

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Performance Site Management,

Respondent.

OSHRC Docket No. **06-1457**

**Simplified Proceedings**

Appearances:

Paul Spanos, Esquire, Office of the Solicitor, U.S. Department of Labor,  
Cleveland, Ohio

For Complainant

Corey Crognale, Esquire, Schottenstein, Zox & Dunn Company, LPA, Columbus,  
Ohio

For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

Performance Site Management (PSM) contracted to install underground utilities for Sam's Club in Centerville, Ohio. On August 8, 2006, the project was inspected by safety compliance officer Charles Shelton, Occupational Safety and Health Administration (OSHA), while a PSM crew was extending a 6-inch underground water main from an existing main to a fire hydrant. As a result of the OSHA inspection, a serious citation was issued to PSM on August 15, 2006. PSM timely contested the citation.

The serious citation alleges PSM violated 29 C.F.R. § 1926.651(j)(2) (Item 1) for failing to keep excavated and stored material at least 2 feet from the edge of the excavation; 29 C.F.R. § 1926.651(k)(1) (Item 2) for failing to inspect the excavation by a designated competent person

prior to the start of work; and 29 C.F.R. § 1926.652(a)(1) (Item 3) for failing to utilize adequate cave-in protection for an employee working in an excavation more than 5 feet in depth. A penalty of \$3,500.00 is proposed for each alleged violation.

The case was designated for Simplified Proceedings pursuant to Commission Rule 2200.203(a). The hearing on December 5, 2006, was held in Columbus, Ohio. The parties stipulated jurisdiction and coverage (Tr. 5). The parties have filed post hearing statements of position.

PSM denies the violations and argues it was in compliance with OSHA's excavation standards. PSM asserts the excavation at issue was inspected by a competent person before an employee entered the excavation. Also, PSM claims the spoil pile and stored materials were at least 2 feet from the edge of the excavation. PSM argues the benching method implemented by the crew adequately protected the employee working in the excavation.

For the reasons stated below, the Secretary failed to establish the alleged violation of § 1926.651(k)(1) (Item 2) but proved violations of § 1926.651(j)(2) (Item 1) and § 1926.652(a)(1) (Item 3). A total penalty of \$4,000.00, is assessed.

### **The Inspection**

PSM is in the business of site development and related activities which includes building pads, parking lots and underground utilities. PSM employs 300 employees. Its office is in Columbus, Ohio. Approximately May 2006, Wal-Mart contracted PSM to expand the Sam's Club's parking lot in Centerville, Ohio and relocate and install sanitary and water lines (Tr. 13, 85, 97).

On August 8, 2006, a PSM crew was assigned to extend an underground 6-inch water main to a fire hydrant (Tr. 104, 157). The crew consisted of superintendent Thomas Schlorman, foreman/pipelayer Steven Wallenfelez and backhoe operator Mark Malott (Tr. 72, 104). The crew started work at 7:00 a.m. The backhoe with a 2-foot bucket began digging a hole to locate the end of the existing 6-inch water main which PSM had installed several months earlier (Tr. 137, 159, 175). After locating the end of the water main, foreman/pipelayer Wallenfelez entered the excavation to remove the end cap which was held in place by six bolts. According to Wallenfelez, the job takes less than six minutes (Tr. 154).

While Wallenfelez was in the excavation, OSHA inspector Shelton who was driving by the parking lot, observed PSM's digging operation. It was approximately 10:30 a.m. (Tr. 13-14, 51, 53).

Pursuant to OSHA's national emphasis program on excavations, Shelton made a referral and was directed to conduct an inspection.

Upon entering the project, Shelton observed and videotaped foreman Wallenfelez in the excavation removing the end cap (Exh. C-1; Tr. 15). He interviewed Wallenfelez and superintendent Schlorman (Exh. C-2). Shelton testified they told him the excavation had not been inspected before Wallenfelez began removing the end cap (Tr. 22-23, 65). Shelton also testified he observed the spoil pile and stored millings on the sides of the excavation. The spoil pile along the left side of the excavation was approximately 7 inches high. On the right side, there was stored millings approximately 8-feet high. The millings pile consisted of material from grinding the asphalt previously making up the parking lot. The asphalt had been ground to the size of 304 aggregate and 57 limestone (Exhs. R-3, R-4 - *samples*). The millings were used as backfill (Tr. 19-20, 32, 59-61, 114, 125).

Shelton classified the soil in the excavation as Class B, even though he observed water in the bottom of the excavation. He determined the water came from the bed under the existing pipe and not the side walls of the excavation (Tr. 27, 46). Shelton described the soil as cohesive with some sandy loam (Tr. 46).

The excavation was approximately 8 to 10 feet long (Tr. 167). Shelton measured the depth of the excavation at 5.4 feet from the top of the 6-inch pipe where foreman Wallenfelez was standing to the surface and 4.3 feet from bottom of the excavation to the first cut in PSM's benching method (Exh. C-3; Tr. 28, 31).<sup>1</sup> PSM's first cut was 2 feet across. The horizontal plane of the second cut was approximately 19 to 24 inches on one side and 24 inches on the other side. Based on his measurements, Shelton concluded the excavation was approximately 6 feet deep and 6 feet wide (Exh. C-4; Tr. 32, 35, 42, 48). He determined the benching method was not compliant with OSHA standards (Tr. 28-29). At approximately 11:30 a.m., Shelton finished his inspection and left the site (Tr. 13).

PSM Safety Manager Paul Hodge, after being informed of the OSHA inspection, arrived at Sam's Club's site at approximately 12:15 p.m.(Tr. 98). According to the crew, the excavation site

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<sup>1</sup>Shelton used a engineering rod which is in tenths of a foot (Tr. 95-96).

was not changed. Hodge's measurement of the first cut in the bench was 4 feet, 6 inches, in depth. His measurement was basically the same as Shelton's measurement (Exhs. R-9, R-10; Tr. 96). Hodge also agreed the type of soil was Class B (Tr. 97). According to the project's cut sheet, the depth to the water flow at this location was supposed to be 4.13 feet (Exh. R-5).

As a result of the OSHA inspection, PSM received the serious citation on August 15, 2006.

### **Discussion**

There is no dispute that OSHA's excavation standards at Subpart P, § 1926.650 *et. seq.* are applicable to PSM's worksite.<sup>2</sup> PSM does not dispute that if violations are found, PSM through its superintendent and foreman was aware of the conditions at the excavation and that its foreman was working in the excavation to remove the pipe's end cap. Although the foreman's exposure was less than six minutes, the Review Commission has determined that even a brief exposure to a hazardous condition does not negate a violation or its seriousness. *H.H. Hall Construction Co.*, 10 BNA OSHC 1042 (No. 76-4765, 1981) (five to ten minutes in an unsafe trench results in serious violations). Also, it is noted that after OSHA's inspection, PSM allowed the employee back into the excavation to measure the depth (Exhs. R-9, R-10).

The issue in dispute is whether PSM's excavation complied with the cited OSHA standards. PSM asserts that it was in compliance.

### **Citation Item 1 - Serious Violation of § 1926.651(j)(2)**

The citation alleges the excavation was dug immediately adjacent to stored ground asphalt and the excavated soil was not kept at least 2 feet from the edge of the excavation. Section 1926.651(j)(2) provides:

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<sup>2</sup>The Secretary has the burden of proving a violation.

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

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.

Backhoe operator Malott testified that as he dug the excavation, he placed the excavated materials at least 2 feet from the left side of the excavation (Tr. 114). The millings pile along the right side which Malott described as solid from sitting in the sun for approximately a month was also 2 feet from the edge of the excavation (Tr. 110). Malott did not observe any cracks in the side walls of the excavation (Tr. 123).

Despite Malott's testimony, the record establishes the spoil pile and the stored millings of ground asphalt were immediately at the edges of the excavation. OSHA inspector Shelton's testimony regarding his observations is supported by his videotape/photographs as well as PSM's photographs (Exhs. C-1, R-2; Tr. 20). Shelton described the excavated soil on the left side of the excavation as approximately 7 inches high (Tr. 32). On the right side of the excavation, operator Malott estimated the millings pile was approximately 8 feet high (Tr. 125). It is noted that PSM concedes Malott "cut through a pile of stored materials" when digging the excavation (PSM's Post Trial Brief, p. 4). There is no evidence the spoil pile or stored material was retained by a device to prevent it from falling into the excavation. The possible solid cohesion of the millings from the sun melting the asphalt is not considered "retained" in accordance with the standard. The standard requires the use of a retaining device.

PSM's argument that the spoil pile and stored material were at least two feet from the excavation's edge is rejected because it is based on PSM's misunderstanding of what constitutes an "excavation." PSM's witnesses considered only the area within the first cut of the bench as the excavation (Exh. R-2; Tr. 92, 94, 115, 117). The excavation, however, is the entire area dug by the backhoe as part of PSM's benching method. OSHA defines "excavation" as "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." 29 C.F.R. § 1926.650(b). Malott acknowledged he made additional cuts on either side of the first cut as part of the benching system. He referred to the first cut as the "trench" (Tr. 115, 117).

Also, PSM's argument that the spoil pile and millings were not shown to pose a hazard is rejected. PSM's cites Judge Schoenfeld's decisions in *Honey Creek Construction Company*, 18 BNA OSHC 1652 (No. 97-0353, 1998) and *Columbia Gas of Ohio*, 17 BNA OSHC 1510 (No. 93-3232, 1995) to argue that it is the Secretary's burden to show a hazard under § 1926.651(j)(2). The Secretary argues that when the standard such as § 1926.651(j)(2) prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335 (No. 15983, 1978). It is noted that Judge Yetman, when confronted with same argument, recently ruled that the hazard is presumed by the standard. *North Texas Contracting, Inc.*, 21 BNA OSHC 1419 (No. 05-0330, 2005). To date, the Review Commission has not addressed the issue of burden of proof under § 1926.651(j)(2).

A careful reading of § 1926.651(j)(2) indicates to this court that unless the excavated or other materials "could pose a hazard by falling or rolling" into the excavation, there is no violation of the standard even if the spoil pile and stored material were within 2 feet of the excavation's edge. Although Judge Schoenfeld's decisions are unreviewed decisions of an administrative law judge and are not binding precedent, this court agrees that the Secretary must make some showing the spoil pile or millings "could pose a hazard by falling or rolling into the excavation." Section 1926.651(j)(2). In establishing the hazard, the Secretary is not required to show there is significant risk of the hazard coming to fruition, only that if the hazardous event occurs, it would create a significant risk to employees. *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993).

In this case, the Secretary has made such a showing. PSM's reliance on the small size of the gravel in the pile is misplaced. It is not the size of the individual rocks which may cause injury but the accumulation of the material if it fell into the excavation. The millings pile was 8 feet high and was immediately along the right edge of the excavation (Exh. C-4; Tr. 125). It is noted that the backhoe cut through the millings pile when digging the excavation (PSM Post-Trial Brief, p. 4). Shelton testified that he heard and saw gravel slide from the sides of the excavation and hit the water (Tr. 60). He opined that the spoil pile and millings could have "rolled in and covered up an employee" (Tr. 19). The millings pile contained ground-up asphalt parking material (Tr. 59). Operator Mallot also testified that he "could have seen" material from the millings pile fall into the

trench. “It just crumbles” (Tr. 112). The videotape and photographs show loose rocks and dirt (Exhs. C-1, R-9, R-10). The fact that other PSM employees did not see or hear any falling gravel is not given weight. Their attention was on their jobs and the noise from the backhoe would have prevented them from hearing rocks sliding and falling into the water. Also, PSM’s argument that the millings pile was hard from sitting in the sun for a month is weakened by the fact the backhoe had to cut through it in digging the excavation. Such digging could have loosened the pile’s cohesion. There is no showing that PSM’s two competent persons on-site made any determinations regarding the lack of a hazard posed by the spoil pile or millings.

Since the spoil pile and stored millings were within 2 feet of the excavation’s edge, PSM’s violation of § 1926.651(j)(2) is properly classified as serious. Pursuant to § 17(k) of the Occupational Safety and Health Act (Act), a serious violation is established if the Secretary shows there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known of the violation. Evidence as to the likelihood of an accident occurring is not required. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

There is no dispute PSM, through superintendent Schlorman and foreman Wallenfelez, knew of the improperly placed spoil pile and stored material in close proximity to the edge of the excavation. Also, if material from either side fell into the excavation, it could result in serious injury or death to an employee in the excavation. The spoil pile was composed of excavated material, soil and rocks, that could cause serious harm if they fell on Wallenfelez. Similarly, the millings pile was composed of material previously making up the parking lot. It contained chunks of material approximately the size of a person’s fist (Tr. 66, 113). It is noted Shelton saw material from the millings pile roll into the excavation. He also heard material roll into the excavation and splash into the water at the bottom of the excavation (Tr. 60). Backhoe operator Malott agreed the material from the millings pile could potentially roll into the excavation (Tr. 109, 112).

A serious violation of § 1926.651(j)(2) is established.

**Citation Item 2 - Serious Violation of § 1926.651(k)(1)**

The citation alleges that an inspection of the excavation was not conducted by a designated competent person prior to the start of work and as needed throughout the shift. 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.

OSHA inspector Shelton testified superintendent Schlorman and foreman Wallenfelez told him that they had not inspected the excavation prior to the start of work (Tr. 22-23). Shelton's OSHA 1B form also states that Schlorman told him "he did not inspect the trench this morning" (Exh. R-5, p. 5). Both Schlorman and Wallenfelez denied Shelton's testimony (Tr. 170).

Shelton acknowledges Schlorman and Wallenfelez are qualified competent persons (Tr. 70, 73). A competent person is defined as "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." 29 C.F.R. § 1926.650(b).

Despite Shelton's testimony, the weight of the evidence establishes the excavation at issue was inspected by superintendent Schlorman prior to foreman Wallenfelez's entry into the excavation. Superintendent Schlorman testified, under an oath, he inspected the excavation as the excavation was being dug. He performed a thumb penetration test and classified the soil as Class B. He described the soil as "good clay." He noted the water in the bottom of the excavation and decided that a pump was needed. He did not observe any cracks in the walls or material falling into the excavation (Tr. 163-164, 168).

Schlorman's testimony regarding his inspection is support by his "Daily Inspection Report" which he prepared after OSHA's inspection. The report reflects that he inspected the excavation at

8:30 a.m., on August 8, 2006. (Exh. R-11; Tr. 164, 173, 175). Schlorman had prepared similar reports for the two previous workdays, August 4 and 7, 2006 (Exhs. R-11, R-12). Shelton did not obtain a written interview statement from Schlorman. His note in the OSHA 1B may be based on a misunderstanding or typographical error. For example, contrary to Shelton's testimony, his OSHA 1B states the foreman who is considered a competent person, "did inspect the trench" (Exh. R-5, p. 8; Tr. 69). In this instance, Shelton claims it was a typographical error in his file and not what he meant to say. However, the written interview of Wallenfelez fails to address the lack of inspections (Exh. C-2; Tr. 77).

The Secretary's argument that violations of the spoil pile and cave-in protection standards show the lack of inspection by a competent person is misplaced. Although violations of the spoil pile and benching requirements are found, the mere existence of such violative trench conditions does not in this case, in and of themselves, show the excavation was not inspected by a competent person. The Secretary agreed that superintendent Schlorman as well as foreman Wallenfelez were qualified as competent persons. Although their judgment may have been flawed, they performed the tests and made the determinations required of competent persons.

A serious violation of § 1926.651(k)(1) is not established.

**Citation Item 3 - Serious Violation of § 1926.652(a)(1)**

The citation alleges PSM failed to ensure adequate sloping and/or use of a trench box for the employee involved in removing 6-inch water main cap. Section 1926.652(a)(1) provides:

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 parties agree the soil at the excavation site was Class B (Exh. R-12; Tr. 46, 97, 107, 147, 163).<sup>3</sup> Shelton described the soil as "very stiff, crumbly," and cohesive with some sandy loam

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<sup>3</sup>Class B soil is considered soil with an unconfined compressive strength greater than 0.5 ton per square foot (tsf) but less than 1.5 tsf. It is granular cohesion less soils including angular gravel, silt, silt loam, sand loam and in some cases silty clay loam and sand clay loam. Appendix A, to Subpart P, § 1926.650 *et. seq.*

(Tr. 46). Schlorman described the soil as “fairly stable clay” and “cohesive” (Tr. 162). The excavation was not dug in stable rock.

Shelton testified he observed fissures in the sidewalls of the excavation. He said it appeared the soil was pulling away from itself (Tr. 49). Shelton also testified he heard gravel slide from the side into the water (Tr. 60). Backhoe operator Malott testified he did not notice any cracks in the sidewalls. He speculated the cracks observed by Shelton could have been caused by the bucket (Tr. 123-124). Malott’s observation regarding the lack of cracks in the side walls of the excavation was supported by the testimony of the foreman and superintendent (Tr. 147-148, 168).

PSM argues the excavation was less than 5 feet in depth, but if found to be in excess of 5 feet deep, its benching system of cave-in protection complied with the excavation standards. PSM notes that the cut sheet for the waterline showed a depth of 4.13 feet (Exh. R-8).

PSM’s argument that the excavation was less than 5 feet in depth is rejected. Shelton measured the depth of the excavation at 5.4 feet from the top of the 6-inch pipe where foreman Wallenfelez was standing to the surface; and 4.3 feet from bottom of the excavation to the first cut in PSM’s benching method (Exh. C-3; Tr. 28, 31). Based on his measurements, Shelton concluded the depth of the excavation was approximately 6 feet (Tr. 32, 35).

PSM’s depth measurement was 4 feet, 7 inches from the first bench (Exh. R-9, R-10). Although the measurement is consistent with Shelton’s measurement of 4.3 feet, it does not reflect the total depth of the excavation. As safety manager Hodge testified, PSM considered the first cut to be the trench (Exh. R-2; Tr. 92-93). As shown in the photographs of the excavation, the first cut was not at surface level (Exhs. C-1, R-2). Shelton’s measurements reflect the total depth of the excavation which was in excess of 5 feet. PSM did not measure the total depth of the excavation. A “bench” is a protective system within an excavation. The excavation is deeper than the first bench. It is noted that PSM used a benching system for cave-in protection which would not be required if the excavation was less than 5 feet in depth. Superintendent Schlorman testified he made the decision to bench the excavation (Tr. 177).

Therefore, the two exceptions (solid rock or an excavation less than 5 feet in depth) associated with 29 C.F.R. § 1926.652(a)(1) do not apply. Since the excavation at issue was in Class B soil and in excess of 5 feet in depth, PSM was required to provide cave-in protection to employees

working in the excavation. PSM decided to use benching as its cave-protection system. Benching is defined by OSHA as “a method of protecting employees from cave-ins by excavating the sides of an excavation to form one of a series of horizontal levels or steps, usually with vertical or near-vertical surfaces between levels.” 29 C.F.R. § 1926.650(b).

The benching method utilized by PSM at this worksite did not comply with OSHA’s requirements. Section 1926.652(b) requires that the bench is constructed in accordance with (1) sloped at an angle not steeper than one and one-half horizontal to one vertical; (2) the requirements set forth in Appendices A and B to Subpart P; (3) tabulated data, such as tables and charts; or (4) approved by a registered professional engineer. PSM does not assert that its benching method at issue was designed in compliance with (1), (3), or (4).

Under subsection (2), Appendix B benching requirements incorporated by § 1926.652(b)(2) require that all bench excavations in Class B soil less than 20 feet are to have a maximum allowable slope of 1:1 and maximum bench dimensions of 4-feet vertical side walls and 4-feet horizontal planes.

PSM’s benching did not comply with the Appendix B requirements. The first step of PSM’s benching system was in excess of 4-feet vertical. Also, the benching system did not maintain a maximum allowable slope of 1:1. The horizontal plane of the bench was 19 to 24 inches on one side and 24 inches on the other side of the excavation.

As noted by PSM, the 1990 revisions to the excavation standards expanded the role of the competent person and required such person to exercise appropriate judgment. However, the standards do not allow the competent person to substitute his judgement for the requirements of cave-in protection for excavations in excess of 5 feet in depth. Although the competent person did not observe any indications of a potential cave-in, PSM was not relieved from requiring appropriate cave-in protection.

In that the benching system utilized by PSM violated the requirement of § 1926.652(a)(1), PSM’s violation was properly classified as serious. Superintendent Schlorman, as competent person, designed the benching method and observed the digging of the excavation. His knowledge of the inadequacies in the benching system is imputed to PSM. *Ormet Corp.*, 14 BNA OSHC 2134, 2137 (No. 85-531, 1991), citing *Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6<sup>th</sup> Cir. 1983). A

cave-in of an excavation in excess of 5 feet in depth could cause serious injury or death of an employee in the excavation. The lack of an employee's injury does not prove the lack of a hazard. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 (No. 90-2866, 1993).

PSM's argument that the violation should be classified as *de minimis* is rejected. The excavation at issue was not adequately protected from a possible cave-in. The cave-in hazard continued to exist even with PSM's benching system. The cave-in hazard was increased by the 8-foot millings pile along one side of the excavation. The lack of an adequate method of cave-in protection has a direct relationship to employee safety and abatement requires such cave-in protection. *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991).

A serious violation of § 1926.652(a)(1) is established.

#### **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.

PSM is a large employer with approximately 300 employees (Tr. 85). PSM had four employees on site at the time of the inspection (Tr. 72). One employee was in the excavation for less than six minutes (Tr. 153). Although PSM had received a serious citation on February 15, 2000 and May 9, 2001, after two fatalities, PSM is given credit for history since it had not received any serious citations in the preceding three years. The previous citations involved the unexpected release of excavators' buckets. *Performance Site Management*, 2001 CCH OSHD 32,459 (No. 00-0535, 2001); *Performance Site Management*, 19 BNA OSHC 2054 (No. 01-956, 2002). Also, PSM is entitled to good faith credit because it maintains a safety program, provides safety training to employees and employs a full time safety manager.

A penalty of \$2,000.00 is reasonable for serious violation of § 1926.651(j)(2). The excavation material and stored millings, 8 feet high, were immediately adjacent to the edge of the excavation while an employee was working in the excavation. However, the employee's exposure was less than six minutes. Also, the edges of the second cut where spoil piles were located was approximately 2 feet from the edge of the first bench where the employee was working.

A penalty of \$2,000.00 is reasonable for serious violation of § 1926.652(a)(1). One employee was in the excavation which was in excess of 5 feet deep. The employee's exposure was less than six minutes. Although inadequate, PSM was attempting to utilize some form of cave-in protection.

**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. Citation Item 1, alleged serious violation of § 1926.651(j)(2), is affirmed and a penalty of \$2,000.00 is assessed.
2. Citation Item 2, alleged serious violation of § 1926.651(k)(1), is vacated and no penalty is assessed.
4. Citation Item 3, alleged serious violation of § 1926.652(a)(1), is affirmed and a penalty of \$2,000.00 is assessed.

/s/ Ken S. Welsch

KEN S. WELSCH

Judge

Date: January 19, 2007