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. A.E.Y. ENTERPRISES, INC., Respondent.	OSHRC DOCKET NO. 06-0224

Appearances:

William G. Staton, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Michael G. Young, President
A.E.Y. Enterprises, Inc.
Walworth, New York
For the Respondent, *pro se.*

Before: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER ON REMAND

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"). On July 6, 2006, the undersigned issued a decision and order vacating a citation issued to A.E.Y. Enterprises ("AEY"). On September 6, 2006, the Commission issued an order in which it remanded this matter to the undersigned for further proceedings. In particular, the Commission's remand order stated as follows:

> On remand, in deciding whether the Secretary proved a violation of § 1926.652(a)(1), the judge shall determine whether AEY's shoring system was adequate, focusing on whether AEY's shoring system was properly designed in accordance with § 1926.652(a)(1). The judge shall also make findings on whether the tabulated data AEY used to design its shoring system was proper. When determining whether AEY meets the exception to § 1926.652(a)(1), the judge shall place on AEY the burden of proving that (1) the excavation was less than five feet, *and* (2) an examination of the ground by a competent person provided no indication of a potential cave-in.

Procedural History

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of AEY from October 13, 2005 to January 6, 2006. As a result, on January 10, 2006, OSHA issued to AEY a citation alleging a serious violation of 29 C.F.R. § 1926.652(a)(1). AEY contested the citation, and this case was designated for the Commission's Simplified Proceedings pursuant to Commission Rule of Procedure 203, 29 C.F.R. 2200.203. The administrative trial was held on May 2, 2006, in Rochester, New York, after which both parties filed post-trial briefs.

As set out above, on July 6, 2006, I issued a decision and order vacating the citation, and on September 6, 2006, the Commission remanded the case to me. Pursuant to the remand, on November 8, 2006, a second administrative trial was held at which both parties presented additional evidence. After the trial, the parties again submitted post-trial briefs.

The OSHA Inspection

On July 15, 2005, Michael Edwards, a foreman with Postler and Jaeckle Corporation ("P&J"), telephoned AEY to request that it install shoring in an excavation located at the University of Rochester ("University").[1] AEY installed the shoring that same day, after which two employees of P&J entered the excavation to repair a pipe. Five days later, on July 20, an employee of a subcontractor, Ferguson-Hall, entered the excavation; the shoring had been removed a few hours before, and the excavation collapsed, resulting in the injury of the employee. OSHA Compliance Officer ("CO") Robert Upton began an investigation into the circumstances of the accident on July 20.[2] In August, the CO received a photograph and an e-mail from the University; the photograph, which showed the excavation when it was shored, was taken on July 19.[3] After seeing the photograph, the CO attempted to find out whether anyone had worked in the excavation in that condition, as he believed it did not comply with OSHA's excavation standard. He was unable to

[1]Hereinafter, all dates will refer to the year 2005 unless otherwise indicated.

[2]Exhibit R-2, the OSHA-1A from the CO's inspection, states that the employee who was injured died later in the hospital from cardiac arrest. The OSHA-1A also states the shoring was removed just a few hours before the accident but does not indicate why or by whom. The CO testified at the trial that the employee's death was not related to the subject citation. (Tr. 99).

[3]Exhibit R-3, the OSHA-1B from the CO's inspection, states that the photograph, Exhibit C-1, was taken by Mike LaPoint, a University project manager, on July 19; further, Mr. LaPoint himself so testified. (Tr. 117-18, 129-30).

obtain that information until October, at which point he learned that AEY had shored the excavation and that two P&J employees had worked in it after it was shored. After interviewing employees of P&J and AEY, the CO determined AEY had not shored the excavation in compliance with the OSHA standard. (Tr. 12-13, 18-19, 22, 56-57, 99).

The Citation

The citation, which proposes a penalty of $1,500.00, alleges as follows:

> 29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(b) or (c):
>
> a) On or about 7/15/05, in excavation at the east end of Lovejoy Hall on the University of Rochester Campus, Rochester, NY: Employees entered an excavation that was approx. 8 ½ ft. deep x 11 ft. wide x 26 ½ ft. long to repair a leaking pipe. The west side of the excavation was the concrete foundation of the building and the south end was also concrete. The north end of the excavation was sloped such that employees could use it to enter and exit the excavation. The east bank of the excavation was vertical. A.E.Y. Enterprises Inc. had installed a shoring system in the excavation comprised of two sheets of 3/4" x 4ft. x 8ft. plywood, two 4"x6" x 8 ft. timbers, and two "Air Shore" trench jacks. However, this shoring system was not an adequate protective system designed in accordance with 29 CFR 1926.652(c).

The Testimony from the First Trial

Kenneth Peck

Mr. Peck, the safety director for P&J in July 2005, has been a safety consultant for at least 26 years. He testified that he observed the cited excavation on July 15 and that while he believed it could have been 5 feet or more in depth, this was "just a visual observation" and he "did not put a tape measure to it." He further testified that on July 15, he instructed two P&J plumbers who were going to work in it "not to enter the excavation without shoring" because it was around 5 feet in depth and because it had flooded and contained some water; in addition, the soil had a "sandy consistency." Mr. Peck did not see the trench after AEY had shored it. On July 20, he received a telephone call that there had been an accident; the trench had collapsed, and the worker in it was an employee of a subcontractor, Ferguson-Hall. Mr. Peck did not observe the accident, as he had been in a meeting, and he did not recall the exact conversation he had later with CO Upton or that he had stated a specific depth of the excavation to the CO. (Tr. 11-14, 18-19).

Michael Edwards

Mr. Edwards, a P&J foreman at the site, testified he had received training in excavations, including training in recognizing soil types, and that he was the competent person at the site. He further testified that he had observed the excavation and the soil on July 15.[4] Upon examining C-1, he estimated the plywood above the trench to be 3 feet and the depth of the trench to be about 5 feet.[5] However, he also said he did not measure the trench; it could have had a depth of 5 feet or 4 feet 10 inches, and he could not accurately state that its depth was 5 feet or more. Mr. Edwards recalled having a phone conversation with CO Upton. He stated it was possible he told the CO the excavation was 6 feet deep but if he did "it was only an approximat[ion]." He also stated that he did not recall telling the CO that the soil was "Type B." Mr. Edwards noted that as to the shoring that was installed, he had no concerns about its safety. (Tr. 21-26, 36-37).

David Haight

Mr. Haight, a plumber/pipe fitter with P&J on July 15, testified upon examining C-1 that he had worked "on the pipe that's shown at the bottom of the excavation." He further testified that although he told CO Upton the excavation was about 6 feet deep, he had not measured it and could not say under oath that his estimate was accurate. Mr. Haight said it was possible the trench was less than 5 feet deep, and he noted that because he had to dig out the pipe when he went in to work on it, the trench would have been a little shallower when AEY shored it; he also said that after it was shored, he had no concern as to the safety of the excavation. (Tr. 40-43).

Andrew Murawski

Mr. Murawski, a plumber with P&J, testified he had worked in the excavation after AEY had shored it; upon examining C-1, he said that he had had to hand dig around the pipe. He also testified that when he spoke to CO Upton, the CO had told him, and he had agreed, that the depth was between 6 feet and 7 feet. Mr. Murawski stated it was possible that the excavation was less than 5 feet deep and that it could have been 4 feet 11 ½ inches deep. (Tr. 47-48, 51-53).

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[4]Mr. Edwards testified that he had had AEY shore the trench on July 15 pursuant to the direction of Mr. Peck. (Tr. 22-23).

[5]Mr. Edwards said C-1 was a "fair and accurate representation of how the excavation looked after it was shored, on July 15, 2005." (Tr. 23-24).

Robert Upton

CO Upton testified that upon learning of the accident, he went to the site on July 20 and met with Mr. Peck and viewed and measured the excavation; it was 8.5 feet deep and had no shoring in it. The CO said that after receiving C-1, he "wanted to find out if there [was] anybody that had worked in that excavation in [that] condition;" however, he was unable to obtain that information until October, when he learned from Mr. Peck that AEY had installed the shoring, that two P&J employees had worked in the trench after it was shored, and that the trench's depth was more than 5 feet. The CO spoke to Michael Young, AEY's president, who told him that two of his employees, Shane O'Connor and a helper, had installed the shoring on July 15. The CO also spoke to Mr. O'Connor, who corroborated Mr. Young's statement and said that "he had been trained by Mr. Young in the [OSHA] shoring requirements;" Mr. O'Connor identified the materials he used to shore the excavation, and he indicated that the depth on July 15 was about 7 feet and that he had not shored the excavation in conformance with the OSHA requirements. (Tr. 56-67).

CO Upton further testified that he spoke to Mr. Haight and Mr. Murawski and showed them C-1; the former indicated the trench's depth was about 6 feet, while the latter indicated it was 6 to 7 feet. The CO also spoke to Mr. Edwards, who told him that he was the competent person at the site, that the trench was about 6 feet deep on July 15, and that the soil was "Type B."[6] CO Upton said he recommended the citation based on C-1 and the statements of the individuals with whom he had spoken, and he accepted Mr. Edwards' statement of the trench's depth as he was the competent person at the site.[7] The CO also said he did not believe the trench was less than 5 feet in depth or that there was no potential for a cave-in. However, he admitted he had measured the trench on July 20, not July 15, and that the trench was not in the same condition as it had been on July 15. He also admitted, upon examining C-1, that the excavation was not 8.5 feet deep and that that number appeared in the citation only because of his own measurement. He noted that the plywood shown in

[6]The CO took soil samples at the site, and the OSHA lab results confirmed that the soil was in fact "Type B." (Tr. 67).

[7]The CO said the shoring in the trench did not meet OSHA's requirements because four air jacks, instead of the two shown in C-1, were needed, pursuant to Exhibit C-4, the tabulated data he had obtained from the website of AirShore International ("AirShore"). (Tr. 68-79, C-4).

C-1 was 8 feet high, that the plywood was about 3 feet above grade level, and that although he could not tell if it did, if the plywood went to the bottom of the excavation, then the excavation's depth could have been less than 5 feet.[8] The CO conceded it was possible that, after AEY installed the shoring, the P&J employees "hand dug around the pipe and made it down even a couple more inches." He also conceded that the excavation could have been 4 feet 10 ½ inches deep and that if it was in fact less than 5 feet deep there was no violation. (Tr. 65-69, 82-99, 104-07).

The Testimony from the Second Trial

Michael LaPoint

Mr. LaPoint has been a project manager at the University for over seven years; his job involves managing construction projects at the University. He testified he managed the project that involved the cited excavation and that he took C-1 on July 19.[9] He further testified the University maintains records of its piping locations and elevations, and he identified Exhibits C-5 and C-6 as engineering drawings relating to the project and the cited excavation; C-5 and C-6 both show Lovejoy Hall, the building abutting the excavation, and while C-5 depicts the building and other conditions existing at the time the project began, C-6 depicts the building at the end of the project with both the new and old piping noted.[10] Mr. LaPoint stated that based on C-5 and C-6, the cited pipe was about 7 feet deep. He explained that C-5 shows Lovejoy Hall's elevation as being 522.29 feet above sea level and that C-6 shows the pipe's elevation as being 529.30 feet above sea level, resulting in the pipe's depth being 7.1 feet.[11] He said, however, that because it was 6-inch pipe, the depth of the top of the pipe would be about 6.5 feet. He also said he could not attest to the accuracy of C-5 and C-6 as a contractor did those surveys and he himself did not verify them. (Tr. 116-35).

Robert Upton

CO Upton testified he interviewed Shane O'Connor on October 14, on the phone, and that he took notes of their conversation which he incorporated into his case file; he identified Exhibit C-7

[8]The CO said he was told the plywood was 8 feet high. (Tr. 86).

[9]Mr. LaPoint could not confirm if he had observed the trench on July 15. (Tr. 130, 134).

[10]Mr. LaPoint highlighted Lovejoy Hall and the excavated area on both C-5 and C-6.

[11]Mr. LaPoint circled the noted elevations on C-5 and C-6

as a copy of his notes. Upon reviewing C-7 at the hearing, the CO said Mr. O'Connor told him the date he had shored the trench, the materials he had used, and the location of the trench. The CO also said Mr. O'Connor told him the trench was approximately 7 feet deep and that he could see the pipe in the trench was broken; in addition, Mr. O'Connor stated no one had told him how to design or install the shoring and that he had used two jacks "because I thought they would be enough for there." When the CO asked Mr. O'Connor if he had followed the tabulated data for the air jacks used, Mr. O'Connor said he had not "but the way they were put in they weren't moving;" also, when the CO asked if the shoring complied with the OSHA regulations, Mr. O'Connor replied "probably not." The CO was adamant he told Mr. O'Connor he was referring to July 15 and not July 20 when he interviewed him; he was also confident he did not misunderstand or misinterpret Mr. O'Connor's answers and that Mr. O'Connor had understood his questions. (Tr. 136-44, 151-55, 222-24).

CO Upton further testified that assuming the pipe was 7 feet deep, or 6.5 feet deep, the shoring did not comply with the OSHA standard. He explained that pursuant to C-4, the tabulated data he had obtained from the website of AirShore, the manufacturer of the jacks Mr. O'Connor had used, two vertical columns with two jacks in each column were required, with the top jacks being between 6 inches and 2 feet below the top of the trench and the bottom jacks being no more than 4 feet above the bottom of the trench; on this basis, he concluded Mr. O'Connor's use of one jack per column did not meet C-4. The CO agreed that if a trench were 6 feet deep, it appeared from the information and drawing in C-4 that one jack per column placed 2 feet below the top of the trench (which would also be 4 feet above the bottom of the trench) would meet C-4.[12] He also agreed that at the prior trial, he had said two jacks per column were needed in a trench of 6 feet or less in depth. The CO said his present testimony was based on C-4 and his conversation with Steve Cudmore at AirShore, who told him two jacks per column were required for trenches over 6 feet deep but that one per column was acceptable for trenches 6 feet or less in depth. (Tr. 145-48, 161-73).

Jack Osborne

Mr. Osborne is a managing partner of Watchdog Building Partners, a construction management company in Rochester, New York. He testified that he had had ten years of experience

[12]The CO said that while other air jack manufacturers expressly stated that a single jack would be acceptable in trenches 6 feet deep or less, C-4 made no such statement. (Tr. 164-66).

with large architectural firms as a construction administrator, which involved reviewing construction documents. He further testified that he had also been a member of the Construction Specifications Institute since 1985 and that he was a certified construction document technologist. Upon reviewing C-4, Mr. Osborne stated that if an excavation was 6 feet deep, only one trench jack, placed 2 feet down from the top of the trench, would be needed in a vertical plane; he further stated, however, that if the excavation was over 6 feet deep, two trench jacks would be required. (Tr. 174-75, 179-80).

Shane O'Connor

Mr. O'Connor is a foreman operator with AEY, and he held that same position on July 15; he has worked for AEY for ten years and has been in construction for 20 years. He testified that he was familiar with AirShore jacks and with C-4, that he was also familiar with "how to use and install them," and that Michael Young had trained him in using the jacks; he considered himself a "competent person" on job sites because he was able "to determine if there's a potential for a cave-in at an excavation." Mr. O'Connor agreed he put the shoring shown in C-1 into the trench and that he determined what equipment he needed after viewing the trench; he also agreed he did not read the tabulated data that day because he had shored "hundreds of holes" and did not feel he had to "refer to it every day." Mr. O'Connor said he did not believe the trench needed shoring; he did not measure it but felt it was 4.5 to 5 feet deep and that there was no potential for a cave-in; he shored it because Mr. Peck had requested it. Mr. O'Connor also said the trench did not look like C-1 when he shored it because the pipe in the bottom of C-1 was not exposed then; he assumed the P&J employees "dug that hole down deeper and exposed that pipe" after he shored it. (Tr. 181-89).

Mr. O'Connor further testified that he spoke on the phone to CO Upton about the trench in October. He said he had read the CO's notes from their conversation and did not feel they were accurate; the CO had told him he was investigating the July 20 incident, and Mr. O'Connor believed most of the CO's questions had to do with July 20. He also said that when the CO asked him how deep the trench was, he replied he "didn't know." Mr. O'Connor stated that at first it seemed the CO was investigating Ferguson-Hall; however, later on in their conversation, he realized the CO was questioning what AEY had done, and he felt angry and confused and that the CO was misinterpreting his answers. He denied seeing the pipe as the CO's notes indicated, and he also denied ever giving the CO an exact depth of the trench. He agreed with the notes' statement that he had "put the first

jack in 3 foot to 3.5 foot up from the bottom," but he said that was a proper location for a 5-foot-deep trench. He also agreed he had answered "probably not" when the CO asked if the shoring was according to regulations, but he explained that he thought the CO was talking about the trench on July 20. Mr. O'Connor opined that the CO's notes reflected answers that were taken out of context or misunderstood. (Tr. 189-96).

DISCUSSION AND CONCLUSION

The cited standard provides as follows:

> *Protection of employees in excavations*. (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The term "competent person" is defined by the excavations standard at 29 C.F.R. 1926.650(b) 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.

In my previous decision and order, I found the Secretary had not met her burden of proving that the cited excavation was 5 feet or more in depth. My finding was based on the testimony of CO Upton that the excavation could have been less than 5 feet deep and that if it was there was no violation of the standard. (Tr. 89-91, 105-07). My finding was also based on the testimony of P&J's employees, all of whom indicated that the trench could have been less than 5 feet deep. (Tr. 13-14, 25-26, 36, 43, 53). However, in light of the Commission's remand order, it is the burden of AEY to prove that the excavation was less than 5 feet deep and that examination of the ground by a competent person provided no indication of a potential cave-in. *See C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996).

As set out above, Mr. LaPoint, the project manager of the project that involved the subject excavation, identified C-5 and C-6 as the University's engineering drawings relating to the pipe the P&J employees repaired. According to those drawings and his testimony about them, the subject pipe was 7.1 feet below grade; however, because the pipe was 6-inch pipe, the top of the pipe would have

been about 6.5 feet below grade. (Tr. 118-26). Mr. LaPoint said he could not attest to the accuracy of C-5 and C-6, as a contractor did those surveys and he himself did not verify them. (Tr. 126-27). I nonetheless find C-5 and C-6 persuasive evidence with respect to the depth of the excavation.

I also find persuasive CO Upton's testimony about what Mr. O'Connor told him during their phone conversation on October 14, particularly because the CO's testimony was supported by C-7, his written notes taken at the time of the conversation. According to the CO's testimony about C-7, Mr. O'Connor told him the trench was about 7 feet deep and that he could see that the pipe in the trench was broken; Mr. O'Connor also told the CO about the materials he had used, including the two air jacks he installed in the trench. Mr. O'Connor admitted he had not followed the tabulated data when he installed the jacks, but he indicated his belief that the two jacks were adequate for the trench; additionally, when the CO asked if the shoring complied with OSHA regulations, Mr. O'Connor's response was "probably not." (Tr. 136-44).

Mr. O'Connor's testimony conflicted with that of the CO. As set out above, for example, he denied seeing the pipe as the CO's notes indicated, and he also denied ever giving the CO an exact depth of the trench; rather, he said he told the CO that he did not know what the depth of the trench was. Mr. O'Connor agreed he had not used the tabulated data when shoring the trench, but he noted that he had shored numerous trenches and did not feel that he had to refer to the data every day. He also agreed that he had said "probably not" when the CO asked him if the shoring was done pursuant to the OSHA regulations, but he explained that he thought that the CO was referring to the condition of the trench on July 20. In fact, Mr. O'Connor thought that most of the CO's questions had to do with the trench on July 20, and he believed that the CO's notes were inaccurate and that the CO had misunderstood or misinterpreted his answers. (Tr. 184-96).

I find Mr. O'Connor's testimony unpersuasive, especially his testimony that he believed most of the CO's questions had to do with the trench's condition on July 20. The CO was adamant his questions referred to July 15, the day Mr. O'Connor was at the site, and it makes no sense the CO would have been asking Mr. O'Connor about the trench's condition on July 20, particularly since Mr. O'Connor testified he had not been at the site on July 20. (Tr. 205, 213-15, 221-24). However, Mr. O'Connor's testimony noted thus far reflects only his statements on direct examination. On cross-examination, his lack of candor was even more apparent. For example, after stating the CO's

notes were inaccurate, he then went on to agree that most of them were accurate. (Tr. 200-05). Further, he said it was the CO who had asked him if the trench was about 7 feet deep on July 20 and that he had responded he didn't know but that it could have been; when asked why he had not told the CO that he had estimated the trench to be 4.5 to 5 feet deep on the 15th, he replied that he "never had a chance" as the CO "kept going from one question to the next." (Tr. 205-06). Mr. O'Connor's testimony that he was a "competent person" was also unconvincing; he showed some knowledge of soil classification, but his answers to questions about shoring and when it was required and how to install it were equivocal and indicate either a lack of clarity about the requirements or an attempt to justify his improper shoring of the cited excavation. (Tr. 183, 186, 206-17).

Based on the foregoing, and also on my observation of the demeanors of the two witnesses, I credit the testimony of the CO over that of Mr. O'Connor, to the extent there are conflicts in their testimony.[13] I find, therefore, that Mr. O'Connor told the CO that the excavation was about 7 feet deep and that he saw the pipe in the excavation. I also find, based on the testimony of Mr. Haight and Mr. Murawski (the P&J employees who worked in the trench) indicating they had to hand dig around the pipe to further expose it, that only the top portion of the pipe was showing when Mr. O'Connor saw it. (Tr. 43, 51). I thus conclude, in view of the testimony of Mr. LaPoint about C-5 and C-6, that the excavation was about 6.5 feet deep when Mr. O'Connor shored it. On the basis of this conclusion, AEY has not proved that it met the exception in the cited standard.

Turning to whether AEY's shoring was adequate, I find it was not. The standard allows the use of a protective system utilizing a manufacturer's tabulated data, as long as all specifications, recommendations, and limitations issued or made by the manufacturer are followed. *See* 29 C.F.R. 1926.652(c)(2). Mr. O'Connor used AirShore jacks, and C-4, AirShore's tabulated data, contains the specifications for shoring using AirShore jacks. CO Upton testified that for a trench 6 feet deep, it appeared from the information and drawing in C-4 that a single jack in each vertical column would be acceptable; he further testified, however, that for trenches over 6 feet in depth, C-4 required two

[13]In so doing, I am aware that in my initial decision and order, I credited the testimony of the P&J employees over that of the CO; there, however, I found the P&J employees credible, and the Secretary did not present the CO's notes from his interviews with the employees to bolster his testimony. My credibility determinations as to those employees therefore remain unchanged.

jacks in each vertical column. (Tr. 147-48, 162-68). The CO spoke to Steve Cudmore of AirShore, who confirmed this information. (Tr. 168-73). In addition, the testimony of Mr. Osborne, a certified construction document technologist, was consistent with that of the CO. (Tr. 180). The record shows that Mr. O'Connor used only one jack per vertical column in the excavation. Consequently, based on the evidence of record, AEY was in violation of the cited standard.[14] This is so even though only employees of another employer (here, P&J) were exposed to the cited condition because of Commission decisions holding that a contractor who creates or controls a work site safety hazard can be liable under the Act even if the exposed employees are solely those of another contractor. *See, e.g., Smoot Constr.*, 21 BNA OSHC 1555 (No. 05-652, 2006); *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052 (No. 90-2873, 1992). Moreover, the alleged violation is affirmed as serious, as it is clear that a cave-in accident in an inadequately-shored excavation could cause serious injury or death.

Turning to an appropriate penalty, section 17(b) of the Act provides, as pertinent, that "[a]ny employer who has received a citation for a serious violation of the requirements of section 5 of this Act ... shall be assessed a civil penalty of up to $7,000.00 for each such violation." 29 U.S.C. § 666(b). Further, section 17(j) of the Act provides, as pertinent, that "[t]he Commission shall have the authority to assess all civil penalties ... giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j).

The Secretary has proposed a penalty of $1,500.00 for this citation item. CO Upton testified that the gravity-based penalty for this item was $5,000.00, due to the high severity of the condition and the greater probability of a serious injury in the event of an accident. He also testified that AEY received a 60 percent adjustment due to its small size and a 10 percent adjustment for having no previous history of OSHA violations, resulting in a proposed penalty of $1,500.00. (Tr. 81-82).

The record is devoid of evidence that the Secretary gave consideration to the good faith element. (Tr. 81-82). In light of the evidence of record relating to this element, it is my opinion that

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[14]To prove a violation of a specific standard, the Secretary must show that: (1) the cited standard applies, (2) the standard's terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or should have known of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). All these elements are met here, including knowledge, in that Mr. O'Connor, a foreman operator, installed the shoring.

AEY is entitled to a penalty reduction of $1,400.00 for good faith. *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1263 (No. 98-701, 2003) (good faith credit may be given even if violation was willful in nature). The reasons for my determination are as follows. The record shows that Mr. O'Connor had been trained in OSHA's excavation requirements, including soil classification and the use of air jacks; the record also shows it was AEY's practice to use AirShore's air jacks in trenches and to follow the tabulated data of AirShore when installing the jacks. (Tr. 152-53,182-83, 207-08, 211-12, 217). Although Mr. O'Connor failed to follow the tabulated data in this particular case, there was no evidence he had done so before or that Mr. Young, AEY's president, was aware of Mr. O'Connor having done so before; in addition, as noted *supra*, AEY had no history of prior OSHA violations. An employer is entitled to credit for good faith where it has taken steps to provide a safe work environment. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1083 (No. 99-18, 2003). Further, credit for good faith may be accorded where the employer has made an effort to comply with OSHA requirements. *Westar Mechanical, Inc.*, 19 BNA OSHC 1568, 1583 (Nos. 99-226 & 99-227, 2001).

In view of the above, I conclude that a penalty of $100.00 is appropriate for the violation in this case. Accordingly, a total civil penalty of $100.00 is assessed.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED, and a total civil penalty of $100.00 is assessed.

/s/
G. MARVIN BOBER
Judge, OSHRC

Dated: February 8, 2007
Washington, D.C.