Secretary of Labor, Complainant, v. McLeod Land Services, Inc., Respondent.	OSHRC Docket No. 03-0832 EZ

Appearances:

Gwenevelyn Anderson, Esquire
Sharon D. Calhoun, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Andrew Froman, Esquire
Brown, Clark, Christopher & DeMay
Sarasota, Florida
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

McLeod Land Services, Inc., is a corporation engaged in the construction of underground utilities with headquarters in Sarasota, Florida. On April 1, 2003, the Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite at Glen Ridge on Palmer Ranch, a retirement community in Sarasota. As a result of this inspection, McLeod was issued a citation. A hearing was held pursuant to the EZ trial procedures in Sarasota, Florida, on September 4 and 5, 2003. At the hearing, the parties stipulated to the violative conditions listed in Citation No. 1, Item 2. For the reasons that follow, Citation No. 1, Items 1, 2, 3 and 4, are affirmed and penalties totaling $7,000 are assessed.

Background

Complainant's compliance officer, Warren Knopf, conducted a comprehensive inspection of the jobsite at Glen Ridge on Palmer Ranch. The inspection began on March 31, 2003. The Weitz

Company was the general contractor on this project. On April 1, 2003, the second day of this inspection, the compliance officer observed McLeod's crew installing an underground drainage line. Respondent was installing 8-foot long sections of 24-inch diameter concrete pipe. At the time of the inspection, McLeod had installed 120 feet of the planned 166-foot drainage line.

The compliance officer observed two employees in the trench while pipe sections hooked to the excavator were placed in the bottom of the trench. When Mr. Knopf arrived at the excavation, the tracks of the 154,000-pound excavator extended over the vertical end wall of the trench. Mr. Knopf told the excavator operator to shut down the machine. The lead superintendent for Weitz ordered the employees to get out of the trench. The operator was McLeod's utility foreman. He identified himself to the compliance officer as Terry Jenkins, McLeod's management person onsite. Mr. Knopf then presented his credentials to Mr. Jenkins and proceeded to conduct the inspection. He interviewed Jenkins and the two McLeod employees after they exited the trench. He measured various dimensions of the trench and took soil samples, which were later analyzed at complainant's Salt Lake City laboratory and determined to be Type "C" soil.

Discussion

The Secretary has the burden of proving violations of standards promulgated under the Act.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (1) 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 conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

There is no dispute that all standards at issue in this case are applicable to the construction activities involved at this jobsite.

Alleged Serious Violation of 29 C.F.R. § 1926.21(b)(2)

The Secretary, in Citation No. 1, Item 1, alleges that:

> The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:
>
> a) On site, east club home area - employees were in a trench 10 feet deep b y 18.8 feet wide and 29 feet long without sloping trench walls or support systems, installing pipe, and the employees did not recognize the hazards associated with these conditions, on or about 4/1/03.

The standard at 29 C.F.R. § 1926.21(b)(2) provides:

> *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 or eliminate any hazards or other exposure to illness or injury.

To establish a violation of 29 C.F.R. § 1926.21(b)(2), the Secretary must show that the employer failed to instruct employees on "(1) how to recognize and avoid unsafe conditions they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." *Superior Custom Cabinet Co.,* 18 BNA OSHC 1019, 1020 (No. 94-200, 1997), *aff'd without published opinion,* 158 F.3d 583 (5th Cir. 1998). An employer's instruction must be modeled on the applicable standards and must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso Crane & Rigging Co.,* 16 BNA OSHC 1419, 1425, fn. 6 & 7 (No. 90-1106, 1993). "A reasonably prudent employer would attempt to give instructions that can be understood and remembered by its employees, and would make at least some effort to assure that the employees did, in fact, understand the instructions." *Pressure Concrete Construction Co.,* 15 BNA OSHC 2011, 2017 (No. 90-2668, 1992). Employers must provide more than "weak admonitions" or "vague advice" for safety training and hazard recognition in order to

give its employees the opportunity to protect themselves. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892 (No. 92-3684, 1997).

The Secretary argues that McLeod failed to give site-specific instructions to its employees, who were working in the trench, on the means of avoiding hazards posed by the excavator hanging over the edge of the trench, by the improperly sloped trench, and by water in the bottom of the trench. Foreman Terry Jenkins was operating the excavator digging the trench, and laying pipe. He was supervising the crew of employees in the trench and was aware of the violative conditions of the trench. This knowledge is imputed to respondent.

Mr. Knopf testified that during his inspection, he interviewed two employees, who had been in the trench. Mr. Jenkins identified those two employees as Willie Smith and Keith Willis. Knopf asked the two employees if they saw anything wrong with the trench, and they told him "No." During the interviews the employees told Knopf that they did not remember seeing a training manual.

Respondent argues that it provided the required safety training. Jenkins testified that he attended monthly safety meetings, and that he attended one training session conducted by Jim McLeod prior to the date of the inspection. This session addressed sloping of a trench and use of a trench box but not types of soil. McLeod stated that respondent's *Safety Policy and Procedures Manual*, revised May 2001, which had an entire section (22 pages) on excavation and trenching modeled on applicable OSHA requirements, was given to every foreman and management employee (Exh. R-4).

McLeod testified that respondent only hires experienced ("skilled and educated") employees for trenching operations. McLeod stated that the "rank and file" employees are provided a mini version of the safety manual when they are hired, and they have to sign that they received it. McLeod said that respondent counts on its foremen to relay information from the monthly safety meetings to the rank and file employees. He also stated that attendance by those employees at the safety meetings was voluntary.

Although McLeod had a monthly safety meeting for management employees, it did not provide regularly scheduled safety meetings (such as daily or weekly toolbox talks) for rank and file employees. It relied on its foremen to provide safety training to the employees. However,

respondent did not have a system to verify that the foremen provided training. It had no record of meetings, no record of employee attendance, and no record of what training was provided. Mr. McLeod admitted that he did not know if Jenkins met with his crew to discuss safety concerns. In addition, safety training meetings for rank and file employees were "voluntary." The standard does not allow voluntary attendance for safety training. Respondent did nothing to ensure that rank and file employees were trained as required by the standard.

Despite the fact that McLeod provided management employees with its safety manual, rank and file employees only received a mini version of the safety manual. The two employees who were interviewed said they did not remember seeing any manual. The mini manual was not introduced into evidence, so it is unknown if the mini manual provided information on the hazards of working in a trench and the applicable regulations. Respondent did not make certain, and had no record, that employees had actually read and understood the mini-manual. *See Concrete Construction Co.,* 15 BNA OSHC 1614 (No. 89-2019, 1992) (employer that provides no training other than safety booklet violated § 1926.21(b)(2) training standard).

Respondent's reliance on hiring only experienced employees does not meet the requirements of the standard. An employer has a duty to provide adequate training even if employees are experienced. *Ford Development Corp.,* 15 BNA OSHC 2003, 2009 (No. 90-1505, 1992), *aff'd without published opinion* 16 F.3d 1219 (6th Cir. 1994).

The testimony of Mr. McLeod and Mr. Knopf establishes that respondent failed to instruct employees, who were assigned to work in a trench, in the recognition and avoidance of unsafe conditions and hazards posed by working in a trench and the applicable regulations. Respondent's employees were not properly instructed regarding hazards encountered while working in excavations, including cave-ins and collapse of trench walls that could result in death or serious physical harm. Therefore, the violation of 29 C. F. R. § 1926.21(b)(2) is affirmed as a serious violation.

Alleged Serious Violation
of 29 C.F.R. § 1926.651(j)(2)

The Secretary, in Citation No. 1, Item 2, alleges that:

> Protection was not provides by placing and keeping excavated or other materials or equipment at least 2 feet (.61 m) from the edge of

excavations, or by the use of retaining devises that were sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary:

> On site, south end of the trench - an employee was operating a Dynamic Acera SK 250LC excavator with the front end of the excavator track hanging over into the trench by 7-8 track shoes, on or about 4/1/03.

The standard at 29 C.F.R. § 1926.651(j)(2) provides:

> (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 cited standard specifically requires that equipment and excavated material be kept at least 2 feet from the edge of the excavation to protect employees in the excavation. The standard, as written, presumes the hazard, specifically, that equipment or material at the edge of an excavation could roll or fall into the trench and onto employees.

At the hearing, the parties, through counsel, stipulated to the violation listed in Citation No. 1, Item 2. At issue are the classification as a "serious" violation and the reasonableness of the proposed penalty. It is undisputed that the front tracks of respondent's 154,000-pound excavator extended over the end of the trench by 7- or 8-track shoes when the compliance officer arrived at McLeod's portion of the jobsite.

The wall that supported the excavator at the end of the trench was vertical. It was not shored, braced, or otherwise supported. The excavator had just placed an 8-foot section of pipe in the trench. When work was stopped by the compliance officer, the excavator bucket was still hanging above that pipe. Two employees of McLeod were in the trench. At least one employee worked between the pipe and the excavator, directly below the bucket and the excavator arm.

These employees were clearly exposed to the hazard of being crushed by the excavator, its arm, or its bucket should the unsupported vertical dirt wall collapse under the weight of this 2,700-ton machine.

Respondent, through Jenkins, its foreman and excavator operator, not only knew of the existence of these violative conditions, but created them. Jenkins dug the trench, placed the pipe, and directed the work of his crew.

It is certainly possible that the vertical end wall could collapse, allowing the excavator to fall into the trench and onto the exposed employees. There is a substantial probability that death or serious physical harm could result from such collapse. The violation of 29 C.F.R. § 1926.651(j)(2) is affirmed as a serious violation.

Alleged Serious Violation
of 29 C.F.R. § 1926.651(k)(1)

The Secretary, in Citation No. 1, Item 3, alleges that:

> Daily inspections of excavations, adjacent areas, and protective systems were not made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions:
>
> Or in the alternative:
>
> 29 CFR 1926.651(k)(2): Where the competent person found evidence of a situation that could result in a possible cavein [*sic*], indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees were not removed until the necessary precautions had been taken to ensure their safety:
>
> a) On site, east club homes site - employees were in a trench 10 feet deep by 29 feet long and 18.8 feet wide without a protective system, not sloped 1 to 1.5 (34 degrees), and an excavator hanging 7 to 8 feet over the trench wall and employees were not removed from the trench, on or about 4/1/03.

(**Note:** During these proceedings, the parties agreed that the above words "7 to 8 feet" should read "7 to 8 track shoes.")

The standards at 29 C.F.R. § 1926.651(k)(1) and (2) provide:

> (k) *Inspections.* (1) 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. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.
>
> (2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

It is undisputed that employee exposure could be reasonably anticipated prior to the start of work on the day of the inspection. Two employees were observed in this excavation during the inspection, and respondent's employees worked regularly in excavations. The standard is applicable and requires respondent's competent person to conduct an inspection, at least daily, in accordance with its terms.

The threshold question before me on this issue is whether respondent had a "competent person" on the jobsite on April 1, 2003.

The standard at 29 C.F.R. § 1926.650 defines a "competent person" as follows:

> *Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who

> has authorization to take prompt corrective measures to eliminate them.

At the beginning of the inspection, McLeod employees exiting the trench stated that Terry Jenkins was management for McLeod on this site. Mr. Knopf, the compliance officer, asked Terry Jenkins, McLeod's foreman at this site, whether he was the competent person on this job. Mr. Jenkins testified that he replied "No," and that he did not have an OSHA competency card. The safety manager for the general contractor, Jose Ortega, heard this conversation. He testified that when asked this question, Mr. Jenkins replied that he has been digging ditches for twenty-five years. Consistent with Mr. Ortega's testimony, and contrary to that of Mr. Jenkins, Mr. Knopf testified as follows:

> A. Mr. Jenkins, whose name I learned after the opening conference with him, came out the cab, joined me there.
>
> I asked him the name of the company, he supplied it. I asked him if he was the management person on site, he indicated he was. I then asked him who the competent person on site, and he replied back that he had 20-some-odd years, and I guess he was competent.
>
> And, I said, "No, I'm looking for the competent person who has knowledge of soil mechanics of the conditions that are existing here presently that can abate these conditions and recognize them."
>
> He said, "Well, I'm still the competent person." (Tr. 170)

Mr. Knopf further testified he explained the responsibilities of a competent person and Mr. Jenkins said, "I guess I'm not it" (Tr. 173). Jenkins told Knopf he had not done any field tests to classify soil. Knopf stated there were no soil classification records onsite. Mr. Jenkins did not know if any soil tests had previously been done. Jenkins later told Knopf that he did not know who was the competent person on this site. At the hearing, Jenkins testified he does not do soil tests and that respondent had done no testing of the soil as of the date of the inspection.

James McLeod, respondent's president, testified that Dan Brenton, respondent's utility superintendent for this and other jobs, was actually the designated competent person for this site, and not Jenkins. Mr. Knopf testified, however, that Bill Eastwood, McLeod's general superintendent, Brenton's and Jenkins' boss, arrived at the site during the inspection on April 1,

2003. When Knopf asked Eastwood for the competent person on this site, he identified Jenkins as the competent person. Knopf's testimony was corroborated by Mr. Ortega. Eastwood gave Knopf a letter indicating that he had scheduled employees for competent person training on April 19, 2003, almost three weeks after the inspection.

At no time during the inspection did Mr. Eastwood state, or otherwise indicate, that Dan Brenton was McLeod's competent person on this jobsite. He affirmatively stated that Jenkins was the competent person. Jenkins first said he was the competent person, but later denied he was, stating he did not know who was respondent's competent person onsite. It is inconceivable that neither Eastwood nor Jenkins identified Brenton as McLeod's competent person on this jobsite if, in fact, he had been so designated as such by respondent. This confusion demonstrated by Eastwood, the general superintendent, and Jenkins, the foreman and on-site management representative, leads to the only logical inference that there was no one designated as a competent person for respondent on the jobsite. I find the testimony of James McLeod to be lacking in credibility. His unsupported testimony is inconsistent with statements by Eastwood and Jenkins during the inspection. Clearly, neither the general superintendent nor the foreman stated that Brenton had been designated as the competent person. Mr. Brenton's name was never even mentioned in this context throughout the inspection.

Respondent relies on Brenton's logbook to show not only that he was the competent person, but also that he made daily inspections of excavations on the jobsite. This reliance is misplaced, and respondent's assertions are rejected.

Mr. McLeod testified that all foremen, superintendents and other management personnel are given logbooks to record daily conditions, comments, and jobsite conditions. Brenton was the utility superintendent with responsibilities for this jobsite and for other sites. Respondent submitted excerpts from Brenton's logbook to prove that he was the competent person and made the daily inspections required by the standard. After careful review of this evidence, I conclude that there is no indication that this logbook was kept by Brenton in the capacity of a competent person. Furthermore, there is no information even suggesting that he made any inspection of this trench as required by 29 C.F.R. § 1926.651(k). At most, it shows that Brenton may have been at this site on April 1, 2003, consistent with his duties as utility superintendent. After careful review of all

testimony and documentary evidence, I conclude that daily inspections were not made by a competent person as required by 29 C.F.R. § 1926.651(k)(1).

As discussed above, Mr. Eastwood, the general superintendent for McLeod, told the compliance officer that his foreman, Mr. Jenkins, was McLeod's competent person onsite. At that time, he also produced a letter indicating that competent person training would be provided later that month. Mr. Jenkins had not tested the soil, had no knowledge of soil types, and had no soil records onsite. Respondent, through Eastwood and Jenkins, knew or, with the exercise of reasonable diligence, could have known that it did not have a competent person on the jobsite who performed daily inspections of the excavation as required by the standard.

Respondent's failure to assure that required daily inspections of excavations were performed by a competent person could result in cave-ins or collapse of trench walls, or other hazardous conditions while employees worked in those excavations. There is a substantial probability that death or serious physical injury by crushing could result from such hazardous conditions. The violation of 29 C.F.R. § 1926.651(k)(1) is affirmed as a serious violation.

Having determined that respondent has violated 29 C.F.R. § 1926.651(k)(1), it is unnecessary to discuss or consider the alleged violation of 29 C.F.R. § 1926.651(k)(2).

Alleged Serious Violation
of 29 C.F.R. § 1926.652(a)(1)

The Secretary, in Citation No. 1, Item 4, alleges that:

> Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal):
>
> a) On site, east club home site - employees were in a trench 10 feet deep by 29 feet long and 18.8 feet wide that was not sloped 1 to 1.5 and did not have a protective system to prevent cave-ins, on or about 4/1/03.

The standard at 29 C.F.R. § 1926.652(a)(1) provides:

> *Protection of employees in excavations.* (1) Each employee 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 (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The standard is clearly applicable. The excavation was not in solid rock and was at least 5 feet deep. The Secretary asserts that the trench was dug in Type C soil and was improperly sloped. Respondent argues that the soil was Type B and that the trench was properly sloped. In the alternative, respondent argues that the trench was sufficiently sloped should the soil be determined to be Type C soil.

Mr. Knopf, the Secretary's compliance officer, took a soil sample from the side wall of the trench at the bed of the trench, alongside the last pipe laid, in the area where employees were working. This sample was bagged, sealed, labeled, and sent to the Secretary's laboratory in Salt Lake City, Utah, for analysis. There the sample was analyzed and determined to be Type C soil. Syd Aslami, the Secretary's analytical chemist, testified as to his testing methodology and his results.

Christopher Cole, respondent's consulting engineer, testified that he does not disagree with the Secretary's test results showing the tested soil sample as Type C soil. Mr. Cole's firm dug a test pit about 20 feet from the excavation. The pit was dug about 8 feet deep. Mr. Cole admitted that soil is not homogeneous and can vary in type over a distance of 20 feet. In analyzing this sample, Mr. Cole's company mixed the soil like preparing a cake. Cole's technicians tested this mixture and found it to be Type B soil. This sample was not from the lowest layer of soil. The layers of soil were mixed. Mr. Cole admitted there could be layers of Type C soil below layers of Type B soil. He stated that the weakest layer can have an influence on the safety and stability of the trench sidewall. Appendix A to Subpart P of 29 C.F.R. Part 1926 requires that in a layered soil system, the system shall be classified in accordance with its weakest layer. In this case, Type C soil is the weakest type soil, and it was found at a depth of 10 feet, 2 feet below the lowest level of Mr. Cole's sample.

Mr. Cole analyzed a mixture that averaged out soil types. The average result was Type B soil. His firm performed only the gradation analysis pursuant to ID-194 (Exh. C-7). He did not perform an unconfined compressive strength test of the soil sample. He testified that OSHA did additional tests that he did not do, specifically, the clumps test, the fissures test, and the compressive strength test. Mr. Cole stated that in determining trench wall stability, it was important to observe the trench walls to look at the layers, color of soil, and fissures. His analysis of his soil sample as Type B was done without the benefit of such observations. Having performed this analysis, Mr. Cole testified that his analysis does not disprove the Secretary's results and that he does not dispute the results of the Secretary's tests, finding the soil taken from the bottom of the trench, where employees worked, to be Type C soil. I find that the soil in this trench was properly classified by the Secretary as Type C soil.

Prior to the date of the inspection, respondent had been warned by the general contractor to treat the soil as Type C soil. Mr. Jenkins, respondent's foreman, testified that he does not do soil tests and that respondent had done no testing of the soil as of that date. He did mention that some soil testing had been done on the site, but did not indicate who performed those tests or when they were done. He stated that he relies on others to tell him the soil type. He was not trained regarding soil types, and types of soil were not discussed in respondent's safety class. With this prior warning as to soil type by the general contractor, respondent had a responsibility to treat the soil as Type C soil or to make further diligent inquiry to determine whether the soil was something other than Type C before digging the trench. Respondent had requisite knowledge that the soil in the area of the trench was Type C soil.

During the inspection, Mr. Knopf, the compliance officer, took several measurements of the various dimensions of the trench. Mr. Ortega, the general contractor's safety manager, was present at the trench and observed this activity, which he estimated taking twenty to thirty minutes. Mr. Hinkle, the lead superintendent for the general contractor, assisted Mr. Knopf with some of his measurements.

Mr. Knopf used a tape measure to determine the depth of the trench to be 10 feet. While respondent argues that Mr. Knopf's measurements are not believable, it produced no contrary evidence as to the depth of the trench at the specific location where Mr. Knopf took his

measurements. The time taken to measure the dimensions of this trench is indicative of the compliance officer's concern for accuracy.

The width was measured and double-checked by Mr. Knopf using two devices. He first used a Sonin, which is an instrument that shoots a beam across the trench to a point that reflects back to the instrument. Using this device, Mr. Knopf obtained the width distance of 18.8 feet. He took three additional readings to verify his results. He then used a tape measure to double-check the Sonin readings. Assisted by Mr. Hinkle, Mr. Knopf measured the width at 18 feet 10 inches. Mr. Hinkle then double-checked this distance with the tape. This area of the excavation where employees were working was a narrower section. This factor was considered by Mr. Knopf and can be seen in the photographs in evidence (Exhs. C-1 thru C-6).

Respondent challenges the readings as to depth and width of the trench. It has presented arguments and assertions attempting to discredit the testimony of Mr. Knopf, but no credible evidence to defeat this evidence.

Construction plans called for the pipe invert, the lowest elevation of the pipe to be 6.9 feet below grade or ground level. Adding the 2- to 3-inch thickness of the pipe, the bottom of the pipe should be 7.1 feet below the ground level when finally installed. While site plans and blueprints indicate the planned depth of the bottom of the finished pipe, such evidence does not diminish the testimony of Mr. Knopf as to the actual depth measured in the trench area where employees were working. No measurements were taken during the inspection other than those by Mr. Knopf and Mr. Hinkle. The plans do not show the actual depth of the trench at the time of the inspection.

Mr. Jenkins, respondent's foreman, testified that he used a transit to measure the depth of the trench when this job began on April 1, 2003. He stated that he used a level on a tripod to set the depth of the first pipe at 7 feet. At the time of the inspection, Mr. Jenkins' crew had laid 120 feet of the pipeline planned to be 166 feet long. Throughout that 120-foot length of pipeline, Mr. Jenkins took no other depth measurements of the trench in which at least two members of his crew worked. He felt no need to use his transit or any other device to determine how deep the actual trench was as work progressed. Mr. Ortega testified that he did not recall seeing a transit at the trench during the inspection. For an employer to accurately determine the necessary slope, it must

continuously measure changes in excavation depth. As depth changes, so must the slope to provide adequate protection for employees working in these trenches.

I find the testimony of the compliance officer, Mr. Knopf, to be credible and convincing as to the depth and width of the trench at the location where employees were working at the time of the inspection. This testimony was consistent with the photographs, as well as the testimony of Mr. Ortega. I observed Knopf's demeanor during his testimony. He was forthright in his answers and consistent in his explanations of his methodology used during his inspection. Mr. Knopf is an experienced compliance officer with fourteen years with OSHA and twenty-two years as an accident investigator with the State of Pennsylvania. His demeanor during his testimony was firm, direct and unwavering.

Respondent argues that Mr. Knopf did not measure the length of the trench correctly when he determined it to be 29 feet long from the mouth of the last pipe laid to the unshored vertical end wall over which McLeod's excavator was extending. Respondent submits that the distance is little more than the length of one 8-foot pipe. If I accept this argument, I must find that respondent's employees would be exposed to the collapse of the vertical end wall on top of them and not just the side walls and excavator. This would actually increase the hazard to which respondent's employees are already exposed. In addition, without other evidence, photographs cannot be used as an accurate means to measure distance. Mr. Bill Eastwood was at the site after Mr. Knopf made his measurements of depth, width and length of the trench. He disputed none of these findings.

The soil at the bottom of the trench was wet. Mr. Knopf found there was some water in the bottom of the trench. This is consistent with the laboratory findings that the soil sample taken from the bottom of the trench wall was very wet. Mr. Knopf described the soil as moist, very wet, and with no cohesiveness. I find his testimony to be credible and consistent.

Mr. Jenkins' testimony serves as the primary basis for respondent's argument that the excavation was properly sloped even if the soil is determined to be Type C soil. Jenkins did not observe the compliance officer taking length or depth measurements of the trench, so he has no knowledge of those measurements. He said he saw Knopf aim an instrument or tool across the trench. This was the Sonin device discussed above. Jenkins said Knopf was 8 feet down the slope of the trench when he used this device. Ortega testified that Knopf was only about a foot or two

down. This is consistent with Knopf's testimony. Mr. Ortega also testified that, when questioned at the site, Jenkins told Knopf that the trench was about 6 feet deep. At the hearing, Jenkins was confident that the depth was precisely 7.1 feet deep even though he made no depth measurement after laying the first pipe of the day.

In uncorroborated testimony, Jenkins claimed that he painted the center line down the length of the proposed pipeline and then two lines 14 feet on either side of the center line so the trench would be 28 feet wide at the top. He failed to mention this to Knopf or anyone else on the inspection team during the inspection. He offered no explanation how he determined the direction of the center line. His prior statement submitted by respondent gives no further information relating to the above testimony of Jenkins.

During the hearing, I observed the demeanor of this witness. Throughout his testimony, Mr. Jenkins was confusing and appeared unwilling to give direct answers to specific questions. His answers were inconsistent on whether he was a competent person. Even his description of his backhoe bucket varied. During the inspection, he told Knopf the bucket was 3 feet wide. At the hearing, it was 4.5 feet wide. He seemed to project an image that he was being ill-treated by the compliance officer. He was concerned to the extreme that Mr. Knopf was rude to him. Mr. Ortega described Knopf's behavior as firm and not hostile. I conclude that Mr. Jenkins' testimony and prehearing statement are not credible, and I afford them no evidentiary weight.

The standard at 29 C.F.R. § 1926.652 allows an employer to use an adequate protective system designed in accordance with paragraphs (b) or (c) of that standard. An employer may choose to slope or bench excavations or use support, shield, or other protective systems. Here, McLeod chose to slope its trench walls and is subject, therefore, to the requirements of 29 C.F.R. § 1926.652(b)(2) which provides:

> (b) *Design of sloping and benching systems.* The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3); or, in the alternative, paragraph (b)(4), as follows:
>
> > (2) *Option (2)--Determination of slopes and configurations using Appendices A and B.* Maximum

> allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.

Appendix A relates to *Soil Classification.* I have determined that the soil in the trench where employees worked was Type C.

Appendix B contains specifications for sloping and benching of the face of excavations where, as here, the employer chooses to use this system to protect its employees. Appendix B specifies the maximum allowable slope for an excavation face in Type C soil is 1.5:1 (34 degrees) (See Table B-1 of Appendix B).

As discussed above, the excavation was 10 feet deep and 18.8 feet wide at the top. It was 3 to 4.5 feet wide at the bottom. The end face of the excavation was vertical. To comply with the requirements and specifications of the cited standard, all faces of the excavation must be sloped 1.5:1, or 34 degrees, in Type C soil. Considering facts most favorable to the respondent, the top of the trench was required to be at least 33 feet wide (assuming a trench width of 3 feet at the bottom). Respondent failed to comply with the terms of the standard.

Even using respondent's depth measurements of 7.1 feet with a 3-foot wide trench bottom, the trench width at the top must be at least 24 feet to comply with the standard.

Respondent, through Jenkins, its management representative onsite, knew or, with the exercise of reasonable diligence, could have known of the violative conditions. Jenkins was the foreman and backhoe operator. He created the conditions at issue. His crew, under his direction, worked in the trench. Jenkins failed to measure the depth of the trench, by his own admission. He did not otherwise determine the precise depth or width of the excavation or the type soil in which he was digging. He was warned by the general contractor before digging to treat the soil as Type C soil. He dug the trench without regard for employees in that excavation exposed to the hazard of cave-in or collapse of the trench walls. Had a collapse occurred, respondent's employees would have been crushed. Such collapse or cave-in could result in death or serious physical injury. The violation is affirmed as a serious violation of 29 C.F.R. § 1926.652(a)(1).

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

McLeod is an employer with approximately 100 employees. It has no history of violations, which were affirmed in the last three years.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). Two employees were observed being exposed to the hazard of cave-in and falling materials and equipment for a short period of time during the inspection. Respondent's crew, however, had laid 120 feet of pipeline over several hours on the day of the inspection. These conditions could result in serious injury and possibly death. Thus, the gravity of the violation is moderate. McLeod was cooperative and demonstrated good faith throughout the investigation.

Based on these factors, appropriate penalties for the violations found are as follows:

For the violation of 29 C.F.R. § 1926.21(b)(2), the appropriate penalty is $1,000.

For the violation of 29 C.F.R. § 1926.651(j)(2), the appropriate penalty is $2,000.

For the violation of 29 C.F.R. § 1926.651(k)(1), the appropriate penalty is $2,000.

For the violation of 29 C.F.R. § 1926.652(a)(1), the appropriate penalty is $2,000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Citation No. 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.21(b)(2), is affirmed and a penalty of $1,000 is assessed;

2. Citation No. 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.651(j)(2), is affirmed and a penalty of $2,000 is assessed;

3. Citation No. 1, Item 3, alleging a serious violation of 29 C.F.R. § 1926.651(k)(1), is affirmed and a penalty of $2,000 is assessed; and

4. Citation No. 1, Item 4, alleging a serious violation of 29 C.F.R. § 1926.652(a)(1), is affirmed and a penalty of $2,000 is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: October 22, 2003