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

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SECRETARY OF LABOR
Complainant,
v.
COLUMBIS GAS SYSTEMS OF OHIO
Respondent.

OSHRC DOCKET
NO. 93-3232

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 11, 1995. The decision of the Judge will become a final order of the Commission on September 11, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 31, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr/SKA

Date: August 11, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-3232

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
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Complainant,	:	
	:	
v.	:	Docket No. 93-3232
	:	
COLUMBIA GAS OF OHIO, INC.,	:	
	:	
Respondent.	:	
	:	
	:	

APPEARANCES: Kenneth Walton, Esq.
Office of the Solicitor
United States Department of Labor
For Complainant

Jenny L. Higgins, Esq.
Columbia Gas of Ohio, Inc.
For Respondent

BEFORE: MICHAEL H. SCHOENFELD
Judge, OSHRC

DECISION AND ORDER

Background and Procedural History

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

Having had its work site inspected by a compliance officer of the Occupational Safety and

Health Administration, Columbia Gas of Ohio Inc. ("Respondent") was issued one citation alleging six serious violations of the Act. Respondent timely contested. Prior to the commencement of the trial, the Complainant voluntarily withdrew Citation 1, Item 3, which alleged a violation of 29 C.F.R. § 1926.651(g)(2)(I). Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on February 6 and 7, 1995, in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is a natural gas distribution company and that it is engaged in a business which affects commerce.

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

Citation No. 1, Item 1a
29 C.F.R. § 1926.20(b)(2)

The cited standard provides:

> (b) *Accident prevention responsibilities.*
>
> * * *
>
> (2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Complainant alleges that Respondent failed to comply with the standard in that it failed to have the Harmon Avenue work site inspected by a competent person. Respondent is engaged in the distribution and retail sale of natural gas. It owns numerous underground pipelines. On October 4, 1993, a leak was reported in Respondent's pipeline property located at 1271 Harmon Avenue,

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[1] Title 29 U.S.C. § 652(5).

Columbus, Ohio. In response to the report, Respondent arranged for an independent contractor, C.J. Hughes Construction Company ("C.J. Hughes") to repair the leak[2]. Respondent, consistent with its usual practice, assigned one of its employees, Robert Cook, a Contract Inspector, to be present at the site. During the course of C.J. Hughes excavating a trench to allow access to the leaking area an unanticipated leak from a regulator was found, The trench was expanded and a certified welder, Kenneth Cook, an employee of Respondent, was called in. The work site consisted of an L-shaped trench. The first portion of the trench paralleled Harmon Avenue and measured between eight feet, ten inches and nine feet in length. (Tr. 195, Ex. 23)[3]. The perpendicular portion of the trench measured between eleven feet and twelve feet two and one half inches in length. (Tr. 134, 195). At its deepest point, the trench was four and one half feet deep. (Tr. 195). The parallel portion was dug first to expose the main gas line in order to perform standard leak repair. It revealed a large leak in an abandoned service line. The perpendicular portion was then dug to reach the leaking service line. (Tr. 98-99).

Based upon OSHA's receipt of a complaint, Compliance Officer Richard Burns ("CO") investigated the Harmon Avenue site. (Tr. 241). Upon arrival at the work site the CO approached Cook. Both the CO and Cook testified that Cook claimed to be the competent person, but that he had not performed an inspection of the site. (Tr. 24-25, 190). Thomas Febes, C.J. Hughes' foreman at the site, approached the two and indicated that he was the competent person on the site. (Tr. 52,

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[2] See, *C.J. Hughes Construction Co.,* OSHRC Docket No. 93-3177 (March 9, 1995)(ALJ); *Commisison review pending.*

[3] References to the transcript of proceedings at the hearing are identified as "Tr." and to exhibits admitted into evidence at the hearing as "Ex."

135, 246). The CO then interviewed Febes and completed a standard form entitled "Competent Person Interview Schedule" describing his interview (Tr 191, 267, Ex. 13) There is no evidence that the CO completed any other such forms in regard to this inspection..

In support of this alleged violation, Complainant relies on the uncontroverted evidence that Cook, who claimed to be the competent person on the site, admittedly did not perform any inspections. It is uncontroverted that Cook was not a "competent person" as that term is used in § 1926.20(b)(2). The standard, however, seems to assume that there is but a single employer at each work site and does not appear to take into account the rather common multi-employer work site. Based on the unambiguous language of the standard, I conclude that it does not require each employer on a multi-employer work site to have a competent person at the site. It is enough that an individual at the site recognizes himself as the competent person and fulfills the duty of a competent person in such a manner as to inspect conditions to which employees of any cited employer might be exposed..

It is uncontested that Febes told the CO at the time of the inspection that he was the competent person on the site. (Tr. 135, 246). Febes testified that he performed visual inspectionsof both portions of the excavation, that he took a random handful from the spoil pile of the parallel excavation and determined the soil cohesiveness, prior to entering the perpendicular excavation and performed a manual thumb penetration test while in the excavation. (Tr. 103-105, 117-119). Febes testified that during the visual inspections he considered water seepage, spoil or anything rolling in due to traffic vibrations and fissures in the walls. (Tr. 125).

Respondent produced documentation that Febes attended training seminars pertaining to competent person, trenching and shoring, soil analysis, and related training in CPR, first aid, fire

control and protection, and blood borne pathogens. (Tr. 136-144, Ex. 46). Furthermore, Febes testified that he conducted regular safety meetings with his employees covering several excavation safety and safe work practices topics. (Tr. 139-140, Ex. 47).

The Secretary claims in his brief that Febes performed no inspection of the perpendicular excavation prior to the entrance of Cummins or himself because of the emergency created by the gas leak. (Sec. brief p. 3-4)[4]. While Respondent produced no evidence that Febes performed any manual soil tests on the perpendicular excavation prior to his own entrance, Febes testified that he performed a manual thumb penetration test while he was in the trench, prior to Cummins' arrival. (Tr. 105-106). Complainant also states in his brief that Cummins' testimony to the effect that he took ten minutes to assess the excavation directly rebuts Febes' testimony that the leak was dangerous. (Sec. brief p 3-4). This argument is rejected since Cummins testified that the leak had been plugged prior to his arrival. (Tr. 84).

The CO testified that he based his decision to charge Respondent with this violation upon his observation that other hazards on the job site existed. He testified;

> I felt that if a person were to be considered a competent person, the things that I found coming on the site, such as the spoil pile too close to the trench, the backhoe right up to the back of the trench. Also, the not having a safe access out of the trench, along with vibration. I didn't feel that there were adequate precautions taken.

(Tr. 213). Complainant offers no other evidence, but rather relies on the existence of other alleged hazards in order to show a violation. The mere presence of an alleged hazard, however, does not establish a violation of the standard.

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[4] The failure of the Secretary's brief to include any citations to the transcript of proceedings does little to instill confidence in its statements as to the state of the testimonial evidence.

I find that Febes was the competent person on the site and performed the requisite inspections prior to Cummins' entering the trench. In addition to a continuing visual inspection of both portions of the trench, Febes performed two manual soil tests; one of them on the perpendicular trench which Cummins later entered. Although Febes only performed a visual inspection of the perpendicular trench prior to his own entry into the trench to plug the leak, the emergency created by the escaping gas most likely outweighed the need for an additional soil test at that time. The mere fact that Febes was an employee of C.J. Hughes does not render Respondent in violation of the cited standard where, as here, an inspection was made by a competent person employed by another in such a manner as to protect Respondent's employee at the same site. I thus conclude that Respondent was not in violation of the requirements of 29 C.F.R. § 1926.20(b)(2). Citation 1, item 1a is vacated.

Citation No. 1, Item 1b
29 C.F.R. § 1926.21(b)(2)

The cited standard provides;

> b) Employer responsibility.
> * * *
> (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control and eliminate any hazards or other exposure to illness or injury.

Complainant alleges that Respondent violated the standard in that it failed to provide safety training or instruction concerning trenching and excavation to its welder.[5]

The Compliance Officer testified that when he asked Cummins if he had received training on how to identify potential trenching and excavation hazards, he replied that he had not. (Tr. 218-219). The evidence, however, establishes that Respondent provided Cummins with formal training

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[5] The citation initially alleged that Respondent failed to provide training for its Contract Inspector as well. The Secretary's post-hearing brief, however, makes no allegation regarding the inspector. That portion of the alleged violation has thus been abandoned.

in trenching and shoring in 1975. (Tr. 70, Ex. 24).

Cummins testified that he inspected the Harmon Avenue site for water seepage, traffic vibrations and solidity of the banks prior to entering the trench. (Tr. 76). Additionally, at the hearing Cummins was able to state what hazards he should be concerned about as a welder under the Harmon Avenue conditions and why. (Tr. 81). Finally, Cummins testified that in prior situations where he had safety concerns about his work environment, he insisted upon some type of protective system being installed. (Tr. 81-82).

The Secretary relies solely on the fact that Cummins received his formal training twenty years ago in order to establish a violation. The cited standard, however, makes no mention of refresher training or the frequency of training. Additionally, while the standard does require instruction regarding the regulations applicable to an employee's work environment, the fact that the standards were revised after Cummins received his formal training is not, on its own, enough to establish a violation. The training that is important to a welder, such as Cummins, is not instruction on how to slope and shore, but rather "the recognition and avoidance of" hazards. The Secretary has failed to show that the hazards Cummins should have been trained to recognize and avoid under the old regulations are any different from the hazards under the new regulations. The Secretary has failed to meet his burden. Citation 1, item 1b, is vacated.

Citation No. 1, Item 2
29 C.F.R. § 1926.651(c)(2)

The cited standard provides:

> (c) *Access and egress*
>
> * * *
>
> (2) A stairway, ladder, ramp, or other safe means of egress shall be located in trench excavations that are 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees.

In order to perform the leak repair on the main line, Febes, operating a backhoe, excavated an approximately nine foot long trench parallel to Harmon Avenue. He testified that while excavating the main line he encountered an unanticipated leak on the service line which was

releasing natural gas under rather high pressures. (Tr. 98 - 99). Febes then excavated the service line which ran perpendicular to Harmon Avenue. (Tr. 99). He testified that he created a ramp at the far end of the service line excavation. He stated that he did not tamp down the earthen ramp, but that this was not necessary because of the method by which he dug it out.

> I don't believe I tamped it, I believe it was just a cut into -- by not moving too much dirt is just the same as tamping it, you don't -- it is undisturbed soil. I had been digging a couple inches off the top at a time.

(Tr. 153). Febes testified that he intended the ramp to be used as an entrance and an exit by all employees and that he entered and exited the trench via the ramp with no difficulty. (Tr.162-163). Cummins also testified that he entered the trench via the ramp.[6] (Tr. 79).

The CO arrived at the excavation after the gas leak had been brought under control. (Tr. 84, 220). He testified that he observed Cummins in the trench. The CO also testified that he did not observe any type of safe access out of the trench and that at the time of the inspection he did not consider the ramp to be an access to the trench, although at the hearing he acknowledged that it was possible that the ramp could be used as an access. (Tr. 220-221).

I find that the ramp was an access to the trench. The CO acknowledged it as such and Febes and Cummins used it to enter and exit the trench. The issue is whether it could be used safely.

The CO testified that he felt the ramp was not a safe access because the backhoe was placed squarely at the top of the ramp. (Tr.209). He stated that the backhoe stabilizers were between one and one half and two feet from the edge[7] and that he felt that the employees would have to climb over them in order to get out. (Tr. 198, 221-222). Febes testified that the backhoe created no obstruction to his ability to enter or exit the trench. (Tr. 130). Cummins testified that no portion of the backhoe obstructed the ramp's entrance. (Tr. 79-80).

The CO also believed that the ramp was unsafe because it did not extend all the way to the

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[6] Cummins testified that he used the ramp to enter the excavation, but was uncertain how he exited. (Tr. 79). The CO testified that he saw Cummins crawl out of the excavation over the top of the trench. (Tr. 249).

[7] Although the CO was trained to take and record measurements, he failed to do so in regard to this alleged violation. (Tr. 233-234, 268-269).

top of the trench; requiring employees to step up in order to exit. He described a "straight cut down from the top of the trench to the top of the ramp" which created a one and one half to two foot step in order to exit the trench. (Tr. 221).

Respondent asserts that CO mistook the bucket cut of the service line excavation for the earthen ramp. Febes testified that the bucket cut was not part of the ramp but that the ramp was adjacent to the bucket cut. (Tr. 122, 153, Exs 1, 7). Furthermore Febes testified that he did not recall there being a step at the top of the ramp and that he exited via the ramp with no difficulty and in an upright position. (Tr. 130).

The CO also testified that he considered the proximity of the spoil pile to the top of the ramp as part of the hazard in issuing the citation.[8] He stated that an employee stepping out of the trench might step into the loose soil on the edge of the pile, slip and fall back into the trench. (Tr. 221). Febes contradicted the CO, testifying that he was able to use the ramp without slipping or sinking. (Tr. 130).

The Secretary relies on the CO's assertions that the backhoe and a spoil pile blocked the top of the ramp and that there was a one and one half to two foot step from the top of the ramp to the top of the trench.[9]

The CO's testimony that the employees would have to climb over the backhoe stabilizer in order to exit appears to be pure supposition. He took no measurement of the distance between the stabilizer and the top of the ramp. He did not attempt to enter or exit the trench via the ramp, nor did he witness anyone else enter or exit via the ramp. Additionally, his testimony is contradicted by the testimony of Febes and Cummins, the two individuals who used the ramp, that the backhoe did not obstruct access to or from the trench. Although the CO testified that he went back to the area where the backhoe and the top of the ramp were located, (Tr 269), he acknowledged that he had a responsibility to measure the distance between the backhoe and the ramp, as well as the distance

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[8] The CO apparently did not measure the distance from the spoil pile to the top of the ramp.

[9] The Secretary in his post hearing brief stated that the CO felt the ramp could not be used safely because it was too steep. The Secretary cites no portion of the transcript where the CO indicated that this was his opinion, nor could any be found.

between the spoil piles and the ramp. He did not do so. The CO's supposition alone is not sufficient to prove a violation of the standard. The Secretary failed to establish that the backhoe or the spoil pile blocked or to any substantial degree impeded access to the ramp.

Since Complainant has offered no reliable testimony to the contrary, I find that the ramp was configured in accord with the testimony of Febes; that it did not include the bucket cut above the service line, but was located adjacent to it. Although there might have been a straight cut from the top of the trench above the bucket cut of the service line identified by Febes, (Ex. 1), it is impossible to determine from any of the photographs if a step is located at the top of the ramp. The Secretary offered no other evidence to show that a one and one half foot step was necessary to exit via the ramp. The Secretary has not met his burden of proof. Citation 1, item 2 is vacated.

Citation No. 1, Item 4
29 C.F.R. § 1926.651(j)(2)

The cited standard provides:

> (j) *Protection of employees from loose rock or soil.*
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> * * *
>
> (2) 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.

The CO testified that during his inspection of the Harmon Avenue site he observed two spoils piles; one directly behind the L-shaped point on the northwest side of the trench and the other on the opposite side. (Tr. 222). He further testified that both piles were within two feet of the edge of the excavation and that neither was retained in any way.[10] (Tr. 223). The CO also testified that he observed a small amount of roll-in, three or four shovels full, trickle into the excavation from the

[10] CO did not measure the distance from the spoil piles to the edge of the excavation or the dimensions of the piles. (Tr. 272-273).

northwest spoil pile and less from the other pile. (Tr. 279).

Cook, Cummins and Febes all testified that they did not observe any material from the spoil piles fall into the excavation. (Tr. 62, 80, 126). Cook testified that both spoil piles appeared to be within a foot of the trench. (Tr. 61-62). Febes testified that the southeast spoil pile was at least one and one half feet from the edge of the excavation, but was unable to say exactly what the distance was. (Tr. 111).

The CO testified that he based his recommendation for issuance of the citation on his belief that the added weight from the spoil piles might cause a cave-in. (Tr. 224). However, § 1926.651 (j)(2) does not encompass such a hazard. *Cf. Secretary v. Flint Engineering and Construction Co.*, 15 BNA OSHC 2052, 2056-2057 (No. 90-2873, 1992). The standard is concerned with "material ... that could pose a hazard by falling or rolling into excavations." The standard permits the use of retaining devices to prevent such rolling or falling materials. If the standard were directed at the hazard of cave-in caused by added weight, retaining devices would not alleviate it, but would likely aggravate the cave-in hazard by concentrating additional weight on the excavation's side.

The secretary relies on the CO's assertion that the spoil piles were less than two feet from the edge of the excavation and his observation of a small amount of material from the spoil piles trickling into the excavation to establish a violation. This is insufficient. The small volume of material that CO observed falling into the excavation did not place employees in danger of physical harm and thus does not constitute a hazard within the contemplation of the standard. To make a *prime facie* case under this standard, the secretary must present at least some specific rationale to believe that enough material from the spoil piles could fall into the excavation so as to cause some injury to those in the trench. He has not. The secretary has failed to meet his burden and citation 1, item 4 is vacated.

Citation No. 1, Item 5
29 C.F.R. § 1926.652(a)(1)

The cited standard provides:

> (a) *Protection of employees in excavations.* (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:

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

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989). It is undisputed that the standard applies to the cited conditions. It is uncontested that the Harmon Avenue excavation was not sloped and that no shoring, sheeting, bracing or a trench box was installed. The Harmon Avenue site consisted of an excavation. There is sufficient evidence that Columbia Gas employees were exposed to the cave-in hazard. All the witnesses testified that Respondent's welder, Cummins entered the excavation. Additionally, Respondent had constructive notice of the conditions at the excavation. "The actual or constructive knowledge of an employer's supervisor can be imputed to the employer." *Secretary v. A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991). Cook testified that he was in charge of the location and that C.J. Hughes' foreman Febes reported to him. Cook further testified that as the Columbia Gas Contract Inspector at the Harmon Avenue site he represented Columbia Gas, had authority to require C.J. Hughes to address safety and health issues and the authority to stop the work if he found any violations. (Tr. 57, 29-30, 313). Thus, Respondent's employee Cook was in a supervisory position at the Harmon Avenue site. He was present the entire time the trench was open, (Tr. 15), he had training in recognizing trenching hazards and he actually entered the trench. (Tr. 22). Even if Cook did not have actual knowledge of the violation, he had constructive knowledge and his knowledge is imputed to Respondent. All the elements of the alleged violation have been shown.

An exception to these protective system requirements is permitted when the excavation is less than 5 feet in depth. Since § 1926.651 (a)(1)(ii) allows an exception to the requirements of the

standard, the burden is on the Respondent to show that the exception applies. *Secretary v. Falcon Steel Co.*, 16 BNA OSHC 1179, 1181 (Nos. 89-2883 and 89-3444, 1993). It is uncontested that the trench's maximum depth was less than 5 feet. Thus Respondent must show that upon inspection of the ground by a competent person there was no indication of a possible cave-in.

Febes testified that during his inspections of the site he found no water seepage, spalling or fissures. (Tr. 125-127). He found the walls of the trench to be "pretty stable", with "no crumbs". (Tr. 113). He classified the soil as type C as dictated by Respondent's policy. (Tr. 127). He further testified that there was no vibration from the traffic on Harmon Avenue, but stated that the traffic was medium to heavy and included truck traffic. (Tr. 112).

The CO agreed in his testimony there was significant traffic along Harmon Avenue and that it included truck traffic. He testified that the traffic was within two to three feet of the excavation and, although he never entered the trench, he stated that he felt vibrations from the traffic . (Tr. 207). The CO determined that the soil was type C, with a high content of sand and gravel. (Tr. 198). He was unable to perform either a torvane shear test or a pentrometer on the soil in the spoil piles because he was unable to locate a clod of dirt. (Tr. 207). The CO testified that these factors indicated that the soil was not cohesive. The OSHA Technical Center's report, however, indicated that the soil was actually type B. The report indicated that the soil had a high gravel and sand content, but that the soil was cohesive. (Tr. 205, 260, Ex. 12). The report also indicated that the soil was fissured. (Tr. 205, Ex. 12).

Looking at the evidence in a light most favorable to Respondent I find that Respondent has failed to show that there was no indication of a potential cave-in. Fissured, type C soil[11], which was possibly subject to some vibrations from passing truck traffic and to the uncertain effects of the near-by spoil piles were indications of possible cave-in.

Accordingly, Respondent was in violation of the standard at 29 C.F.R. § 1926.652 (a)(1). Citation No 1, item 5 is affirmed.

The violation was alleged to be serious under § 17(k) of the Act, 29 U.S.C. § 666(k). A

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[11] Although the Technical Center determined that the soil was type B, using this classification in considering whether there was a violation would be counterproductive to Columbia Gas' wise and cautious policy of classifying all soils as type C.

violation is serious where an accident is possible and there is substantial probability that death or serious physical harm could result from the accident. *Secretary v. Dravo Corp.*, 7 BNA OSHC 2095, 2101 (No. 16317, 1980), *pet. for review denied*, 639 F.2d 772 (3rd Cir. 1980).

The "incidence of cave-ins is high and the likelihood of death or severe injury to employees in a collapsing trench is also high." *Secretary v. Calang Corp.*, 14 BNA OSHC 1789, 1794 (No. 85-0319, 1990). Although, while a cave-in would have been unlikely to completely cover an employee standing erect in a four and one half foot deep trench, the employee would have been likely to suffer serious physical harm. Moreover, if the employee had been in a bending position, it is likely he would have been fully covered with soil. *Cornell and Company, Inc.*, 7 BNA OSHC 1598, 1602 (No. 78-2723, 1979). Consequently, the violation was serious. The proposed penalty, $3,750, is uncontested.[12] Accordingly, it is assessed.

FINDINGS OF FACT

Findings of fact relevant and necessary for a determination of all 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. The Secretary failed to establish that respondent was in violation of the standard at 29 C.F.R. § 1926.20(b)(2).

4. The Secretary failed to establish that respondent was in violation of the standard at 29

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[12] Tr. 6-7.

C.F.R. § 1926.21(b)(2).

5. The Secretary failed to establish that respondent was in violation of the standard at 29 C.F.R. § 1926.651(c)(2).

6. The Secretary failed to establish that respondent was in violation of the standard at 29 C.F.R. § 1926.651(j)(2).

7. The Secretary established that respondent was in serious violation of the standard at 29 C.F.R. 1926.652(a)(1).

ORDER

1. Items 1, 2 and 4 of Citation No.1 issued to Respondent on or about November 5, 1993, are VACATED.

2. Item 5 of Citation No. 1, issued to Respondent on or about November 5, 1993 is AFFIRMED. A civil penalty of $3,750 is assessed therefor.

Michael H. Schoenfeld
Judge, OSHRC

Dated: August 10, 1995
Washington, D.C.