United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 03-0479
	:	
RMS CONSTRUCTION, INC.,	:	
	:	
Respondent.	:	

Appearances:

Jeffrey S. Rogoff, Esquire U.S. Department of Labor New York, New York For the Complainant.	Rashid Bashir, President RMS Construction, Inc. Cliffwood Beach, New Jersey For the Respondent, *pro se.*

Before: Chief Judge Irving Sommer

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"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's construction workplace in North Bergen, New Jersey, on November 5, 2002. As a result of the inspection, on February 5, 2003, OSHA issued to Respondent a five-item serious citation and a one-item "other" citation alleging violations of various of OSHA's construction standards. Respondent contested all of the citation items and the penalties proposed for those items. A hearing in this matter was held on January 6 and 7, 2004, in New York, New York. Both parties have filed post-hearing submissions.

The OSHA Inspection

The work at the subject site was a road widening and bridge replacement project under the responsibility of the New Jersey Department of Transportation ("DOT"). The general contractor at the site was Anselmi & DeCicco ("A&D"), and Respondent, RMS Construction, Inc. ("RMS"), was

one of the subcontractors at the site; the job of RMS was to construct a block wall in the trench at the work site. On November 5, 2002, OSHA Compliance Officer ("CO") David Katsock went to the site to follow up on a previous inspection that had involved a gas leak explosion. At the site, at about 9 a.m., the CO saw five to seven employees doing form work and tying rebar in a trench that was 100 feet long and 11 feet deep at its deepest end; one side wall was vertical, and the other had a slight slope with an angle of less than one-half to one.[1] There was a trench box in the deep end of the trench; however, none of the workers was in the box, and one worker was standing between the vertical side of the trench and one of the trench box walls. The CO took some photos of the trench and the employees, who began exiting the trench, and the CO noted that there were no ladders or other means for them to use to exit the trench; he also noted that the rebar in the trench was not capped. CO Katsock then called his supervisor, who instructed him to conduct an inspection. (Tr. 11-16, 20-21, 24-27, 33-36, 44, 55, 93, 165-66, 169, 240-41; Exhs. C-3-5).

CO Katsock held an opening conference with Joao Pinto and Gaspar Domingues, who said they were foremen with RMS; the CO also held an opening conference with Paul Natalizio, A&D's field engineer and competent person at the site, and Jason Karamanol of Applegate Associates, A&D's safety consultant at the site. Pinto and Domingues told the CO that they and the others had been in the trench since 7 a.m. that day.[2] They also told the CO that while they all normally worked for Sharpe Concrete ("Sharpe"), another contractor, they had been working for RMS for about two weeks; they explained that Sharpe had had no work for them and that Sharpe and RMS had agreed that the employees would work for RMS at the subject site. The CO learned that A&D had dug the trench and that Natalizio had last inspected the trench five days before the CO's arrival.[3] The CO

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[1]CO Kutsock measured the trench dimensions with a steel tape measure during the course of his inspection; the CO testified that about 70 percent of the trench was 5 feet or more in depth and that the employees he saw were working in the area that was 9 feet deep. (Tr. 15; 21; 33).

[2]The employees had completed the work they were able to do inside the trench box the day before and had been working outside of the box since 7 a.m. that morning. (Tr. 43-44).

[3]A&D had worked in the trench prior to the arrival of RMS, and although Natalizio inspected the trench before A&D employees got in it he did not do so when RMS employees were in it; further, A&D had put the trench box in the trench for its own employees to use and had left it there as it was a rental and the rental time had not expired. (Tr. 173-74; 200-01).

further learned, from Pinto and Domingues, that none of the RMS employees had been trained in the hazards at the site, that RMS did not have a competent person at the site, and that RMS had not done any inspections of the job site or the trench. The CO was at the site for about four hours, and besides taking measurements of the trench and more photos, he also took a sample of the soil from the trench; the CO concluded from his inspection of the soil at the site that it was Type C, and the later testing of the sample at OSHA's lab in Salt Lake City verified the soil was Type C. (Tr. 16-22, 27, 36-41, 44-48, 51-52, 62-65, 77, 100-01, 156, 167, 172, 193, 237-41; Exhs. C-1, C-6-12, C-16, R-1).

CO Katsock returned to the site two more times. He learned that A&D had abated the physical conditions within two days of his inspection; among other things, A&D had put two more trench boxes in the trench and had replaced Natalizio with a new competent person. He also learned, at some point before the citations were issued, that Applegate had trained the RMS employees. The CO held a closing conference with Rashid Bashir, RMS's president, and Sonny Chohan, RMS's project manager, on December 17, 2002, at the OSHA area office.[4] The CO explained his inspection findings and the items for which RMS might be cited; he also explained the rights an employer has under the Act, including the right to contest any citation and the right to an informal settlement conference. The CO held a further closing conference with Bashir on the phone on January 30, 2003, at which time he provided the same information he had given on December 17. After the inspection, OSHA issued citations to A&D and RMS that, with one exception, alleged violations of the same standards.[5] Each company had an informal settlement conference; however, while A&D settled its citations, RMS did not. (Tr. 16-19, 70-72, 114-18, 124-30, 141, 170, 250-52, 256-57, 318; Exhs. C-13, C-16, R-1).

Respondent's Complaints about the Pretrial Process

RMS has several complaints about the pretrial process in this case. First, it urges that the denial of its request for E-Z Trial was unfair and prejudiced it because it is a small, minority contractor unable to afford an attorney. However, as the Secretary stated in her opposition, the

[4]At some point after the inspection and before the closing conference, the CO had phoned Bashir to confirm that the individuals in the trench were employees of RMS and that Pinto and Domingues were foremen for RMS. (Tr. 18, 21, 33).

[5]Only RMS was cited for an alleged violation of 29 C.F.R. 1926.21(b)(2) for failing to train its employees in the hazards at the site. *See* Exhs. C-16, R-1.

proposed penalty in this matter was over $10,000.00, and cases assigned for E-Z trial are generally those with proposed penalties of not more than $10,000.00. *See* Commission Rule 202(a)(2). Further, although a case may be designated for E-Z Trial if the proposed penalty is more than $10,000.00 but less than $20,000.00, at the discretion of the Chief Judge, the Secretary also stated in her opposition that she desired to conduct full discovery, which clearly made this case inappropriate for E-Z Trial. *See* Commission Rule 202(b). Respondent's request for E-Z Trial was properly denied.[6]

RMS also urges that it filed pre-hearing motions that were not acted upon and that the granting of the Secretary's motions for postponement of the hearing prejudiced it. I have reviewed the pre-hearing motions in this matter and am satisfied that I issued appropriate orders with respect to the pre-hearing submissions of both parties. I am further satisfied that the postponing of the hearing in this case did not prejudice RMS. Respondent's claims are accordingly rejected.

Finally, RMS urges that it was prejudiced by the Commission's failure to issue subpoenas to the individuals it desired to call as witnesses at the hearing and that it was further prejudiced by the denial of its request to submit a notarized statement of a particular individual it had wanted as a witness.[7] However, as I advised Respondent's representative at the hearing, it was his responsibility to ensure the appearance of witnesses and he had ample opportunity to seek advice on how to proceed in this regard. (Tr. 380-83). Moreover, the Commission's Rules make it clear it is the responsibility of the party desiring subpoenas to specifically apply for them from the Commission Judge; it is also clear that it is the responsibility of that party to serve the subpoenas. *See* Commission Rule 57. RMS did not file a request for subpoenas with my office and, according to its representative, made only one

[6]I have noted the contention of RMS that the Secretary's opposition was purposefully misleading because, after E-Z Trial was denied, she amended the amount of the total proposed penalties to $8,725.00 in her complaint. I disagree with RMS that the Secretary's action in this regard was deceptive. Moreover, the request for E-Z Trial was properly denied in any case in view of the Secretary's desire to conduct discovery.

[7]RMS also complained about not being able to question a particular witness, Natalizio, who the Secretary had subpoenaed, after the Secretary decided to release the witness from the subpoena because his testimony would be duplicative. (Tr. 236-37, 380-81).

attempt to call my office for information about how to obtain subpoenas.[8] RMS cannot now claim prejudice after its own failure to take the actions necessary to ensure that the witnesses it desired would appear at the hearing. Respondent's claims of prejudice are rejected.[9]

Serious Citation 1 - Item 3 - 29 C.F.R. 1926.652(a)(1)

This item alleges a violation of 29 C.F.R. 1926.652(a)(1), which provides as follows:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) [sloping and benching] or (c) [support systems, shield systems, and other protective systems] ... except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

To demonstrate a violation of a specific OSHA standard, the Secretary has the burden of proving by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the standard, (3) employees had access to the violative condition, and (4) the employer either knew of the condition or could have known of it with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

As set out above, CO Katsock testified that on November 5, 2002, he saw five to seven employees working in the trench at the site; the trench was 100 feet long and 11 feet deep at the deepest end, over 70 percent of the trench was 5 feet or more in depth, and the employees he saw were in the 9-foot-deep area of the trench. One side wall of the trench was vertical and the other had a slight slope with an angle of less than one-half to one, and while there was a trench box in the deeper end of the trench, no one was in the box; in addition, one employee was standing between the vertical wall of the trench and one of the trench box walls. The CO took photos of the trench and the

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[8]Respondent's representative indicated at the hearing that he had made an attempt to talk to one of my law clerks about "how witnesses are called.." However, the law clerk was out that day, according to the representative, and there was no claim of any other such attempt. (Tr. 381).

[9]RMS states in its post-hearing filing that it received the Guide to Review Commission Procedures. The guide advises on page 1 that it is not a substitute for the Commission's Rules and that a copy of those rules may be had by calling or writing the Commission; the guide also advises on page 8 that proceeding under either E-Z Trial or conventional proceedings without a lawyer could put the employer at a disadvantage. RMS apparently did not request a copy of the Commission Rules or seek legal advice in this matter.

employees, who began to leave the trench, and he then spoke with Joao Pinto and Gaspar Domingues, who told him that they were foremen for RMS and that the other employees in the trench also worked for RMS. (Tr. 15-18, 21, 24-26, 33-36, 42-43, 93, 136-41; Exhs. C-3-5).

CO Katsock further testified that there was no protection in the trench, other than the trench box, and that Pinto and Domingues told him the box had not been used since the day before; they also told him they began work in the trench at 7 a.m. that day. The CO stated that the trench was not in solid rock; in fact, he determined the soil to be Type C, and the soil sample he took from the site and later sent to OSHA's lab confirmed the soil was Type C. The CO also determined that the employees were exposed to the hazard of the trench walls collapsing, based on the lack of sloping or shoring, and that the heavy traffic in the area contributed to the hazard. (Tr. 27, 32-33, 43-49, 104-07; Exh. C-1).

RMS questions the CO's inspection, suggesting that his trench measurements and conclusions about the soil were wrong. I have reviewed the CO's testimony and find nothing amiss in how he measured the trench and how he found the soil to be Type C. I also find nothing amiss in how he took his soil sample and sent it to OSHA's lab, and C-1 clearly shows the soil was Type C. (Tr. 21, 45-48, 104-07, 136-41). Further, I observed the CO's demeanor on the stand and found him a sincere and credible witness. Finally, RMS offered nothing to rebut the Secretary's evidence about the trench dimensions and the soil, and an inspection report of RMS itself states that the soil at the site was Type C. *See* Exh. H to the Secretary's Second Request for Admissions, contained in Exh. C-2.

RMS also questions the CO's conclusion that the employees in the trench were those of RMS, and Sonny Chohan, RMS's project manager, testified at the hearing that Domingues was a foreman but that Pinto was not.[10] (Tr. 303-04). However, the CO testified that Domingues and Pinto both told him that they were foremen and that both also told him that the employees in the trench worked for RMS; he further testified that during the first closing conference and in an earlier phone conversation, Rashid Bashir, RMS's president, verified what Domingues and Pinto said. (Tr. 18, 21, 89-91, 107, 156-57). The CO's testimony that the employees in the trench worked for RMS is supported by the

[10]Bashir and Chohan both referred to the foreman at the site as Carlos Domingues; however, Gaspar Domingues is the person shown to be the RMS foreman on RMS's list of telephone numbers for all individuals working at the site, and no one by the name of Carlos Domingues is shown on that document. *See* Exh. E to the Secretary's Second Request for Admissions, contained in Exh. C-2.

testimony of Jason Karamanol, A&D's safety consultant, and Essam Saad, the acting superintendent for A&D at the time of the inspection. (Tr. 167-69, 172-74, 242, 262, 272). It is also supported by the fact that the CO recorded the names of the RMS employees at the site on his OSHA-1B forms and that those same names also appear in RMS's payroll records for that period of time. (Tr. 77-78; Exhs. C-16, R-1). *See also* Exh. F to the Secretary's Second Request for Admissions, contained in Exh. C-2. In light of the evidence of record, I conclude that the workers in the trench were RMS employees and that Domingues and Pinto were both foremen for RMS.[11]

Based on the foregoing, the Secretary has shown that the standard applied, that the terms of the standard were violated, and that employees were exposed to the violative condition. She has also shown the employer knowledge element, in that Domingues and Pinto had actual knowledge of the cited condition, and, because they were foremen, their knowledge is imputable to RMS. The Secretary has therefore established a prima facie violation of the cited standard.

Respondent's primary contention in this matter is that A&D, the general contractor, was responsible for the conditions at the job site, that it (RMS) was unfairly cited, and that OSHA citing both A&D and RMS for the same conditions constitutes "double jeopardy." In support of its position, RMS notes that it worked under the direction of A&D and that A&D abated the cited conditions. RMS also notes the statement the CO wrote in his OSHA 1-A form for A&D (*see* R-1, p. 0000033):

> This general contractor was in charge of the work site and created the work conditions which lead [sic] to the violative conditions. The company had over[all] control of the employees of the subcontractor whose employees were exposed to the conditions. The competent person for the trenching operations was an employee of this company.

As the Secretary points out, Commission precedent is well settled that each employer is responsible for the safety of its own employees. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1189 (No. 12775, 1975). Thus, on a multi-employer work site, OSHA may appropriately cite

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[11]In concluding that Domingues and Pinto were both foremen, I have noted that Bashir and Chohan stated that Pinto was not a foreman. (Tr. 91, 303-04). I have also noted that Exhibit E, cited in the previous footnote, shows only Domingues as a foreman. Regardless, I credit the CO's testimony that Domingues and Pinto told him they were foremen and that Bashir verified this information. Further, even assuming *arguendo* that CO Katsock was mistaken about Pinto, his testimony indicates that he questioned Domingues and Pinto together and that they answered him as a "duo." (Tr. 156). Thus, in those instances where the CO attributes a comment only to Pinto, it is reasonable to infer that Domingues was there and gave the same response.

a subcontractor whose employees are exposed to a hazard, even if the subcontractor did not create or control the hazardous condition. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1197-99 (Nos. 3694 & 4409, 1976). OSHA may also appropriately cite the general contractor for the same condition, if it is one that the general contractor could reasonably have been expected to prevent or abate by reason of its supervisory capacity at the site; this is especially true, of course, if the general contractor created or controlled the hazardous condition. *Grossman Steel*, 4 BNA OSHC at 1188; *Anning-Johnson*, 4 BNA OSHC at 1199. The subcontractor in this situation may defend against the alleged violation by showing that it did "everything reasonable to protect its employees." *Rockwell Int'l Corp.*, 17 BNA OSHC1801, 1808 (Nos. 93-45, 93-228, 93-233 & 93-234) (citation omitted).

Here, RMS did not show that it did anything to protect its employees from the cited hazard. Chohan indicated that he had asked Paul Natalizio, A&D's competent person, to slope the vertical wall on October 25, 2002, and that while Natalizio was unable to do anything about that wall he did widen the trench. (Tr. 300-02). However, Saad testified that he recalled nothing about RMS asking A&D to further slope the trench; he also testified that RMS could have told A&D that the trench was not safe and that RMS did not do so. (Tr. 212, 225). Moreover, while RMS claims that it refused to work in the trench on October 25, 2002, because of the trench's unsafe condition, Saad and Chohan both testified that RMS did not work in the trench that day because the grade in the bottom of the trench was wrong and had to be corrected. (Tr. 175-76, 212-13). Based on the evidence of record, RMS was in violation of the cited standard. This item is therefore affirmed as a serious violation.

A penalty of $2,500.00 has been proposed for this item. In assessing penalties, the Commission must give due consideration to the employer's size, history and good faith, and to the gravity of the violation. The CO testified that the gravity of the violation was high, due to potential for the trench to collapse, and that the gravity-based penalty of $5,000.00 was reduced by 40 percent due to the size of the employer's business and by 10 percent due to RMS's lack of OSHA history.[12] The CO further testified that no reduction for good faith was given, based on OSHA's policy to not give any credit for good faith for high gravity violations, and that the total proposed penalty for this item was $2,500.00. (Tr. 49-51). I find the proposed penalty appropriate, and a penalty of $2,500.00 is assessed.

[12]The record shows that although RMS had a total of 10 to 12 employees at the time of the inspection, it had had a maximum of 40 employees in the previous year. (Tr. 18, 147, 309).

Serious Citation 1 - Item 4 - 29 C.F.R. 1926.651(k)(1)

This item alleges a violation of 29 C.F.R. 1926.651(k)(1), which states that:

> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions....

CO Katsock testified that he learned during his inspection that Natalizio, A&D's competent person, had last inspected the trench five days before the CO's arrival; he also testified that Pinto and Domingues told him that they were not competent persons and that Natalizio was RMS's competent person.[13] The CO said that during the closing conference he held with RMS on December 17, 2002, Bashir also told him that Natalizio was RMS's competent person. (Tr. 51-52, 150-51). However, Saad and Karamanol both testified that Natalizio was not the competent person for RMS at the site. (Tr. 173, 246). Karamanol further testified that after the inspection, Bashir called him and they discussed RMS's responsibilities at the site; according to Karamanol, Bashir told him that he did not have a competent person at the site because he believed that that was A&D's responsibility.[14] (Tr. 246-48).

Chohan testified that he and Bashir were the competent persons for RMS and that he or Bashir inspected the site daily; he indicated that RMS was not responsible for inspecting the soil or the trench, which was up to DOT and A&D, and it was his belief that Natalizio or another A&D engineer inspected the trench every day.[15] (Tr. 280, 289-90, 302, 310-11, 326-27). However, the CO's testimony plainly establishes that A&D had only inspected the trench before its own employees worked in it, and Saad testified that DOT's inspections related solely to the job specifications and not to safety. (Tr. 168-69). Moreover, to the extent that RMS is claiming that Chohan and/or Bashir were "competent persons" within the meaning of the standard, such a claim is inconsistent with the evidence of record; it is also inconsistent with Chohan's lack of knowledge about trenching and excavation requirements, which was

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[13]As set out in footnote 3, *supra*, while Natalizio had inspected the trench before A&D workers entered it he had not done so before the RMS workers got in it. (Tr. 173-74).

[14]Karamanol noted that among other things, he told Bashir about the OSHA trenching requirements and the multi-employer work site policy. (Tr. 247-49).

[15]Chohan further testified that "Carlos Domingues" was also a competent person for RMS at the site. (Tr. 326-26).

apparent from his responses to the questions the Secretary's counsel asked. (Tr. 327-29). Finally, RMS should have known what the standard required and that A&D was not inspecting the trench before RMS employees worked in it. Based on the record, RMS was in violation of the cited standard. This item is therefore affirmed as a serious violation.

The Secretary has proposed a penalty of $2,500.00 for this item. The CO testified that the gravity of this violation was high, because the failure to have a competent person inspect the trench before employee entry could have resulted in a trench collapse and serious injury or death; he further testified that the same reductions were given in this item as in Item 3, *supra*. (Tr. 53-54). I find the proposed penalty appropriate, and a penalty of $2,500.00 is accordingly assessed.

Serious Citation 1 - Item 5 - 29 C.F.R. 1926.701(b)

This item alleges a violation of 29 C.F.R. 1926.701(b), which states that:

> All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

The CO testified that he saw numerous vertical reinforcing rods, or rebar, in the trench, that there were no protective caps on the rebar, and that the RMS employees were working within 3 feet of the rebar; he further testified that while the employees were not exposed to the hazard of impalement they could have sustained deep cuts or wounds if they had tripped and fallen against the rebar. The CO noted that the uncapped rebar was shown in several of his photos, that is, C-3-8 and C-10-11, and that when he asked about the condition, Pinto told him they had no caps. (Tr. 25-55-60).

In addition to the foregoing, Saad testified that he had spoken to Chohan about the rebar being uncapped prior to the day of the inspection and that when Chohan asked him where he could get the caps, he (Saad) had referred Chohan to Natalizio for the name of a supplier of OSHA-approved caps. (Tr. 170-72, 220-22). Although Chohan denied that he had ever had a conversation with Saad about rebar caps, the testimony of Saad is credited over that of Chohan. (Tr. 287). The testimony and photos of the CO, together with the testimony of Saad, clearly demonstrate the alleged violation, and this item is affirmed as a serious violation.

A penalty of $700.00 has been proposed for this item. The CO testified that the gravity of this item was moderate, resulting in a gravity-based penalty of $2,000.00; he also testified that adjustments of 40, 10 and 15 percent were made for size, history and good faith, respectively, resulting in a proposed penalty of $700.00. (Tr. 61-62). The proposed penalty is appropriate and is therefore assessed.

Serious Citation 1 - Items 1a and 1b - 29 C.F.R. 1926.20(b)(2) and 29 C.F.R. 1926.21(b)(2)

Item 1a alleges a violation of 29 C.F.R. 1926.20(b)(2), which provides as follows:

> [F]requent and regular inspections of the job sites, materials, and equipment [shall] be made by competent persons designated by the employers.

Item 1b alleges a violation of 29 C.F.R. 1926.21(b)(2), which provides as follows:

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

As to Item 1a, the CO testified that when asked, Pinto told him that no inspections of the job site were done; the CO also testified that, based on what he learned during his inspection, Natalizio was the only person at the site competent to make such inspections.[16] The CO said that the cited standard refers to general inspections of the work site and that such inspections would have discovered things like the uncapped rebar and the lack of ladders in the trench. (Tr. 62-64, 78).

Serious Citation 1 - Item 2 - 29 C.F.R. 1926.651(c)(2)

This item alleges a violation of 29 C.F.R. 1926.651(c)(2), which states that:

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

The CO testified that there was no ladder, ramp or other safe means for the employees to use to exit the trench; he further testified that while the employees were able to climb out on the side of the trench that had a slight slope it was very difficult for them to do so and that one employee was on all fours as he climbed out. The CO said the hazard was that there was no safe and quick means of getting out if the trench had collapsed; he also said that he spoke to Pinto, Domingues and Bashir and that they all recognized the need for ladders in order to get out of trenches quickly. (Tr. 20, 27-28).

Chohan testified that RMS and A&D both had ladders at the site, and he indicated that C-3 showed ramps and "ties" employees used for exiting the trench; he also testified that he had never seen employees exiting the trench on all fours and that they simply walked out upright. (Tr. 314-15, 333-34).

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[16]As noted in Item 4 above, Pinto and Domingues both told the CO that they were not competent persons and that Natalizio was the competent person for RMS; Bashir also told the CO, on December 17, 2002, that Natalizio was RMS's competent person. (Tr. 52, 63-64).

Upon reviewing C-3 and the other photos the CO took, I see no ladders, ramps or "ties" that the employees could have used to exit the trench. Moreover, while the two employees depicted in C-3 are in fact walking upright, I note the steepness of the wall and the fact that they have essentially reached the top of the trench, and I credit the testimony of the CO that he saw an employee exiting the trench on all fours. Finally, the CO's testimony is supported by Saad and Karamanol; Saad and Karamanol both testified that they recalled no ladders in the trench that day and that they saw the employees walking or climbing up the sloped wall to get out of the trench. (Tr. 172, 244, 259-60). The Secretary has established the alleged violation, and this item is affirmed as a serious violation.

The Secretary has proposed a penalty of $525.00 for this item. The CO testified that the gravity of this violation was low, resulting in a gravity-based penalty of $1,500.00, and that the same reductions were given for this item as those set out in Item 5, *supra*, resulting in a proposed penalty of $525.00. (Tr. 30-31). I find the proposed penalty appropriate, and it is therefore assessed.

"Other" Citation 2 - Item 2 - 29 C.F.R. 1926.51(c)(2)

This item alleges a violation of 29 C.F.R. 1926.51(c)(2), which requires that:

> Under temporary field conditions, provisions shall be made to assure not less than one toilet facility is available.

The CO testified that he saw no portable toilet facilities at the site and that when he asked where such facilities were, Pinto said he "had no idea." The CO also testified that there was no evidence that any arrangements had been made for RMS employees to use toilet facilities that were near the site. The CO noted that C-7, one of his photos, showed two "Porta-Johns" that A&D had had delivered to the site after the CO brought up the matter. (Tr. 68-69). Saad confirmed that there were no toilet facilities at the site before the inspection and that, to his knowledge, RMS had made no arrangements for employees to use toilet facilities elsewhere. (Tr. 176).

Chohan testified, and the contract between RMS and A&D states, that it was the responsibility of A&D to provide toilet facilities at the site. (Tr. 292). *See also* Exh. C (p. 3, ¶ 7.7) to the Secretary's Second Request for Admissions, contained in Exh. C-2. However, as set out in the discussion relating to Item 3, *supra*, each employer is responsible for the health and safety of its own employees, and there is no evidence in the record that RMS either asked A&D to fulfill its obligation in regard to toilet facilities or made any arrangements for employees to use nearby toilet facilities. This item is affirmed as an other-than-serious violation. No penalty was proposed for this item, and none is assessed.

Conclusions of Law

1. Respondent RMS was in serious violation of 29 C.F.R. 1926.20(b)(2) and 29 C.F.R. 1926.21(b)(2), as alleged in Items 1a and 1b of Serious Citation 1.

2. Respondent RMS was in serious violation of 29 C.F.R. 1926.651(c)(2), as alleged in Item 2 of Serious Citation 1.

3. Respondent RMS was in serious violation of 29 C.F.R. 1926.652(a)(1), as alleged in Item 3 of Serious Citation 1.

4. Respondent RMS was in serious violation of 29 C.F.R. 1926.651(k)(1), as alleged in Item 4 of Serious Citation 1.

5. Respondent RMS was in serious violation of 29 C.F.R. 1926.701(b), as alleged in Item 5 of Serious Citation 1.

6. Respondent RMS was in "other" violation of 29 C.F.R. 1926.51(c)(2), as alleged in Item 1 of "Other" Citation 2.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Item 1 of Serious Citation 1 is AFFIRMED, and a penalty of $2,500.00 is assessed.

2. Item 2 of Serious Citation 1 is AFFIRMED, and a penalty of $525.00 is assessed.

3. Item 3 of Serious Citation 1 is AFFIRMED, and a penalty of $2,500.00 is assessed.

4. Item 4 of Serious Citation 1 is AFFIRMED, and a penalty of $2,500.00 is assessed.

5. Item 5 of Serious Citation 1 is AFFIRMED, and a penalty of $700.00 is assessed.

6. Item 1 of "Other" Citation 2 is AFFIRMED, and no penalty is assessed.

/s/
Irving Sommer
Chief Judge

Dated: May 10, 2004
Washington, D.C.