United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Darby Creek Excavating, Inc., Respondent.	OSHRC Docket No. 03-1541

Appearances:

Janice L. Thompson, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio
For the Complainant

Michael S. Holman, Esq, Brickler & Eckler, Columbus, Ohio
For the Respondent

Cary W. Purcell, Esq., Purcell & Scott, Dublin, Ohio
For the Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Darby Creek Excavating, Inc. (DCE), is an excavation contractor with its corporate headquarters in Circleville, Ohio. On February 4, 2003, Occupational Safety and Health Administration (OSHA) compliance officer Richard Burns conducted an inspection of one of DCE's worksites, located on Tussing Road in Pickering, Ohio. As a result of Burns's inspection, the Secretary issued two citations to DCE on August 1, 2003.

Citation no. 1 contains three items alleging serious violations of the Occupational Safety and Health Act of 1970 (Act). Item 1 alleges a violation of the general duty clause, § 5(a)(1) of the Act, for failing to barricade the swing radius of an excavator. Item 2 alleges a violation of 29 C.F.R. § 1926.651(h)(1) for failing to take adequate precautions to protect employees working in an excavation in which there was accumulated water. Item 3 alleges a violation of 29 C.F.R. § 1926.651(k)(1) for failing to have a competent person inspect a trench prior to beginning work. The Secretary proposed a penalty of $1,500.00 for item 1 and of $3,000.00 each for items 2 and 3.

Citation no. 2 contains two items alleging willful violations of the Act. Item 1 alleges a violation of 29 C.F.R. § 1926.651(c)(2) for failing to have a safe means of egress located in an excavation 4 feet or more in depth. Item 2 alleges a violation of 29 C.F.R. § 1926.652(a)(1) for failing to protect employees in an excavation from a cave-in. The Secretary proposed a penalty of $56,000.00 each for items 1 and 2.

A hearing was held in this matter from March 30 to April 2, 2004, in Columbus, Ohio. The parties stipulated jurisdiction and coverage. They have filed post-hearing briefs.

DCE argues that the Secretary failed to prove the violations alleged in items 1 and 2 of citation no. 1. DCE contends that item 3 of citation no. 1 should be reclassified as *de minimis*. DCE asserts the affirmative defense of unpreventable employee misconduct for item 2 of citation no. 1 and for items 1 and 2 of citation no. 2.

For the reasons discussed below, items 1 and 2 of citation no. 1 are vacated and item 3 is affirmed. Also, items 1 and 2 of citation no. 2 are vacated.

Background

In January and February 2003, DCE was working under a contract with Fairfield County, Ohio, for the installation of a water line along Tussing Road (Exhs. R-1 & R-2). The project required the installation of 1,500 feet of pipe (Tr. 115). DCE began the project on January 8th or 9th, 2003 (Tr. 145). DCE used two types of pipe in the project. Precise Boring, a subcontractor to DCE, performed the boring work with 650 feet of 12-inch diameter HDPE pipe (Tr. 74, 115, 147, 187). For the rest of the job (except for ductile iron bends for changes in direction), DCE used a 12-inch diameter C-900 water pipe (Tr. 74, 85, 91, 114).

DCE installed the C-900 pipe in excavations 5 feet, 6 inches deep. The plans required 6 inches of bedding for the C-900 pipe and 4 feet of covering over the pipe (Exh. R-2, p. 6; Tr. 90-92). At utility crossings and at bore holes, DCE dug excavations deeper than 5½ feet (Tr. 184).

On February 4, 2003, DCE was planning to connect 20-foot sections of C-900 pipe to a pipe already located underneath Tussing Road, using a 45 degree elbow and a repair flange (Exh. C-9; Tr. 74, 209, 337). DCE had a four-man crew at the site: foreman Nick Johnson, excavator operator Steve Riffle, topman Jason Justus, and pipelayer David Longerot (Tr. 86).

That day, compliance officer Burns arrived at the site at approximately 10:30 a.m. When he arrived, he observed and photographed Longerot in the excavation with no protection from a cave-in. Approximately 12 inches of water had accumulated at the bottom of the excavation (Exh. C-6; Tr. 380). Burns took measurements of the excavation with the assistance of DCE chief safety officer and site utility superintendent Daniel Butler, whom Johnson had called to the site (Tr. 88). Burns recorded the depth of the excavation as 7 feet, 6 inches, on the side nearest the Fairfield County sign, and 6 feet, 4 inches, on the opposite side. The width of the bottom of the excavation was approximately 4 feet. The width at the top of the excavation ranged from 12½ feet to 15 feet (Tr. 401-403).[1]

Burns took additional photographs of the site and interviewed several of DCE's employees. As a result of Burns's inspection, the Secretary issued the citations that gave rise to this case on August 1, 2003.

Citation No. 1

Section 5(a)(1) of the Act (the general duty clause) provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

The citation alleges:

> On the Tussing Road water project where water[2] pipe was installed, on February 4, 2003, and at times prior to, the swing radius on the Caterpillar 325 was not barricaded thereby exposing employees to a caught-in/struck-by hazard.
>
> Among other methods, feasible and acceptable abatement methods to correct this include, but are not limited to the following:

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[1] Counsel for DCE saw fit to insert a "Note" in the midst of his post-hearing brief, issuing a challenge to the court. The note criticizes the compliance officer's conduct of the inspection and then states, "This Court can pass over this lack of professionalism, or it can address it directly and send an appropriate message to the Secretary" (DCE's brief, p.11). DCE contends that the measurements of the excavation taken by the compliance officer were inaccurate and the photos he took documenting the measurements were distorted. Counsel for DCE spent an inordinate amount of time at the hearing cross-examining the compliance officer regarding these measurements, especially considering that there was no dispute that the excavation was deeper than 5 feet. This cross-examination was a waste of time for all concerned, as was the squabble between counsel for DCE and counsel for the Secretary that is memorialized in the first sixty pages of the transcript of this hearing.

[2] The court ordered the citation amended on February 17, 2004, from "sewer" to "water."

a. Barricade the swing radius of the excavator in such a manner as to prevent employees from entering the swing radius area of the rotating superstructure.

Preemption

Under the Act, a specific standard preempts the application of the general duty clause. In order for a specific standard to preempt the general duty clause, the standard must address the particular hazard for which the employer has been cited under § 5(a)(1). *Armstrong Cork Co.,* 8 BNA OSHC 1070 (No. 76-2777, 1980). The specific standard that appears to be most applicable to the cited condition is § 1926.550(a)(9)[3], which addresses barricades for the swing radii of the rotating superstructures of cranes. The Review Commission determined that § 1926.550(a)(9) did not apply to a backhoe used to move a trench box and to lower pipe sections in *Lisbon Contractors, Inc.*, 11 BNA OSHC 1971 (No. 80-97, 1984). The Caterpillar 325 at issue here was variously referred to at the hearing as an excavator, a backhoe, and a trackhoe (Tr. 213-216, 280-284, 387, 402, 420-421). It is not a crane, and thus is not covered under § 1926.550(a)(9). No other standard addresses barricading the swing radii of the rotating superstructures of excavators, backhoes, or trackhoes. DCE does not contend that § 5(a)(1) is preempted by a specific standard in this case. Section 5(a)(1) applies to the condition cited in the instant case.

Elements of § 5(a)(1)

To establish a violation of section 5(a)(1), the Secretary must prove that: (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard.

Waldon Healthcare Center, 16 BNA OSHC 1052, 1058 (Nos. 89-2804 & 89-3097, 1993).

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[3] Section 1926.550(a)(9) provides:

Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.

Facts

On February 4, 2003, DCE employee Steve Riffle was the operator of the excavator. He began work at 7:30 a.m., excavating the trench so that the rest of the crew could install two 20-foot sections of C-900 pipe. After these two sections of the pipe were installed, Riffle used the bucket of the excavator to dig out the dirt around the previously installed bore pipe. The area of the excavation around the bore pipe was referred to as the bore pit or the bore hole (Tr. 644).

The superstructure of the excavator was 15 feet long (Tr. 712). There was a length of pipe located 15 to 16 feet to the rear of the excavator that was to be hooked up to the excavator and installed in the excavation later that day. A sandpile was also located to the rear of the excavator (Tr. 285-286). The excavator was located between the excavation and Tussing Road, which was closed to public traffic that day (Tr. 117). No barricades were placed around the swing radius of the rotating superstructure of the excavator.

Recognized Hazard

Burns testified that the rotating superstructure of an excavator presents two potential hazards: a pinch point hazard from the top of the superstructure, and a struck-by hazard from the rotating superstructure. The Secretary cited DCE only for the struck-by hazard.[4]

When asked what created the struck-by hazard, Burns stated, "The employees walking in the back of the swing radius of the backhoe and the backhoe operator not knowing they're back there, when he swings, they could be struck by the superstructure" (Tr. 534-534). The Secretary contends that the hazard is recognized because the excavator's *Operation and Maintenance Manual*, issued by Caterpillar, contains the following section (Exh. C-30, emphasis in original):

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[4] Initially, Burns testified that there was a pinch point hazard presented by the excavator at issue, stating (Tr. 424):

> If employees were to be walking by the excavator and be caught or struck by the swing radius of the excavator, it could actually pull them in between the tracks and underneath the body of the excavator, and there have been several fatalities which have been documented within OSHA.

Later, Burns clarified that the Secretary cited DCE only for the struck-by hazard (Tr. 534). The citation alleges a "caught-in/struck-by hazard." The evidence at the hearing addressed a struck-by hazard, which is determined to be the only hazard at issue here.

Before Operating the Machine

Clear all personnel from the machine and the area.

Clear all obstacles from the path of the machine.

Beware of hazards such as wires, ditches, etc.

It is noted that the above-quoted section does not specifically refer to a struck-by hazard presented by the rotating superstructure of the excavator. Rather, it is a general warning intended to keep employees from the immediate vicinity of a piece of heavy machinery. The second sentence addresses the path of the excavator as it moves forward or backward, not the swing radius of its superstructure. The only sentence in the entire manual that uses the word "rotating" is "Stay clear of all rotating and moving parts" (Exh. C-30, p. 6). This broadly worded admonition is not specific to the superstructure of the excavator, and does not direct attention to its swing radius.

The Secretary also introduced the *Safety Manual* for a hydraulic excavator issued by the Construction Industry Manufacturers Association (CIMA). There is no evidence that DCE was a member of CIMA,[5] that CIMA was active in Ohio, or that DCE had ever seen a copy of CIMA's *Safety Manual* (Tr. 706-707). The Secretary quotes from this publication where it states (Exhibit C-31, p. 17, emphasis in original):

> **KNOW THE WORKING RANGE OF THE MACHINE**
>
> **Be sure** attachment or load doesn't catch on obstructions when lifting or swinging.
>
> When lifting a load, do not lift, swing or stop unnecessarily fast.
>
> **Be sure** everyone is in the clear before swinging or moving in any direction. NEVER swing or position attachment or load over personnel or vehicle cabs. **Never allow personnel** to walk or work under any part of the machine or load while the machine is operating.

It is clear from the illustration accompanying this section, as well as the language itself, that these instructions are directed to the hazard presented by the movement of the bucket of the excavator, and not the rotating superstructure.

[5] At the time of the hearing, CIMA had merged with Equipment Manufacturers Industry and had become American Manufacturers Industry Association.

Page 12 of CIMA's *Safety Manual* states, "**Be sure** there is adequate clearance for tail swing. Barricade the area to prevent entry," and is illustrated with a drawing showing an excavator in a residential area near a sidewalk (Exh. C-31, emphasis in original). The area around the excavator's swing radius is barricaded with sawhorses.

DCE contends that under certain circumstances, it recognizes the need to barricade an excavator's swing radius. One of those circumstances is similar to the one depicted in the illustration on page 12 of CIMA's *Safety Manual*. DCE chief safety officer Daniel Butler stated that DCE would barricade the swing radius of an excavator if it was near a pedestrian walkway (Tr. 708). Butler also stated that DCE barricades the swing radius when a stationary object, such as the wall of a building or a statue is within the swing radius of the excavator (Tr. 706).

With the exception of the compliance officer, whose only documentation was the CIMA *Safety Manual*, none of the witnesses testified that the failure to barricade the swing radius of an excavator's rotating superstructure in an open area away from pedestrian walkways was a recognized hazard. Gregory Mathers is an industrial safety consultant for the Ohio Bureau of Workers Compensation, Division of Safety and Hygiene (Tr. 803, 807). In this capacity he had inspected "several thousand" construction sites by the time of the hearing (Tr. 811). Mathers works with employers to emphasize safety and to reduce worksite accidents (Tr. 807-808). He has taught OSHA classes, Safety Works for Industry courses, and competent person training (Tr. 809-810). Mathers stated that the Bureau of Workers Compensation has the second largest collection (after the National Safety Council) of books on construction safety training (Tr. 829). Mathers testified that he was unaware of any accidents occurring as the result of a struck-by hazard from an excavator's rotating superstructure in the absence of a fixed object within the swing radius (Tr. 819). He was also unaware of any training materials that advise employers to barricade excavators when fixed objects or the general public were not a factor (Tr. 829).

The Secretary contends that Mathers's testimony is not credible because he stated, on cross-examination, "that if he testified against employers, they would not use his services" (Secretary's brief, p.7). This contention is without merit. As a witness, Mathers demonstrated a detailed knowledge of construction safety and was eminently credible. In twelve years with Ohio's Bureau of Workers Compensation, this was the first time he had testified in a Review Commission

proceeding (Tr. 824). The Secretary's attempts to show bias on Mathers's part were ineffective (Tr. 820):

Q. Mr. Mathers, who is paying you to be here today?

Mathers: The Bureau of Worker's Compensation, Division of Safety and Hygiene.

Q. Are you taking a vacation?

Mathers: No.

Q. You are accepting no fee for being here?

Mathers: Correct.

Q. Do you do any outside consulting?

Mathers: No.

A hazard is deemed "recognized" when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry. *Pepperidge Farm Inc.*, 17 BNA OSHC 1993 (No. 89-0265, 1997). The Secretary has failed to prove that the underground utilities construction industry recognized a hazard in failing to barricade the swing radius of excavators operating in open areas not trafficked by the general public. She also failed to establish that DCE recognized a hazard under such circumstances. DCE made a reasoned assessment of what situations call for barricades of the swing radius. When the public roadway is closed, as it was here, and there is no fixed object within the swing radius, as here, DCE does not regard the absence of barricades around the swing radius as a hazard.

Typically DCE's crew consists of four or five men (Tr. 290). One employee operates the excavator, while the other employees work in and around the excavation to the front of the excavator. The length of pipe to the rear of the excavator was 15 or 16 feet away, outside the swing radius of the rotating superstructure. Burns stated that he saw Longerot exit the excavation and walk behind the excavator, but there is no evidence that he walked within the superstructure's swing radius (Tr. 423).

The Secretary has failed to establish that under the circumstances in this case, the failure to barricade the swing radius of the rotating superstructure of an excavator is a recognized hazard, either by the underground utilities construction industry or by DCE itself. Item 1 of citation no. 1 is vacated.

Item 3: Alleged Serious Violation of § 1926.651(k)(1)

Section 1926.651(k)(1) provides:

> 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.

The citation alleges, "On the site where trenching was performed, a daily inspection of the trench was not performed prior to beginning work."

Foreman Nick Johnson was DCE's designated competent foreman (Tr. 455-456). Johnson told Burns that he had conducted a visual inspection of the excavation the morning of February 4, 2003, but that he had not performed a manual test to determine the classification of the soil (Tr. 442-444). Johnson conceded at the hearing that he had not conducted a manual test of the soil (Tr. 246).

In its post-hearing brief, DCE concedes that it violated § 1926.651(k)(1) and that this item should be affirmed (DCE's brief, pp. 2, 15). DCE argues, however, that the violation should be reclassified from serious to *de minimis* because DCE had a trench box available for use, which would constitute adequate protection for Type C soil, the type of soil most likely to cave in.

Reclassifying this item would not be appropriate given the hazard § 1926.651(k)(1) seeks to prevent.

> The Commission has held that a violation is properly classified as *de minimis* when the hazard is trifling or bears a negligible relationship to employee safety or health. *Continental Oil Co.*, 79 OSAHRC 42/C3, 7 BNA OSHC 1432, 1979 CCH OSHD P23,626 (No. 13750, 1979); *Clifford B. Hannay & Son, Inc.*, 78 OSAHRC 12/A2, 6 BNA OSHC 1335, 1978 CCH OSHD P22,525 (No. 15983, 1978).

General Motors Corp., Rochester Products Division, 9 BNA OSHC 1575 (No. 78-2894, 1981).

The hazard of an excavation caving in is neither trifling nor negligible to employee safety. The court does recognize, however, that DCE planned to use the same protective system in the excavation that is appropriate when Type C soil is found, so that DCE's employees would have been

afforded adequate protection. This recognition will be reflected in the penalty determination for this item.

Item 3 is affirmed.

Item 2 of Citation No. 1: Alleged Serious Violation of § 1926.651(h)(1) and Items 1 and 2 of Citation No. 2: Alleged Willful Violations of §§ 1926.651(c)(2) and 1926.652(a)(1)

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Item 2 of citation no. 1 and items 1 and 2 of citation no. 2 have been grouped because DCE admits the violation of all three. DCE concedes that the cited standard applies in each item, that it was in noncompliance with the terms of each cited standard and that each instance of noncompliance exposed its employee David Longerot to the hazard of a cave-in. DCE argues, however, that the violations resulted from a single act of employee misconduct on the part of pipelayer David Longerot.

The cited standards are:

§ 1926.651(h)(1)

> Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

§ 1926.651(c)(2)

> 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.

§ 1926.652(a)(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 (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Facts

When Burns arrived at the Tussing Road worksite on February 4, 2003, at 10:30 a.m., he exited his vehicle and approached the excavation. As he approached, he heard Riffle, who was on the excavator, talking to someone in the trench. Burns looked over and saw Longerot standing in the excavation in the bore pit area, holding a shovel. When Riffle saw Burns, he yelled to Longerot to get out of the trench because "the OSHA man was here" (Tr. 381). Burns had enough time take a picture of Longerot in the excavation with his digital camera (Exh. C-6). Burns observed Longerot climb up the side of the excavation and walk off behind the excavator (Tr. 382, 423). Longerot then "vanished," immediately leaving the site (Tr. 506).

At the time Burns observed Longerot in the excavation, Justus was gone from the area, looking for locking flanges to help secure the pipes (Tr. 267). Johnson was driving up in the frontend loader (also referred to as a backend loader), carrying a load of sand , which was used as bedding material (Tr. 203). About 12 inches of water had accumulated in the excavation in the bore pit area (Tr. 401). The end of a green suction hose had been placed in the water next to the bore pipe, but the pump to which it was attached was not operating (Exh. C-5; Tr. 278). DCE had a trench box next to the excavation, as well as a blue ladder lying by a sign for Fairfield County. There was no trench box or ladder in the excavation (Exh. C-6).

Burns attempted to interview Johnson, whom he found uncooperative. Johnson asked Burns to wait for chief safety officer Butler to show up before continuing the inspection. Burns agreed to do so and Butler arrived approximately 30 minutes after being called on the telephone by Johnson (Tr. 70, 388). Unbeknownst to anyone at that time, Johnson had suffered a heart attack earlier in the week. He thought he had pulled a muscle in his leg and was trying to work through it. Johnson was, by his own account, in a great deal of pain on the day of the inspection. One reason he had sent Justus, who was the regular frontend loader operator, off to find locking flanges was so that Johnson

could sit down on the frontend loader. DCE suspended Johnson following the OSHA inspection, which gave him an opportunity to go to the doctor the following Monday, where it was discovered that he had had a heart attack. As of the March 2004 hearing, Johnson had not been able to return to work (Tr. 189, 208, 265-266, 273-276).

Knowledge

In addition to the employee misconduct defense, DCE argues that the Secretary failed to show DCE had knowledge of the alleged violative conditions, an element of her *prima facie* case. The Secretary must prove by a preponderance of the evidence that the employer had actual or constructive knowledge of the condition. *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 20-1747, 1994); *Siebel Modern Mfg. & Welding Corp.,* 15 BNA OSHC 1218, 1221-22, 1991-93 CCH OSHD p. 29,442, p. 39,678 (No. 88-821, 1991). The Secretary can make a *prima facie* showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation. *Todd Shipyards Corp.,* 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

The Secretary alleges that Johnson had actual knowledge that Longerot was in the excavation and that, as foreman, his knowledge can be imputed to DCE. There is nothing, however, in the record to indicate that Johnson knew Longerot was in the excavation. When Burns arrived, Johnson was operating the frontend loader. Johnson testified that he had taken the frontend loader to a staging area behind some buildings away from the site. As he drove up, he saw Burns's car parked near the excavation. One of DCE's employees came up to Johnson and told him that an OSHA compliance officer was on the site. Johnson parked the frontend loader and went to meet Burns. By this time Burns had taken the photo of Longerot and Longerot had exited the excavation (Tr. 207-208). Johnson testified that he did not see Longerot in the excavation (Tr. 261). He told Burns at the time of the inspection and repeated at the hearing that no one was supposed to be in the excavation until the trench box was installed (Tr. 259, 385). The record establishes that Johnson had no actual knowledge that Longerot was in the excavation.

The Secretary argues in the alternative that Johnson had constructive knowledge that Longerot was in the excavation. This is based on Burns's testimony that Riffle told him during the inspection that Longerot had been in the excavation for approximately an hour by the time Burns photographed him. The Secretary contends that if an employee was in an excavation with accumulated water for

an hour, the supervisory employee could have discovered this with the exercise of reasonable diligence.

In his interview with Burns, his deposition by the Secretary, and his testimony at the hearing, Riffle showed himself to be hostile, uncooperative, contemptuous, and evasive. He initially refused to answer any questions put to him by Burns, including his name and address (Tr. 407-408, 483). Riffle eventually told Burns that Longerot had been in the excavation for about an hour (Tr. 483-484).

Riffle's statement is the only evidence the Secretary adduced that indicates Longerot was in the excavation for as long as an hour. It was clear from his demeanor at the hearing that Riffle had a chip on his shoulder and that he took the OSHA inspection and the Review Commission proceeding less than seriously. In his deposition testimony as well as at the hearing, Riffle's answers were flip and given with little thought to accuracy or consistency (Tr. 661-663, 665-666). Riffle was no longer working for DCE at the time of the hearing, so there was no apparent incentive for the inconsistency in his answers, other than an innate belligerence. He was asked at the hearing why he replied that he could not answer a series of simple questions during his deposition. Riffle responded insincerely "Well, some questions I didn't understand. I didn't understand. He was just–I'm not going to lie. I'm not a very smart guy, and some things he was twisting up" (Tr. 667).

At the time of the inspection, Derek Frease was the Class III plant operator for Fairfield County Utilities (Tr. 320). Frease had been assigned as county inspector for the Tussing Road waterline installation (Tr. 322-323). Frease made daily inspections of DCE's worksites while the Tussing Road project was underway (Tr. 325-326).

Frease had stopped by the excavation site between 7:00 and 8:00 the morning of the OSHA inspection on his way to the wastewater treatment plant, located 300 to 500 feet south of the excavation (Tr. 340, 360). He returned to the site later that morning, at approximately 10:30. This is the same time Burns estimated that he arrived at the site, but Burns had not arrived when Frease first got to the site (Tr. 339, 360, 362). Frease got out of his truck, walked over to the excavation, and spoke to DCE's crew. Frease stated that all four of them were "up on top" and that no one was in the excavation (Tr. 361). Because it was cold and had started snowing, Frease returned to his truck at the site and started filling out paperwork. By the time Frease got out of his truck 15 or 20 minutes later, Burns had arrived on the site and had taken the photograph of Longerot in the trench (Tr. 362).

Based upon Riffle's demeanor and inconsistent statements, the court deems him an unreliable witness whose testimony is given no weight. His statement to the compliance officer during the inspection is also deemed unreliable. Frease was a credible witness who worked for a third party. His testimony was detailed and was related in an assured manner. Based upon Frease's testimony, Longerot could not have been in the excavation for more than 15 minutes (he had already left by the time Frease got out of his truck the second time). After Frease spoke with him at 10:30, Johnson got on the frontend loader and went to get a load of sand for the bedding.

Considering the credibility of the witnesses, there is no evidence that Johnson demonstrated less than reasonable diligence in leaving the excavation for at most 20 minutes, when no one was supposed to enter the excavation at that time. The failure to discover a safety violation that occurs in a short period of time is not evidence that the employer was not diligent in its efforts to discover violations. The Secretary has failed to show that DCE had constructive knowledge of Longerot's presence in the excavation.

Unpreventable Employee Misconduct Defense

DCE has also shown that the violative conditions were the result of employee misconduct. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997).

DCE had written work rules designed to prevent the three violations cited here. Burns acknowledged that DCE's written safety program is good (Tr. 594). DCE's safety manual states in pertinent part(Exh. R-18, p.18, 19):

> Water will not be allowed to accumulate in excavations.
> . . .
> Employees working in trenches four feet deep or more will have access, egress ladders available at no more than 25 feet of lateral travel. . .
> . . .
> Trenches more than five feet deep require shoring or must be laid back to a stable slope. In hazardous soil, trenches less than five feet must be protected.

> Portable trench boxes or sliding trench shields used in place of shoring and sloping will be designed, constructed and maintained to provide protection at least equal to the required sheeting and shoring. Shields will be designed by a certified registered professional engineer.
> . . .
> Do not work outside trench shields or shoring protection in unprotected trenches.

Each employee is given a copy of DCE's safety manual. DCE also conducts training on excavation safety, personal protective equipment, and competent person qualifications (Exh. R-6; Tr. 722-724). DCE's foremen conduct regular tool box meetings with their work crews. All the members of Johnson's crew attended numerous tool box meetings and signed the attendance sheets (Exhs. R-32 & R-33; Tr. 750-752). DCE has established that it effectively communicated its work rules to its employees.

DCE took reasonable steps to discover violations of its safety rules. Chief safety officer Butler and foreman Johnson conducted regular inspections (Tr. 66, 197). DCE contracted for safety audits by Today's Resources, a safety consulting company (Exh. R-31; Tr. 734, 736-737). DCE also worked with the Ohio Bureau of Workers Compensation to perform onsite safety consulting (Tr. 813).

DCE also adduced evidence that it had a disciplinary policy that it enforced. DCE suspended Johnson, Riffle, and Longerot for two days without pay after Longerot was discovered in the unprotected excavation (Exh. R-29; Tr. 731-732). DCE had reprimanded or suspended employees on other occasions for safety violations (Exh. R-28).

DCE has established all of the elements of the employee misconduct defense. Item 2 of citation no. 1 and items 1 and 2 of citation no. 2 are vacated.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

DCE employed between 65 and 75 employees at the time of the inspection (Tr. 59). DCE had previously been cited for OSHA violations (Tr. 473). DCE had a good written safety program and is entitled to credit for good faith.

The gravity of the violation of § 1926.651(k)(1) in this instance is low. Johnson conceded that he had not conducted a manual test of the soil, but he intended to place a trench box in the excavation when it was time for Longerot to enter it. The trench box and ladder were next to the excavation. Johnson's failure to conduct a manual test of the soil did not result in an increased hazard to any employee.

It is determined that the appropriate penalty for the violation of § 1926.651(k)(1) is $1,000.00.

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 ORDERED that:

1. Item 1 of citation no. 1, alleging a violation of § 5(a)(1) is vacated, and no penalty is assessed;
2. Item 2 of citation no. 1, alleging a violation of § 1926.651(h)(1), is vacated, and no penalty is assessed;
3. Item 3 of citation no. 1, alleging a violation of § 1926.651(k)(1), is affirmed, and a penalty of $ 1,000.00 is assessed;
4. Item 1 of citation no. 2, alleging a violation of § 1926.651(c)(2), is vacated, and no penalty is assessed; and
5. Item 2 of citation no. 2, alleging a violation of § 1926.652(a)(1), is vacated, and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: November 4, 2004