this judge cannot find that the Secretary's application of the cited standard is unreasonable.

Neither the existence of the cited condition, nor employee exposure is contested. The Secretary has, therefore, established a violation of §1926.652(b)(2).

Classification

The Secretary classified the cited violation as "serious;" a penalty of $900.00 was proposed.

Although CO Fuentes did not detect any cracks or fissures in the soil, or note any sloughing or crumbling of the trench wall, he testified that soil could fall from the face of the

excavation above the box, and strike employees in the trench (Tr. 26, 76, 85). The employees could have suffered facial and/or dental injuries (Tr. 26). Alvarez and Garza told Fuentes that they had been working in the trench for at least an hour to an hour and a half (Tr. 26). Fuentes stated the probability of an accident was "lesser," that is, it was more likely than not that no accident would occur (Tr. 29-30). Moreover, soil sloughing from the trench wall above the trench box could have fallen into the opening between the trench wall and the trench box, rather than into the trench (Tr. 33). Finally, employees in the trench were wearing hard hats (Exh. C-1).

Under §17(k) of the Act, a violation is deemed "serious" if, in the event of an accident, the cited condition would, in all likelihood, result in death or serious physical harm. The hazard in this case consists of a remote possibility that workers in the trench, all wearing hard hats, could be struck by spalling from the unguarded portion of the trench above the trench box. The CO himself admitted that in the unlikely event of spalling, the workers would, at worst, suffer facial cuts and bruises or chipped teeth. Clearly the cited violation does not meet the criteria for a "serious" classification.

A violation is *de minimis* when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987). In the Fifth Circuit, the Court has held that a *de minimis* classification may be considered where no, or only minor injury will result, or where the possibility of injury is remote. *Phoenix Roofing, Inc.*, 874 F.2d 1027 (5th Cir 1989).

Jalco's was a temporary work site, the work has since been completed and the trench filled. An abatement order is inappropriate under the circumstances. In addition, the CO significantly overstated the gravity of the violation in computing the penalty. As noted, Fuentes did not detect any cracks or fissures in the soil, or note any sloughing or crumbling of the trench wall. He believed that the possibility of soil falling into the trench was remote. The chance of employees being injured by sloughing soil while wearing hard hats is insignificant. This judge finds that the cited violation is appropriately classified as *de minimis*, and no penalty assessed.

Alleged Violation of §1926.652(g)(2)

Serious citation 1, item 2 alleges:

29 CFR 1926.652(g)(2): Excavations of earth material to a level no greater than 2 feet (.61m) below the bottom of a shield was + permitted (sic):

1. At the jobsite, near the southwest corner of the intersection formed by Monte Christo Road and Monmack Street, Edinburg, TX. Employees worked inside an 8 foot tall x 32 foot long trench shield that had been installed 4.4 feet above the trench floor. Employees were exposed to hazards associated with cave-ins.

Facts

CO Fuentes testified that he asked Alvarez and Garza to measure the bottom of the trench at the point where they were working, and found that the trench was between 4.4 and 4.5 feet deeper than the bottom of the trench box (Tr. 41-42; Exh. C-1, C-13). Wayde Wendell admitted that he knew of the cited conditions at the time of the inspection (Tr. 168).

Fuentes testified that had the bottom portion of the trench walls collapsed, soil could slough into the trench from under the trench box, pinning employees to the pipe they were working on (Tr. 46). Pressure from soil pinning the employees to the pipe could result in fractures of the lower extremities and crushed blood vessels (Tr. 46). Fuentes testified that the likelihood of a cave-in is much greater at 14 feet than at the surface, and that the likelihood of an accident was "greater," in that it was more likely than not that an accident would occur (Tr. 46-47, 50).

As noted above, Wayde Wendell testified that he performed a "thumb test" on the soil in the bottom of the trench October 20, 1999 (Tr. 162, 173). At a location approximately 15 feet in front of the 18" water main, three feet from the bottom of the trench, he found the soil to be Type A (Tr. 162, 175, 178).

Fuentes classified the soil in the bottom of the trench as Type B, based solely on the presence of heavy equipment in the area earlier, before the trench was extended beyond the 18" water main (Tr. 92-97). Fuentes testified that the vibrations from the truck loosened the soil before the trench was excavated (Tr. 97). Fuentes admitted, however, that he did not see any physical signs: fissuring, splinter lines, or sloughage, which showed that vibrations from the truck traffic had affected the soil in the area (Tr. 99). Fuentes testified that the 42" water line Jalco was installing was new, and that the lower portions of the trench wall may very well have consisted of undisturbed soil (Tr. 89). According to Fuentes, the trench walls below the trench box appeared smooth and dry, and he did not see any soil sloughing into the trench (Tr. 80). Fuentes admitted that no injuries were reported on the Jalco work

site, and that two employees were exposed for approximately an hour to an hour and a half without a cave-in occurring (Tr. 48, 50).

Finally, this judge notes that although Fuentes testified that he believed Alvarez and Garza were exposed to a serious hazard, and that in his opinion a cave-in was more likely to occur than not, he did not mention this to the employees in the trench. Instead he asked the employees to read the measurements on his leveling rod so that he might determine the size of the gap below the trench box (Tr. 80).

Discussion

The cited standard provides:

> Excavations of earth material to a level not greater than 2 feet (.61 m) below the bottom of a shield shall be permitted, but only if the shield is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the shield.

The evidence establishes, and Jalco admits that it failed to comply with the cited standard (Brief for Jalco, Inc., p. 6). Jalco argues, however, that the Secretary overstated the gravity of the cited condition. Jalco argues that the Secretary failed to establish that the cited conditions created a substantial probability of death or serious physical harm, maintaining that the possibility of an injury accident occurring was remote.

This judge agrees that the probability of an accident resulting from the cited violation was overstated. This judge finds that the CO's testimony was not credible in regard to the probability of a cave-in occurring. Though the Secretary established that parts of the trench consisted of previously disturbed Type B soil, she did not establish that the soil in the bottom of the trench was Type B. As noted in the statement of facts under item 1, CO Fuentes admitted that the soil in the bottom of the trench could have consisted of undisturbed soil, and that he did not know which part of the trench the Type B soil in the spoil pile came from. Wayde Wendell's manual test on the day of the inspection established that the soil in the bottom of the trench was Type A. This judge is not convinced that the vibrations from heavy equipment working on the road nearby affected the integrity of the soil at the bottom of the trench walls. There were no physical signs that a cave-in was imminent; there was no sloughing; the trench walls appeared smooth and dry though the trench had been open for an hour and a half. During the inspection Fuentes did not act as though he was concerned about the possibility of a cave-in.

It is well settled, however, that the substantial probability of death or serious physical harm required by the Act does not refer to the probability that an accident will, in fact, result, but only that if the accident were to occur, there would be a substantial probability that death or serious physical harm would result. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1987-90 CCH OSHD ¶28,501 (No. 87-1238, 1989). Under Commission precedent, the implausibility of the CO's cave-in scenario is insufficient, in itself, to reduce the classification of the cited violation.

Nonetheless, because Fuentes' testimony regarding the severity of the possible injuries was not credible, this judge believes that the violation was erroneously classified as "serious."

It is undisputed that a trench box was in use in the trench, though the trench was two to two and a half feet too deep for the box. The standard allows the trench to be excavated two feet below the bottom of the shield. It presumes that the two foot gap creates *no* hazard to employees in the trench. Though the gap beneath the trench box in this case was two to two and a half feet deeper than that allowed by the standard, constituting a technical violation, it is clear that the amount of soil that could slough from behind and below the shield and flow into the trench would be insufficient to cause the serious injuries, *i.e.*, leg fractures, that CO Fuentes testified to.

The record contains no credible evidence of the type of injuries that might be sustained as a result of the cited violation. Because the Secretary failed to prove, by a preponderance of the evidence, that the cited condition could result in serious physical harm, the violation is re-classified as "other than serious." No penalty will be assessed.

Alleged Violation of §1926.652(a)(1)

Repeat citation 2, item 1 alleges:

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

> At the jobsite, near the southwest corner of the intersection formed by Monte Christo Road and Monmack Street, Edinburg, TX. Employees installing a 42-inch treated water line traveled across an unprotected gap of 9.4 feet, 13 feet deep between two trench shields. The unprotected area had vertical walls. Employees were exposed to hazards associated with cave-ins.

JALCO, Inc., was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent Standard which was contained in OSHA Inspection #302097787 Citation #01, Item #002, issued on 08/11/98.

Facts

Fuentes testified that there was a gap between two trench shields of approximately 9.4 feet (Tr. 53; C-1, C-5). An 18" water main running across the trench prevented Jalco from placing the trench boxes next to each other (Tr. 54; Exh. C-1, C-2, C-4). Wayde Wendell testified that he was aware of the cited conditions (Tr. 169). He deliberately placed the trench boxes on either side of the water main, as he did not want to chance damaging the pipe and flooding the excavation (169-70). Wendell believed that the unguarded portion of the trench consisted of Type A soil, as noted above, he did not realize that previously excavated soil is always classified as Type B (Tr. 163). Wendell had not planned on any men working in the gap (Tr. 169-70). Both he and Fuentes, however, observed Alvarez and Garza walking through the unprotected area to work and to collect their tools (Tr. 53, 59, 83).

Fuentes stated that the employees could have been completely entrapped in the event of a cave-in (Tr. 57). Fuentes admitted that the employee exposure to the violative condition was short, a few seconds at a time, totaling two or three minutes (Tr. 63, 83). Nonetheless, he believed it was "very likely" that a cave-in would eventually occur because the soil in that area had been previously disturbed where the water main was installed (Tr. 57, 102). Specifically, Fuentes stated that the chance of a cave-in was 80% (Tr. 64). A cave-in would likely result in serious internal damage up to and including death (Tr. 58).

Discussion

Jalco admits that it was in violation of the cited standard (Brief for Jalco, Inc., p. 7). Jalco maintains, however, that the Secretary failed to show that the violation was a "repeated." Jalco maintains that the violation should have been classified as *de minimis*, because, except for the soil immediately above and surrounding the crossing water line, the soil in the trench was Type A.

Classification

Repeat. A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16183, 1979). The

Fifth Circuit, in which this case arises, has held that the Secretary has the burden of demonstrating the substantial similarity of the conditions and hazards associated with the violations, even where, as here, the prior and present citations are for failure to comply with the same standard. *Bunge Corp. v. Secretary of Labor (Bunge)*, 638 F.2d 831 (5th Cir.1981).

CO Fuentes testified that Jalco was cited for another violation of §1926.652(a)(1) in 1998 (Tr. 60; Exh. C-7). The 1998 citation charged Jalco with allowing employees to work in an excavation which was sloped at an angle steeper than 1-1/2:1, and did not have an otherwise adequate protective system (Exh. C-7). Fuentes testified that both citations involved a cave-in hazard (Tr. 60-61).

First, this judge notes that the Secretary, though arguing that the 1998 and 2000 citations are substantially similar, failed to introduce any evidence, other than the bare citation, showing that the conditions on the prior Jalco work site were similar to those cited here, as required under *Bunge*. Without such evidence, this judge is unable to determine whether the occurrence of the second violation demonstrates a need for greater than normal incentives to comply with the Act. *See, Monitor Construction Co.*, 16 BNA OSHC 1589, 1994 CCH OSHD ¶30,338 (No. 91-1807, 1994). Nothing in the earlier citation suggests that Jalco used trench boxes in its excavations in 1998. The placement of trench boxes in the Edinburg excavation would not only change the nature of the cave-in hazard, it would constitute evidence of Jalco's attempts to take steps to avoid similar occurrences.

This judge finds that, on this record, the Secretary has not shown, by a preponderance of the evidence, that the 1998 and 2000 violations were substantially similar.

Serious. The violation is, however, "serious," in that, if an accident were to occur, there would be a substantial probability that death or serious physical harm would result. *See, Whiting-Turner Contracting Co., supra.* It is clear that were an employee to walk through the unguarded portion of the trench when a cave-in occurred, he could be buried, suffer internal injuries, and/or suffocate. The probability of such an accident occurring is, however, relevant to the determination of an appropriate penalty.

Penalty

In determining an appropriate penalty this judge must give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co*., 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). The gravity of the violation is determined

based on (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

Jalco is a medium sized employer, with more than 26 but less than 200 employees (Tr. 36, 51). Fuentes testified that the Secretary did not give Jalco any credit for good faith because of the high-gravity of the violation (Tr. 36-39, 51). Fuentes further testified that the Secretary erroneously failed to provide Jalco with a 10% credit for prior history (Tr. 39, 51).

No work was going on in the cited portions of the excavation. Two employees were exposed to the cited hazard for several seconds at a time, two or three minutes total, as they passed from one trench box to the next, through the unguarded portion of the trench. The probability of an accident occurring was lessened by Jalco's use of trench boxes on either side of the area in question. However, this judge notes that a cave-in hazard, as defined by the cited standard, remained. As is clearly set forth in the standards, to minimize the danger of a cave-in, Type A soil must either be supported, or sloped back at a 3/4:1 grade; unsupported Type B soil, like that around the preexisting waterline, must be sloped back to a 1:1 angle of repose.

Nonetheless, the CO's testimony that the gravity of the violation was high is not credible. Two employees were exposed for only two or three minutes. Fuentes admitted that the unguarded sides of the trench showed no signs of impending collapse. Though he testified at the hearing that there was an 80% chance of cave-in at the work site, Fuentes did not inform employees who walked thorough the gap between the trench boxes that they did so at their peril. Given Fuentes' behavior at the work site, this judge cannot credit his testimony that he perceived a significant cave-in hazard.

Furthermore the CO unreasonably denied Jalco credit for good faith. Jalco took significant safety precautions on the site; employees worked in the trench with the benefit of trench shields. Finally, the Secretary admits that Jalco should have been given credit for prior history.

Taking into account the relevant factors, this judge finds that a penalty of $1,000.00 is deemed appropriate for this item.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.652(b)(2) is AFFIRMED as a *de minimis* violation of the Act.
2. Serious citation 1, item 2, alleging violation of §1926.652(g)(2) is AFFIRMED as an "other than serious" violation of the Act, without penalty.

3. Repeat citation 2, item 1, alleging violation of §1926.652(1)(1) is AFFIRMED as a "serious" violation of the Act, and a penalty of $1,000.00 is ASSESSED.

_____/s/_____
James H. Barkley
Judge, OSHRC

Dated: December 14, 2000