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. Schaer Development of Central Florida, Inc., Respondent.	OSHRC Docket No. **11-0371**

Appearances:

Charna Hollingsworth-Malone, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

George E. Spofford, IV, Esq., Glenn, Rasmussen, Fogarty & Hooker, Tampa, Florida
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Schaer Development of Central Florida, Inc. (Schaer Development), installs underground utilities. On November 15, 2010, Occupational Safety and Health compliance officers Donald Freeman and Joseph Wilber conducted an inspection of Schaer Development's worksite on U. S. Highway 301 in Dade City, Florida. As a result of OSHA's inspection, the Secretary issued a citation to Schaer Development on January 12, 2011, alleging Schaer Development committed violations of two construction standards of the Occupational Safety and Health Act of 1970 (Act).

Item 1 alleges Schaer Development committed a serious violation of 29 C. F. R. § 1926.651(j)(2), by failing to place excavated materials and equipment at least 2 feet from the edges of an excavation. Item 2 alleges a serious violation of 29 C. F. R. § 1926.652(b), for failing to slope the walls of an excavation in accordance with the requirements of the Act. The Secretary proposed penalties of $4,200.00 for each item.

Schaer Development timely contested the citation. This case was designated for Simplified Proceedings under Subpart M, § 2200.203(a), of the Commission Rules. The undersigned held a hearing in this matter on April 18, 2011, in Tampa, Florida. The parties stipulated to jurisdiction and coverage (Tr. 6). The parties have filed post-hearing briefs.

For the reasons discussed below, Item 1 is vacated. Item 2 is affirmed and a penalty of $4,200.00 is assessed.

Background

Schaer Development's office is located in Land of Lakes, Florida. It installs underground utilities. On November 15, 2010, Schaer Development was working in Dade City, Florida, installing a sewer line under U. S. Highway 301, as well as an adjacent manhole structure. Schaer Development installed the sewer line using the "jack and bore" method, by which the company digs a tunnel underneath the road, rather than opening an excavation. Schaer Development opened an excavation for the installation of the manhole structure on the western end of the sewer line (Tr. 221-222).

At approximately 8:00 a. m. on November 15, compliance officers Freeman and Wilber observed Schaer Development's site as they were driving past on U. S. Highway 301. In accordance with OSHA's national emphasis program for excavations, they stopped to inspect the site. When Freeman and Wilber arrived at the site, Schaer Development foreman Jeff Schaer was standing in the excavation observing Schaer Development employee Joshua Muck as he worked in the excavation near the manhole structure. A third employee was working nearby. Schaer identified himself to Freeman as the foreman and competent person on the site. Schaer stated he and Muck had been working at the site for three days, and they had started work at 7:00 that morning (Tr. 20-23). Foreman Schaer called Schaer Development's general superintendent, Mike Schaer, who arrived at the site during the inspection. Freeman took statements from both Jeff and Mike Schaer (Exhs. C-12 and C-13).

Freeman and Wilber took measurements of the excavation and surrounding area. The excavation was located approximately 14 feet to the west of U. S. Highway 301, which is a four-lane highway. The excavation was 41 feet long. At its east end it was approximately 6

feet deep, and at its west end it was approximately 14 feet deep. The compliance officers took four slope measurements: 56 degrees on the west wall, 56 degrees on the southwest wall, 63 degrees on the southeast wall, and 38 degrees on the east wall. There were two spoil piles next to the excavation. The spoil pile on the northeast side of the excavation was 0 to 6 inches from the edge of the excavation. The spoil pile on the southeast side was 12 inches from the edge of the excavation. The spoil piles were not retained in any manner. A track hoe was parked alongside the north wall of the excavation, 12 to 14 inches from the edge (Exh. C-1; Tr. 29-33).

Freeman took one soil sample from the southeast spoil pile and two from the northeast spoil pile (Tr. 37-38). Following OSHA standard procedure, Freeman sent the samples to OSHA's laboratory at the Salt Lake City Technical Center (SLCTC) for testing. Freeman received the test results from the SLCTC on December 6, 2010. The lab classified two of the samples as Type B soil, and classified the third sample as Type C (Exh. C-2; Tr. 37-39).

The Citation

> The Secretary has the burden of establishing the employer violated the cited standard.
>
> 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) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The cited standards are found in Subpart P of the construction standards, which covers excavations. The parties stipulated the cited standards apply to the cited conditions. Jeff Schaer supervised the excavation, which was in plain view. As foreman, Schaer's knowledge of the conditions of the excavation are imputed to Schaer Development. Thus, applicability and knowledge are established. The only elements of the violations at issue are whether Schaer Development failed to comply with the terms of the cited standards and whether its employees had access to the violative conditions.

Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.651(j)(2)

The citation alleges:

> At 12445 US Highway 301, Dade City, Fla, employees in the process of mudding a manhole with concrete were exposed to a cave-in/engulfment hazard in that the spoil pile and track hoe were not set back from the edge of the excavation at least 2 feet. The track hoe and spoil pile were staged directly alongside the north wall, observed on or about November 15, 2010.

Section 1926.651(j)(2) provides:

> 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 from falling or rolling into excavations, or by a combination of both if necessary.

Schaer Development concedes the two spoil piles and the track hoe were within 2 feet of the edges of the excavation (Tr. 172). Schaer Development defends itself on two fronts: first, that Item 1 is duplicative of Item 2, and thus should be vacated; and second, that the Secretary failed to establish either the material from the spoil piles or the track hoe posed a hazard by falling or rolling into the excavation. Schaer Development's first defense is without merit and is rejected. Schaer Development's second defense is more substantive.

Duplicative Items

Section 1926.651(j)(2) explicitly addresses "materials or equipment that could pose a hazard by falling or rolling into excavations." In her alleged violation description, the Secretary states that the spoil piles and track hoe at the edges of the excavation exposed Schaer Development's employees "to a cave-in/engulfment hazard." Schaer Development contends that the same hazard is alleged in Item 2, and that Item 1 should be vacated as duplicative.

Schaer Development misinterprets the Commission's position on duplicative items. Violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well. *Flint Eng. & Const. Co.,* 15 BNA OSHC 2052, 2056-2057 (No. 90-2873, 1997). Here, moving the spoil piles and track hoe so they are located at least 2 feet away

from the edges of the excavation would not abate the alleged violation of § 1926.652(b). If the walls of the excavation are improperly sloped, they will remain so even if the spoil piles and track hoe are removed. The items are not duplicative.

Schaer Development is correct in pointing out the Secretary has added a hazard in her alleged violation description for Item 1 that § 1926.651(j)(2) is not designed to address.[1] This does not, however, invalidate the Secretary's citation of the spoil piles and track hoe under this standard. The cited standard addresses materials and equipment placed at the edge of excavations. These are the conditions cited by the Secretary. Her misstatement of the hazard created in the alleged violation description does not void the citation, but neither does it alter her burden of proof.

Establishing a Hazard Existed

The hazard addressed by § 1926.651(j)(2) is material or equipment falling or rolling into an excavation and striking employees working there. Generally, a standard presumes a hazard, and the Secretary need only show the employer violated the terms of the standard; she "bears no burden of proving that failure to comply with such a specific standard creates a hazard." *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1523 (No. 90-2866, 1993).

In the present case, it is undisputed that Schaer Development violated the terms of § 1926.651(j)(2) by placing the spoil piles and track hoe within 2 feet of the excavation. If the cited standard omitted its first sentence, the Secretary would have met her burden. A hazard is not presumed, however, when the standard incorporates the hazard as a violative element. *Bunge Corp. v. Secretary of Labor*, 638 F. 2d 831 (5th Cir. 1981).

It is the undersigned's determination that § 1926.651(j)(2) incorporates the hazard as a violative element the Secretary must prove. The first sentence of the standard states (emphasis

[1] In her brief, the Secretary reiterates her belief that the hazard created by the spoil piles and track hoe at the edge of the excavation was that of a cave-in or engulfment. In support of her position, she quotes from the Preamble to the Final Rule for § 1926.651(j)(2), in which a cave-in hazard is mentioned in addition to the hazard of materials and equipment falling into the excavation. Section 1926.651(j)(2) explicitly states the hazard it seeks to prevent is materials and equipment falling into the excavation, not a cave-in. Its language is unambiguous and clear. Recourse to the Preamble is not necessary to interpret the standard. "In determining whether the language of a standard is ambiguous, we look first to its text and structure. When the statute speaks with clarity, in all but the most extraordinary circumstances, judicial inquiry is ended." *General Motors Corporation, Delco Chassis Division*, 17 BNA OSHC 1217, 1219 (Nos. 91-2973, 91-3116 & 91-3117, 1995).

added): "Employees shall be protected from excavated or other materials or equipment *that could pose a hazard* by falling or rolling into excavations." The inclusion of this sentence in the standard requires the Secretary to (1) establish that material or equipment could pose a hazard of falling or rolling into the excavation, and (2) establish the materials or equipment were closer than 2 feet to the excavation. "[W]e must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." *Lake Cumberland Trust, Inc., v. E. P. A.,* 954 F.2d 1218, 1222 (6th Cir. 1992) (quoting *Boise Cascade Corp. v. U. S., E. P. A.,* 942 F.2d 1427, 1431-1432 (9th Cir. 1991)). The first sentence imposes an additional element of proof on the Secretary; otherwise, the inclusion of the sentence would serve no purpose.

Although the Review Commission has not addressed whether the Secretary must prove the hazard in establishing a violation of § 1926.651(j)(2), the issue has arisen before other administrative law judges. Both the late Judge Schoenfeld (in *Honey Creek Contracting, Inc*., 18 BNA OSHC 1652 (No. 97-0353, 1998) and *Columbia Gas of Ohio*, 17 BNA OSHC 1510 (No. 93-3232, 1995)) and Judge Welsch have found the Secretary must establish a hazard in order to prove the employer violated the standard. Although not bound by these decisions, the undersigned agrees with the reasoning of Judge Welsch in *Performance Site Management,* 21 BNA OSHC 2115, 2117 (No. 06-1457, 2007):

> 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."

The record does not support a finding that the track hoe or material from the spoil piles posed a hazard of falling or rolling into the excavation. Freeman was the only witness for the Secretary who was present at the worksite. He did not testify that he observed material from the

spoil piles falling into the excavation. He stated he observed "some loose soil within the trench," but Schaer Development established it had backfilled portions of the excavation, which would account for the loose soil (Tr. 24). The Secretary's lack of evidence for Item 1 may be attributed to her position that it was the superimposed forces on the excavation edge that created the hazard here. Had she focused on the hazard of equipment and material falling into the excavation, she may have elicited more testimony from Freeman on this point.

Phillip Arnold and Stephen West both work for BTL Engineering Services, whom Schaer Development hired to conduct soil testing at the site. Both men visited the site while the excavation was open. Arnold testified he saw no evidence of material from the spoil pile rolling or sliding into the excavation. West also stated he did not observe material from the spoil pile falling into the excavation (Tr. 215). The track hoe was parked parallel to the excavation, with its motor off and its bucket touching the ground (Exh. C-6; Tr. 201). There was no evidence that it posed a hazard of falling or rolling into the excavation.

Wayne Jensen is the director of safety for Stahl and Associates Insurance (Tr. 274). He responded to a request from Schaer Development to come out to its worksite the day of the OSHA inspection. He observed no evidence of material from the spoil piles or of the track hoe falling or rolling into the excavation (Tr. 278). The undersigned has reviewed the photographic exhibits showing the spoil piles and track hoe. The photographs alone do not conclusively demonstrate a hazard exists (Exhs. C-3, C-6, C-7, C-8, and C-9).

The Secretary has failed to establish the spoil pile materials or the track hoe posed a hazard of falling or rolling into the excavation. Item 1 is vacated.

Item 2: Alleged Serious Violation of 29 C. F. R. § 1926.652(b)

The citation alleges:

> At 12445 US Highway 301, Dade City, Fla, an employee mudding in a manhole with concrete in the west end of the trench excavation was exposed to an engulfment hazard in that the 14 foot deep excavation was sloped at 56 degrees in type "B" soil, thereby exceeding the maximum allowable slope of 45 degrees, on or about November 15, 2010.

Section 1926.652(b) provides:

> The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3), or, in the alternative, paragraph (b)(4)[.]

Section 1926.652(b)(2) provides:

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

Classification of Soil

The Secretary asserts the excavation was dug in Type B soil. Appendix A of 1926 Subpart P provides in pertinent part:

> Type B means:
>
> . . .
>
> (ii) Granular cohesionless soils including: angular gravel (similar to crushed rock), silt, silt loam, sandy loam and, in some cases, silty clay loam and sandy clay loam.
>
> (iii) Previously disturbed soils except those which would otherwise be classed as Type C soil.
>
> (iv) Soil that meets the unconfined compressive strength or cementation requirements for Type A, but is fissured or subject to vibration.

Appendix B of 1926 Subpart P provides that the maximum allowable slope for Type B soil in excavations less than 20 feet deep is 45 degrees, or a 1:1 slope.

Freeman initially determined the excavation was dug in Type B soil based on fissuring he observed in the walls of the excavation, the "clumpiness of the soil" when he collected the samples, and the presence of pre-existing utilities in the excavation (Tr. 36). The utility lines are visible in Exhibits C-3, C-6, C-7, and C-8. There are three smaller lines traversing the excavation near the manhole structure, as well as a larger blue-green gas line closer to the floor of the excavation (Tr. 41).

Donald Halterman works for OSHA at its SLCTC's lab (Tr. 126). He has a Masters Degree in geology from the University of Idaho, with a concentration in mineralogy and soil science and forensics (Tr. 126). Halterman was qualified as an expert in soil analysis and soil processes at the hearing (Tr. 134). Halterman analyzed the three soil samples Freeman took from the two spoil piles next to the excavation. He concluded two of the samples were Type B

soil, and the third sample was Type C soil. All three samples contained fissured soil (Exhs. R-1, R-2, R-3).

Schaer Development disputes the Secretary's finding that the excavation was dug in Type B soil. Schaer Development contends the excavation was dug in "stable rock," which means "natural solid mineral material that can be excavated with vertical sides and will remain intact while exposed." Section 1926.650(b). Section 1926.652(a) (i) provides an exemption for employers excavating in stable rock.[2] The employer has the burden of proving it meets the requirements of the exemption.

It is Schaer Development's contention that "the excavation consisted of two distinct layers: stable rock from the bottom of the excavation to a point 24 [inches][3] below the top of the excavation; and a 24 [inch] layer of less stable material at the top of the excavation. The evidence also established that the top 24 [inches] were sloped back at a ratio of 1½:1, which is sufficient for even a Type C soil[4]" (Schaer Development's brief, p. 17). Schaer Development contends the white material that appears approximately 2 feet from the top of the excavation is stable rock that requires no sloping.

Foreman Jeff Schaer testified that the material he excavated was so hard that "the whole job basically had to be redesigned at that point because our first attempt at trying to make it through this hard ground was a failure. It didn't work so we had to shift everything" (Tr. 223).

---

[2] Section 1926.652(a)(i) provides:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system . . .except when:
>
> (i) Excavations are made entirely in stable rock[.]

[3] The undersigned has inserted the word "inch" or "inches" in the quoted section of Schaer Development's brief, where the company originally wrote "foot" or "feet." The context of the quoted section and the evidence adduced at the hearing make it clear that "inches" was the unit of measurement Schaer Development intended to cite.

[4] The record does not establish the top 2 feet of the excavation walls were sloped back. Jeff Schaer claimed at the hearing that the top 2 feet were sloped. Schaer's assertion (which he did not make during the OSHA inspection) is based on a gap visible between an extension ladder in the excavation and the top 2 feet of the excavation wall (Tr. 256). An examination of Exhibits C-3 and C-4 clearly shows that this gap is not caused by sloping, but by the fact that top of the ladder is the extension unit, which is not placed directly against the wall in the manner that the base unit is.

Schaer disputed Freeman's claims that there were fissures in the walls of the excavation, describing each area marked as a fissure on photographs by Freeman as shadows (Tr. 239, 253-254).

Lance Hungerford works for BTL Engineering Services as a structural engineer. He has a B. S. in structural design and engineering construction technology from Penn State (Tr. 174). He was qualified as an expert in soil samples and the use of trigonometry in performing soil sample analysis (Tr. 177-178). Hungerford testified the white material is stable rock because the material is a natural solid mineral that had been excavated with vertical sides and had remained intact for several days (Tr. 183). He stated that the analyses of the soil samples taken from the spoil piles would not give an accurate typing of the soil because "it's a disturbed sample, and so I think it would be different from what's on the face of the excavation" (Tr. 182). Although other BTL employees took soil samples from a spoil pile, Schaer Development did not adduce the results of any soil testing at the hearing (Tr. 191-192).

Wayne Jensen, director of safety for Stahl and Associates Insurance, arrived at the worksite after the compliance officers had left on November 15, 2010. Jensen performed a visual inspection of the excavation, and struck an area of an excavation wall repeatedly with a shovel (Tr. 274-276). A video of Jensen striking the excavation wall was presented at the hearing (Exh. R-4). Jensen concluded the excavation was dug in "a cementitious like material, some of the hardest material I've observed in Florida" (Tr. 276). Jensen did not take a soil sample (Tr. 282).

While the Secretary has the burden of establishing the excavation was in Type B soil, it is Schaer Development's burden, in seeking an exemption, to establish the excavation was dug entirely in stable rock. Schaer Development adduced no test results of samples taken from the excavation, even though it summoned BTL and Jensen to come to the worksite following OSHA's inspection. Jeff Schaer told Freeman during the inspection and at a later meeting, that he believed the excavation was dug in Type A soil. Hungerford, who disputed Halterman's soil sample results, was never at the worksite. He did not fault Halterman's methods or analysis, but

only concluded the soil samples were not representative of the excavation because they were no longer in the excavation.

Based upon the record, the undersigned concludes that the excavation was dug in Type B soil, and was not dug in stable rock. Halterman, the Secretary's expert, was the only witness who actually conducted soil sample analyses that were adduced at the hearing. He found that the samples were Type B soil, and contained fissured soil. The presence of fissured soil negates the possibility the sample could be taken from stable rock (Tr. 156). Halterman found too much sand to be consistent with stable rock (Tr. 163-164).

Furthermore, the presence of the pre-existing utility lines establishes the excavation was dug in previously disturbed soil. By definition, "Type B means . . .[p]reviously disturbed soils." Appendix A to 1926 Subpart P. Even if the soil samples analyzed by Halterman had been classified as stable rock, the presence of the pre-existing utility lines would change the classification to Type B or C soil. In its brief, Schaer Development states, "The blue gas line identified in photos C-8, C-6, C-7 did not create a disturbed soil condition on the north wall. There is no evidence that the blue pipe disturbed the north or south wall" (Schaer Development's brief, p.21). The undersigned disagrees. The phrase "previously disturbed soil" is largely self-explanatory. The Secretary need only prove that some sort of underground construction or installation took place prior to the date of the excavation at issue to establish the soil was previously disturbed.

Finally, § 1926.652(a)(1) provides an exemption for excavations "made entirely in stable rock." *The American Heritage Dictionary (*2d Coll. Ed.) defines "entirely" as "[w]holly; completely." If the top 24 inches of an excavation are in "less stable material" as Schaer Development claims, then the excavation cannot be made entirely in stable rock. By Schaer Development's own admission, the excavation does not meet the requirements for the exemption set out in § 1926.652(a)(1).

Compliance with the Terms of the Standard

In order to comply with § 1926.652(b), an excavation dug in Type B soil must be sloped at least 45 degrees. Freeman, with the assistance of Wilber, took measurements of the excavation during the inspection. Freeman measured the slopes of the excavation walls using an engineering rod and a protractor. Freeman explained: "I would put the engineering rod in the trench at the base of the slope where it started and lay it parallel to the slope, and I would position the protractor on the engineering rod to get a reading in regards to the angle" (Tr. 30). Using this method, Freeman determined the slopes of the west and southwest walls were each 56 degrees, and the slope of the southeast side was 63 degrees. The only wall sloped properly was the east wall, which was 38 degrees. Foreman Schaer was present while Freeman took these measurements. He did not dispute any of Freeman's measurements (Tr. 30-33).

Schaer Development contends Freeman's measurement of the slope of the west wall is flawed (it does not dispute Freeman's other measurements). Schaer Development did not take its own measurements of the excavation during or after the OSHA inspection, despite calling in Wayne Jensen and BTL Engineering Services to assist with its case. Schaer Development bases its argument on a discussion of angles elicited from Hungerford. Hungerford did not visit the site and did not make his own measurements. The alternative measurement Hungerford came up with based on figures given to him by Schaer Development's attorney was 78 degrees, which is a steeper slope than Freeman found (Tr. 185). Schaer Development's argument is rejected as speculative and not based on any actual measurements taken by Hungerford. Freeman's measurements, taken in the presence of another compliance officer and Foreman Schaer, are credited as accurate. Freeman's demeanor on the stand and his straightforward, consistent testimony establish him as a credible witness.

The Secretary has established Schaer Development failed to slope the walls of its excavation to at least 45 degrees. Schaer Development failed to comply with the terms of the standard. Schaer Development employee Muck was standing next to the manhole structure, at the deepest part of the excavation. Muck had access to and was exposed to the violative condition. The compliance officers observed him in the excavation. Foreman Schaer was also

in the excavation, observing Muck work. The Secretary has established a violation of § 1926.652(b). Item 2 is affirmed.

The Secretary classified this item as serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. If a cave-in occurred due to the inadequate sloping of the excavation walls, the likely result would be death for Muck. Item 1 is properly cited as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Schaer Development employed twelve workers at the time of the inspection (Tr. 115). Freeman applied a penalty reduction of forty percent due to the small number of employees (Tr. 79). Schaer Development had no history of OSHA citations (Tr. 80). The company demonstrated good faith in this proceeding.

The gravity of the violation of § 1926.652(b) is high. Joshua Muck was in a 14-foot deep excavation containing previously disturbed soil. The hazard was exacerbated by the superimposed loads of the track hoe and the two spoil piles at the edge of the excavation. The excavation was 14 feet away from a four-lane highway, and thus subject to vibrations caused by passing traffic. Had a cave-in occurred, Muck would have been buried underneath the soil. It is determined that a penalty of $4,200.00 is appropriate.

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 the Citation, alleging a serious violation of § 1926.651(j)(2), is vacated, and no penalty is assessed; and

(2) Item 2 of the Citation, alleging a serious violation of § 1926.652(b), is affirmed, and a penalty of $4,200.00 is assessed.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: June 2, 2011
Atlanta, Georgia