United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
v.	:	DOCKET NO. 98-0230
	:	
MODERN CONTINENTAL/OBAYASHI, A JOINT VENTURE,	:	
	:	
Respondent.	:	

Appearances:

James Glickman, Esquire
Office of the Solicitor
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Richard D. Wayne, Esquire
Hinckley, Allen and Snyder
Boston, Massachusetts
For the Respondent.

Before: 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, Modern Continental/Obayashi, a joint venture, at all times relevant to this action maintained a work site designated CA/T Project, No. C17A9, on Atlantic Avenue in Boston, Massachusetts, where it was engaged in the business of slurry wall construction. Respondent admits that it is an employer engaged in a business affecting commerce and that it is subject to the requirements of the Act.

On the evening of December 11, 1997, OSHA compliance officers ("CO's") Alexander Steel and Eric Jones conducted an inspection of the subject job site.[1] Upon entering the job site, they

[1] In order to accommodate the flow of traffic and the scheduling of the relocation of utilities on the subject project, construction work was ongoing both day and night. OSHA has established a work plan, in accordance with its National Emphasis Program on Trenching and Excavation, that
(continued...)

observed the slurry wall operation in progress. As a result of this inspection, on January 5, 1998, Respondent was issued a serious citation alleging violations of 29 C.F.R. §§ 1926.502(i)(3) and 1926.502(i)(4), and a repeat citation for a violation 29 C.F.R. § 1926.501(b)(7)(ii), with a total proposed penalty of $5,500.00. By filing a timely notice of contest, Respondent brought this proceeding before the Commission. The contested violations were the subject of the hearing held before the undersigned in Boston, Massachusetts on October 1 and 2, 1998. Counsel for the parties have submitted post-hearing briefs, and this matter is ready for disposition.

The Slurry Wall Excavation Process

The Commonwealth of Massachusetts is involved in a massive public works project called the Central Artery/Third Harbor Tunnel Project ("the Project"). The Project is a 14-year undertaking to replace the Central Artery, downtown Boston's central elevated highway, with an underground expressway and to construct a tunnel from downtown to Logan Airport. Respondent is a joint venture involved in building a portion of the new underground expressway beneath the Central Artery. As part of that work, Respondent is engaged in the construction of slurry walls. Slurry walls are sidewalls built downward along the perimeter of the Central Artery and future expressway that support the Central Artery while the land beneath it is excavated. (Tr. 20-21, 26-28, 49-52).[2]

Slurry walls are constructed in segments, or panels, that are 3.5 feet wide and 9 feet long and go below ground for 90 to 100 feet. Each panel is created by making a straight cut in the earth's surface with an excavator and a bucket attachment called a "clamshell." Concrete guide walls about 3.5 feet wide, 6 feet long and 4 feet deep are installed at the surface of the slurry wall excavation, and as the clamshell removes earth from the excavation through the guide walls slurry is poured into the excavation, also through the guide walls. Slurry is a mixture of water and bentonite, which, due to its liquidity and density, creates a hydraulic force with strength sufficient to hold the sidewalls in place without the necessity of using forms. Slurry also has a high viscosity which prevents water from filling the excavation and allows the clamshell to move up and down during the excavation process. Once

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[1](...continued)
includes doing night inspections because of the significant amount of nighttime trenching and excavation. The instant inspection was conducted pursuant to this plan. (Tr. 244-45, 286).

[2]The term "Tr." refers to the official trial transcript.

the excavation reaches the required depth, steel beams are forced down into the slurry on top of one another until they are at grade level. The slurry is then removed and replaced with concrete, and the resulting concrete panels form the permanent sidewalls of the underground expressway. (Tr. 20-21, 28-32, 38-42, 49-52, 56, 158, 214-15, 280-82, Exs. C-6, C-7).[3]

Former employee Loreto Rufo, who was employed with Respondent for a period of 7 years, provided testimony about his experience with the slurry wall excavation process. He was on the site at the time of the subject inspection and had worked as a "bucket man" on slurry wall construction on the Project for about a year and a half. The process usually involved an employee who operated the excavator and clamshell, and a bucket man. Rufo's duties included making sure that slurry hoses were in place at the excavation and lining up the clamshell between the guide walls. He testified that the area was first pre-trenched to a depth of about 20 feet to ensure it was free of underground utilities and other obstructions and that the area was then refilled and the guide walls put in. The clamshell initially dug down to a depth of 30 feet, and, as the ground fill was removed, Rufo would look into the excavation to make sure the sides were straight; he also checked to ensure no water was entering the excavation, which could cause a cave-in. Once the 30-foot depth was reached, slurry was pumped into the excavation to a level of 3 to 4 feet below grade. As the clamshell continued to dig more slurry would be added to replace the earth being removed, and this process was repeated until the excavation's desired depth was reached.[4] (Tr. 288-315).

Rufo further testified that there were times when he had to work right around the edges of the slurry wall excavation, such as when he viewed the opening during the digging of the first 30 feet, when the fall distance could be 10 to 30 feet. He also had to work around the excavation edges when they were slippery due to the presence of slurry; it was not unusual, as the clamshell went in and out of the opening, for slurry to overflow the guide walls or drip out of the clamshell. For example, he had to stand on the guide walls to clean them and, as an indicator for the excavator operator, to mark

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[3]The term "Ex(s)." refers to exhibits introduced into evidence at trial.

[4]The slurry hose was tied into a line going to the plant that supplied it, and when Rufo needed slurry he used a two-way radio to tell the plant to begin pumping; slurry was generally available, but Rufo sometimes had to wait for it if the plant was busy. Depending on how the digging was going, the need for slurry could range from every half hour to once per shift. (Tr. 294-96, 306, 311-15).

the clamshell cables with paint. Rufo also had to set up a sonar camera over the excavation at various times, usually with the help of another worker, to take pictures of the opening to determine its shape and depth, and the taking of pictures could range from a half hour to an hour or more.[5] The slurry level was usually 3 to 4 feet below grade as Rufo performed these tasks, but at times it was over 6 feet and up to 10 to 15 feet below grade; further, while there could be barriers around the opening Rufo had to work inside them, where there was no fall protection. Supervisory personnel sometimes came by to observe Rufo's work, and they would stand by him at the edge of the opening as he checked its depth or help him place the camera over the opening. Rufo knew of four employees who had fallen into slurry openings; two fell in during the concrete pouring process and sustained serious shoulder injuries. (Tr. 304-05, 309-30, 333-34, 340-41).

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).

Citation 2 Item 1: Repeat

29 C.F.R. § 1926.501(b)(7)(ii), the cited standard, states that "[e]ach employee at the edge of a well, pit, shaft, and similar excavation 6 feet (1.8 m) or more in depth shall be protected from falling by guardrail systems, fences, barricades, or covers." The citation alleges as follows:

> Employees were exposed to possible serious fall and drowning hazards while walking and/or working in close proximity to slurry wall ground openings, where standard guardrails, fences, barricades, were not installed around the holes, nor was any other equivalent fall protection used to prevent employees from falling into the ground openings, at the following jobsite locations:
>
> 1. Atlantic Avenue, Work Zone #241, Panel #W-1.
> 2. Atlantic Avenue, Work Zone #244, Panel #M-42.
> 3. Atlantic Avenue, Work Zone #244, Panel #M-30.

[5]The camera sat over the opening on rails. (Tr. 316-20; Ex. C-11).

The Applicability of the Standard

Respondent challenges the applicability of the standard to the cited condition. It is the Secretary's position that due to its shape and properties (100 feet deep, rectangular in shape, and filled with liquid material) and the obvious fall hazards present, a slurry wall opening is a "well, pit, shaft, [or] similar excavation" and thus falls within the ambit of the standard. Secretary's Post-Trial Brief, pp. 8-9. Respondent, on the other hand, contends that the standard does not apply in this case because the term "slurry wall opening" is not specifically mentioned and because the fall hazard alleged here did not meet the 6-foot threshold due to the fact that the slurry at the subject site was maintained at a level of 3 to 4 feet from the ground surface.

I find that the fact that the term "slurry wall opening" is not specifically addressed in the cited standard is of no consequence with regard to the applicability of the standard. Commission precedent is well settled that "[s]tandards and regulations under the Act are to be broadly and reasonably construed to effectuate the Act's express purpose, which is 'to assure as far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.'" *Hackney, Inc.*, 16 BNA OSHC 1806, 1808 (No. 91-2490, 1994) (citations omitted). A review of the cited standard persuades me that its terms are not exclusive or restrictive and, moreover, that the ordinary meaning of those terms makes them applicable to a broad range of man-made openings, cavities or depressions in the ground created by cutting, digging or scooping. I conclude that slurry wall openings are areas which the standard was intended to address and that the standard therefore applies to such openings.[6]

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[6]In making this finding, the undersigned has reviewed the following definitions:

a. 29 C.F.R. § 1926.650(b) "*Excavation* means any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal."

b. The following is found in Merriam-Webster's Collegiate Dictionary, 10th Edition (1998)

1. **excavation** ... 2: a cavity formed by cutting, digging, or scooping....

2. **well** ... 2 a: a pit or hole sunk into the earth to reach a supply of water b: a shaft or hole sunk to obtain oil, brine, or gas ... 4: an open space extending vertically through floors of a structure 5: a space having a construction or shape suggesting a well for water 6 ... b: a deep vertical hole c: a source from which something may be drawn as needed....

3. **pit** 1 a (1): a hole, shaft, or cavity in the ground (2): MINE (3): a scooped-out place used for burning something (as charcoal) b: an area often sunken or depressed below the

(continued...)

As to Respondent's second contention, I note first that the record establishes that the slurry wall openings at the site were dug down to 30 feet before any slurry was pumped into them and that even after slurry was put into an opening its level varied during the excavation process and could be as much as 10 to 15 feet below grade. (Tr. 56-57, 144, 154, 325-26). However, the Secretary contends that Respondent's interpretation does not comport with the standard even when the slurry level was less than 6 feet below grade, asserting that the plain meaning of the phrase "6 feet ... or more in depth" is the distance measured from the ground surface to the bottom of the physical excavation. Secretary's Post-Trial Brief, p. 10. I agree.

Employers are required to choose and use a fall protection system as provided by section 501 at paragraphs (b)(1) through (b)(15), which address fall protection requirements for various areas and activities. Paragraphs (b)(1) through (b)(6) and (b)(9) through (b)(15) set forth a uniform threshold of exposure of falling from a height of 6 feet or more above and/or to lower level(s).[7] Paragraph (b)(7), on the other hand, addresses areas that are 6 feet or more "in depth" that must be guarded to prevent employees from falling into them. *See also* 59 Fed. Reg. 40,687 (1984). I defer to the Secretary's reasonable interpretation of the standard and find that the language of paragraph (b)(7) is distinguishable from the paragraphs that address a 6-foot height "above" or "to which" one would have to fall in order to reach the lower level. *See Martin v. OSHRC*, 499 U.S. 144 (1991). Accordingly, it is the actual depth of the slurry wall openings and not the distance of the slurry from the ground level that is relevant with respect to the cited conditions.

Respondent's final contention is that the standard is unconstitutionally vague. For the reasons set forth above, I find that the language of the standard is not so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Georgia Pacific Corp v. OSHRC*, 25 F.3d 999, 1005 (11th Cir. 1994). I also find that Respondent had reasonable

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[6](...continued)
adjacent floor area....

4. **shaft** ... 3 i: a vertical or inclined opening of uniform and limited cross section made for finding or mining ore, raising water, or ventilating underground workings (as in a cave)....

[7] The term "lower level" is defined as those areas or surfaces to which an employee can fall. Such areas or surfaces include ground levels, floors, platforms, ramps, runways, excavations, pits, tanks, material, water, equipment, structures, or portions thereof. *See* 29 C.F.R. § 1926.500(b).

notice that the slurry wall excavations fell within the ambit of the standard. This finding is supported by the fact, as discussed *infra*, that Respondent was cited in 1996 under the same standard and on the same Project for lack of barriers for its slurry wall excavations and that it provided OSHA photographs for abatement purposes which addressed the standard's requirements. (Exs. C-3-C-5).[8]

The Violation and Employee Exposure

Upon arriving at the site, the CO's observed and photographed a clamshell in operation, and an employee, John McDunough, working adjacent to a slurry wall opening identified as Work Zone #241, Panel #W-1. The clamshell was inside the opening, a wooden guardrail or barrier was on the right side of the opening, and a hose going underneath the guardrail was pumping slurry into the opening. McDunough was between the opening and the guardrail, which was the only barrier around the excavation. CO Steel testified that McDunough told him that the excavation was about 20 feet deep, that he was there to assist the excavator operator, and that his duties included checking the hoses and cables and making sure the clamshell went into the opening straight.[9] He said that McDunough was 3 feet from the edge of the excavation and that there was nothing to prevent his falling in. He also said that one end of the guardrail had to be removed to allow the clamshell to work but that this did not justify McDunough's being 3 feet from the edge of the excavation without any protection. (Tr. 74-77, 93, 96-97, 131-33, 173-75, 234; Exs. C-6-C-8).[10]

CO Steel further testified that they went across the street where a similar slurry excavation, identified as Work Zone #244, Panel #M-42, was in progress. He saw a crane in operation and an employee, Joe Rego, standing about 3 feet from the edge of the slurry opening; he also saw that there was nothing between Rego and the edge of the opening. Rego was watching the clamshell and looking down into the opening, but, as the CO's approached, he walked away from the opening and

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[8]That there is no Commission precedent in this regard is of no consequence. A void in case law does not grant an employer immunity from the enforcement of applicable OSHA standards. *Columbia Art Works, Inc.*, 10 BNA OSHC 1132, 1133 (No. 78-29, 1981).

[9]CO Steel did not measure the depth of the slurry from grade level. (Tr. 173).

[10]Respondent's suggestion that these photos may have been taken before its superintendent was contacted is of no moment. The photos show Respondent's employee working in an open area in public view. *See L.R. Willson & Sons, Inc.*, 10 BNA OSHC 2059, 2060 (No. 94-1546, 1997); *Regional Scaffolding & Hoisting Co.*, 17 BNA OSHC 2067, 2069 (No. 93-577, 1997).

stood behind a barrier on the left side of the excavation. CO Steel said that he looked down into the opening from behind the barrier, that he observed that the slurry level was about 10 feet below grade, and that Rego told him the excavation was 60 to 80 feet deep. (Tr. 134-37, 139-45; Ex. C-10).

The CO's approached another slurry wall excavation, identified as Work Zone #244, Panel #M-30. CO Steel saw a chain link fence surrounding the excavation and several people standing around an excavator that was parked just outside the fence. He also saw a camera on rails over the excavation and a probe that descended into the opening. Loreto Rufo, one of the individuals present, told him that he and the others had just placed the camera on the rails over the opening in order to determine the depth of the excavation and that they had had to take away a portion of the fence to do so. Rufo also told the CO that there had been no fall protection when they installed the camera and the rails and that the excavation was 100 feet deep. CO Steel himself observed the slurry to be about 3 feet below ground level. (Tr. 147-55, 167-69; Exs. C-11-C-12).

I find that the conditions described above establish by a preponderance of the evidence that Respondent's employees were performing activities which required them to be at or over the slurry wall openings and that there was no fall protection to prevent them from falling into the excavations. The testimony of CO Steel was not rebutted by Respondent, and Rufo's testimony, set out *supra*, corroborates that of the CO. I therefore conclude that the conditions at the site exposed employees to falls to depths of 6 feet or more and that Respondent was in violation of the subject standard.

Knowledge

It is clear from the foregoing that the cited conditions were based on physical conditions and practices which were readily apparent to anyone who looked. I find that Respondent's management should have been aware of the conditions and that Respondent had constructive knowledge of them. *Hamilton Fixtures*, 16 BNA OSHC 1073, 1096 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994); *Simplex Time Recorder Co. v. Brock*, 766 F.2d 575, 589 (D.C. Cir. 1985). This finding is bolstered by the fact that Respondent was previously cited under the same standard and similar circumstances on the same Project. *See* "repeat" discussion, *infra*.

Classification: Repeat-Serious

A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a

substantially similar violation. *Edward Joy Co.*, 15 BNA OSHA 2091, 2092 (No. 91-1710, 1993); *Potlatch Corp.*, 7 BNA OSHA 1061, 1063 (No. 16183, 1979). Unless the violation involves a general standard, the Secretary establishes her prima facie case of similarity by showing that both violations are of the same standard. 15 BNA OSHC at 2092.

It is undisputed Respondent was cited on April 29, 1996, for violating the instant standard because employees were observed walking and/or working adjacent to a slurry wall opening having no guardrails, fences, or barricades around it. (Tr. 22; Ex. C-1). CO Steel testified that on April 2, 1996, he inspected a work site of Respondent that abutted the subject site and was part of the Project. He observed that there were no guardrails or barriers around the slurry wall excavation, which was 60 to 80 feet in depth, that the slurry level was about 15 feet below ground level, and that there were employees exposed to falls into the opening. As a result of this inspection, OSHA issued Respondent a citation alleging that employees were exposed to serious fall and drowning hazards while walking and/or working in close proximity to the unguarded slurry wall opening. OSHA and Respondent informally settled this citation on May 22, 1996. Before executing the settlement, Respondent represented to OSHA that it had abated the condition by installing a guardrail system in accordance with 29 C.F.R. § 1926.502 around the perimeter of each active slurry wall excavation to protect employees working at or near the opening. At the hearing, the Secretary presented photos that Respondent had provided OSHA as to its abatement of the 1996 citation; the photos show a slurry wall excavation with guardrails along its perimeter. (Tr. 48-49, 55-56, 60-66, 69; Exs. C-4, C-5).

Based on the foregoing, I find that this violation was appropriately classified as repeated. I further find that the violation was serious. 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." Respondent asserts that no serious injuries would occur upon an employee falling into a slurry wall opening because, due to the fact that slurry has a specific gravity of greater than one, the person would "bob like a cork." (Tr. 30).[11] However, the record establishes that the edges of the slurry wall excavations become slippery due to slurry overflows. The hazard associated with this condition is that of slipping or tripping at the edge of an excavation and falling into it, and, in so doing, hitting one's

[11] Ex. R-2 indicates that the specific gravity for the slurry solution was 2.79.

head against the concrete guide wall and being knocked unconscious. This presents not only the possibility of a serious head injury but also a drowning hazard, especially if the fall is face down. In addition, slurry wall excavations at the site took place at night, the operation generally involved only an excavator operator and a bucket man, and slurry levels could be as much as 15 feet below grade. These considerations could deter the prompt detection of an accident and could also complicate the rescue of a person who had fallen into a slurry wall opening. (Tr. 157, 223 226-27, 231). Finally, Rufo's testimony, set out *supra*, shows that employees were exposed to falls of up to 30 feet during the initial part of slurry wall excavations; his testimony also establishes that four employees had fallen into slurry wall openings and that two had sustained serious shoulder injuries when they fell in during concrete pouring operations. Respondent's assertion is rejected.

Penalty

Once a contested case is before the Commission, the amount of the penalty proposed is just that - a proposal. The Commission, as the final arbiter of penalties, makes the determination of what constitutes an appropriate penalty. In so doing, the Commission must give "due consideration" to the four criteria under section 17(j) of the Act, 29 U.S.C. § 666(j). These penalty factors are the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993).

The record shows that the gravity of this violation was in the moderate range but that the severity was high, due to the serious injuries, or even death, that could have resulted in the event of an accident. The probability of an accident occurring was lesser because of the number of employees present and their frequency of exposure. After taking these elements into account, OSHA's gravity-based penalty was $2,500.00, and because there were no adjustments to this amount for size, history or good faith, the proposed penalty as reflected in the citation is $2,500.00.[12] However, as the Secretary points out in her post-hearing brief, OSHA's Field Inspection Resource Manual provides for the gravity-based penalty for the first repeat violation for a large employer such as Respondent to be multiplied by five. The Secretary further points out that OSHA inadvertently failed to apply the multiplier in this case and that a penalty of $12,500.00 should have been proposed. (Tr. 251, 256).

[12]Respondent had over 250 employees and had been cited for a serious violation in the past three years, and no adjustment for good faith was made as the violation was repeated. (Tr.252-55).

The Secretary contends that under the circumstances, the Commission should assess the larger penalty. *See* Secretary's Post-Hearing Brief, pp. 16-17. I agree with the Secretary that the larger penalty appropriately reflects the facts and circumstances in this case and, in particular, the repeat-serious nature of the violation.[13] A penalty of $12,500.00 is therefore assessed for this citation item.

Citation 1 Item 1: Serious

29 C.F.R. § 1926.502(i)(3), the cited standard, states that "[a]ll covers [for holes in floors, roofs, and other walking/working surfaces] shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees." The citation alleges as follows:

> Employees were exposed to possible serious injuries while walking and/or working in close proximity to excavated slurry wall ground openings which were covered with sheets of plywood which were not secured.

The record indicates that at the end of the night, if a slurry opening was not finished, plywood was placed over the opening. Plywood was also used to cover a slurry wall excavation once it was filled in with concrete to the specified level. (Tr. 328, 194-95). CO Jones testified that he saw a steel beam projecting from the ground that was surrounded by four overlapping sheets of plywood and that he could see an opening under the plywood as part of the guide wall was broken. He also testified that the opening was located between Panels #M-30 and #M-42, which were 70 to 75 feet apart, that he was able to displace the plywood by hooking the side of his boot sole under a corner of each sheet and lifting it, and that the corner of one sheet was encrusted in mud, which made raising it more difficult. The CO said the cover was inadequate because it was not secured to keep someone from picking the sheets up and carrying them away. (Tr. 188-99; 205-10; Exs. C-13, C-14).

29 C.F.R. § 1926.500(b) defines the term "hole" as "a gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof or other walking/working surface." Based on this definition and the record, I find that the cited area was a "hole" within the meaning of the standard and that the standard applies to it. Regardless, I conclude that the Secretary has not met her burden of proving by a preponderance of the evidence that Respondent violated the standard. The language of the standard itself makes it clear that covers over holes are to be secured to prevent accidental

[13]In this regard, I note that section 17(a) of the Act provides that an employer who repeatedly violates the Act may be assessed a civil penalty of not more than $70,000.00 for each violation.

displacement. In addition, the legislative history shows that the intent of the standard was to ensure that covers be secured when installed so that employees cannot easily remove them and so that wind and equipment will not accidentally displace them. *See* 59 Fed. Reg. 40,716 (1984). The language of the standard and its legislative history persuade me that the purpose of the standard is to prevent accidental, not intentional, displacement of hole covers. However, the CO's testimony establishes that he intentionally displaced the plywood sheets by lifting them up with his boot. Further, as he himself stated, his concern was that the sheets were "not secured to keep someone from picking them up and walking away with them." (Tr. 197). Finally, in my view, that the plywood sheets were overlapping also mitigates against accidental displacement.

In addition to the foregoing, the record contains no evidence that employees during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, would have been in a zone of danger or that it was reasonably predictable that they will be in a zone of danger. *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521 (No. 90-2866, 1993); *Armour Food Co.*, 14 BNA OSHC 1817, 1824 (No. 86-247, 1990). The record shows that all non-working openings were covered and that no employees were observed walking over covered openings. (Tr. 181). Moreover, there is nothing to establish that employees had any reason to be working or traveling in the area of the cited opening. First, the CO's testimony about what is shown in Ex. C-13, his photo of the condition, was speculative and unpersuasive.[14] (Tr. 191-92). Second, that an extension cord may have been in the area of the

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[14]Q I see. I see, in the lower left-hand part of the photograph, something yellow, can you tell what that is?

A I believe that is an extension cord, it looks like an extension cord to me.

Q And in the upper right-hand part of the photograph, can you tell me what you see there? There's some --

A I can --

Q -- gray and some green.

A I can tell you what I believe it to be.

Q Yes?

A I believe that is the preparation for a concrete pumping operation for a slurry pit.

Q Okay. Who took this photograph?

A I took this photograph.

Q Does this photograph appear to be the scene you observed during the inspection at

(continued...)

opening does not demonstrate employee exposure, especially since the Secretary presented no evidence to show when or how the cord was placed in the area or if the cord would be used by employees as they worked. Third, that the cited opening was between two work areas 70 to 75 feet apart, that is, Panels #M-30 and #M-42, does not show that the employees seen at Panel #M-42 had any reason to be in the cited area or to go from one panel to the other. (Tr. 227). I conclude that the Secretary has not proved employee access to the cited condition. This item is accordingly vacated.

Citation 1 Item 2: Serious

29 C.F.R. § 1926.502(i)(4), the cited standard, states that "[a]ll covers [for holes in floors, roofs, and other walking/working surfaces] shall be color coded or they shall be marked with the word "HOLE" or "COVER" to provide warning of the hazard." The citation alleges as follows:

> Employees were exposed to possible serious injury while walking and/or working in close proximity to slurry wall ground openings which were covered with sheets of plywood, which were not marked to provide a warning of the hazard.

The record shows that this citation item was issued because the sheets of plywood over the opening addressed in item 1 were not clearly marked with the word "hole." (Tr. 182). CO Jones testified that the letters "HO" and what appeared to be an arrow were written in orange on one sheet of the cover. He said this was an inadequate indication of the hole underneath, that the arrow beside the letters "HO" was misleading because the hole encompassed a larger area than indicated, and that the standard requires the word "hole" or "cover" to be spelled out. (Tr. 193-97).

I find that the marking of only one panel with the letters "HO" was not sufficient to alert employees that plywood sheets had been placed as covers over a hole, particularly since Ex. C-13, the CO's photo of the condition, reveals that the position of the marked panel could be misleading with regard to the exact location of the hole. However, for the reasons set forth *supra*, with respect to Citation 1, Item 1, I conclude that the record is devoid of evidence establishing employee exposure to the cited condition. This item is therefore vacated.

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[14](...continued)
issue?
A Yes.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Citation 2, Item 1, alleging a repeated violation 29 C.F.R. § 1926.501(b)(7)(ii), is AFFIRMED, and a penalty of $12,500.00 is assessed.

2. Citation 1, Items 1 and 2, alleging serious violations of 29 C.F.R. §§ 1926.502(i) and 1926.502(i)(4), respectively, are VACATED.

Covette Rooney
Judge, OSHRC

Dated:
Washington, D.C.