UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036–3419

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SECRETARY OF LABOR
Complainant,
v.
SUPERMASON ENTERPRISES
Respondent.

OSHRC DOCKET
NO. 92-2235

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 11, 1993. The decision of the Judge will become a final order of the Commission on July 12, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 1, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: June 11, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2235

NOTICE IS GIVEN TO THE FOLLOWING:

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John H. Frye, III
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-2235
SUPERMASON ENTERPRISES, INC.	:	
Respondent.	:	

Appearances:

Theresa C. Timlin
Joseph Crawford
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For Complainant

Toni E. Lynch *pro se*
CEO
Supermason Enterprises
Portland, Pennsylvania
For Respondent

BEFORE: Administrative Law Judge John H Frye, III

DECISION AND ORDER

After receiving information that workers were employed in an unprotected trench, OSHA inspected Supermason Enterprises' work site in Pen Argyl, Pennsylvania, on May 6, 1992. As a result of this inspection, OSHA issued two serious and one willful citations to Respondent Supermason Enterprises which the latter contested. At the hearing, one of the serious citations was reclassified as other than serious and the monetary penalty reduced to $00.

The hearing was held in Allentown, Pennsylvania, on January 19, 1993. In lieu of closing arguments, the parties were directed to submit briefs. The Secretary of Labor submitted a Post Hearing Brief consisting of Proposed Findings of Fact, Conclusions of Law, and Argument. The Respondent did not submit a brief. Consequently, this Decision and Order is based largely on the Secretary's brief.

I. OPINION

A. Complainant is an Employer Engaged in a Business Affecting Commerce and is Therefore Subject to Jurisdiction Under the Act.

Respondent's principal defense to the citations is that it is not subject to the requirements of the Occupational Safety and Health Act (Act) because it had subcontracted out the job and had no employees working on the site at the time of the inspection. The Act provides in pertinent part that the term "employer" means "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons engaged in a business affecting interstate commerce who has employees." 29 U.S.C. § 652(4) and (5). An "employee" is "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(6).

In this case, the weight of the evidence reflected in Findings D1 through D5 clearly indicates that Respondent is an employer subject to the jurisdiction of the Act. The only evidence which supports Respondent's defense that it had subcontracted out the project is an unsigned contract between Respondent and C & S Contracting, a company owned by Kevin Corrigan. Mr. Corrigan testified not only that he had not signed this document, but that he had never before even seen it. The evidence clearly establishes that at the time of the inspection Respondent was paying Mr. Corrigan and Richard Schwind an hourly wage as laborers.

There is also no real dispute that Respondent was engaged in a business affecting commerce within Section 3(5) of the Act. Inspector Stelmack testified that he observed a Case backhoe, manufactured in Racine, Wisconsin, which had been utilized to carry out the excavation project. See Finding F1. It is clear that Respondent is an employer engaged in a business affecting commerce within Section 3(5) of the Act, and that I have jurisdiction over the proceedings.

B. Complainant Sustained Her Burden of Proving That Respondent Violated 29 C.F.R. §§ 1926.59(e)(1), 1926.59(g)(1) and 1926.59(h)

To establish a violation of a standard, Complainant must show that "(1) the standard applies to the cited condition; (2) the employer violated the terms of the standard; (3) its employees were exposed or had access to the violative conditions; and (4) the employer had actual or constructive knowledge of the violation." *Secretary of Labor v. Sal Masonry Contractors Inc.*, 15 BNA OSHC 1609, 1610 (Rev. Comm. 1992).

1. 29 C.F.R. §§ 1926.59(e)(1), 1926.59(g)(1) and 1926.59(h) apply to the cited condition

Section 1926.59(e)(1) provides, in pertinent part, that

> employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g) and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met . . . .

Section 1926.59(g)(1) provides that

> employers shall have a material safety data sheet for each hazardous chemical which they use.

Section 1926.59(h)(1) states that

> employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

According to Inspector Stelmack, a written hazard communication program is "basically an overview of all requirements of the standard and how the employer will implement the standard on site." (Tr. 39). An employer is required to have a written hazard communication program whenever there is possible exposure to hazardous materials at the work site. (Tr. 41). Likewise, whenever there is possible exposure to hazardous materials at a work site, the employer must have material safety data sheets available and must provide employees with information and training about the hazardous substances.

Findings F1 through F3 indicate that Respondent's employees were in the process of installing a drop connection to an existing sanitary sewer manhole. Live lines which could generate sewer gasses, in particular methane and hydrogen sulfide, ran out of the manhole. Because the employees were potentially exposed to hazardous sewer gasses at the work site, §§ 1926.59(e)(1), 1926.59(g)(1) and 1926.59(h) apply.

2. Respondent violated the terms of the cited standards.

Respondent did not rebut Inspector Stelmack's testimony that a written hazard communication program and Material Safety Data Sheets were not available at the work site. Respondent's position, expressed to Inspector Stelmack, that it only hired people experienced in trenching operations, does not comply with the terms of the standard, which requires training upon initial employment and whenever a new hazard is introduced to the work area.

3. Respondent's employees were exposed to the violative conditions

Respondent's employees working in a trench with live sewer lines could have been exposed to sewer gasses such as methane and hydrogen sulfide, and consequently to the danger of an explosion or oxygen displacement in the trench. Without a written hazard communication program or material data sheets at the workplace, and without receiving training regarding hazardous chemicals, the employees were uninformed about the dangers of methane and hydrogen sulfide, and how to protect themselves from those dangers.

4. Respondent had actual or constructive knowledge of the violations

Finding F3c reflects the fact that Respondent was aware of the lack of a hazard communication program, Material Safety Data Sheets, and a training program, and that Respondent previously had been cited for violation of the same standards. Respondent's position that the previous citations involved entirely different hazards does not alter the fact that Respondent knew of the requirements of these standards and should have applied them to the hazards presented by the work in which it was engaged. Complainant has established violations of the cited standards that were properly characterized as other-than-serious violations.

C. Complainant Sustained Her Burden of Proving That Respondent Violated 29 C.F.R. § 1926.651(c)(2)

1. Section 1926.651(c)(2) applies to the cited condition, Respondent violated its terms, Respondent's employees were exposed or had access to the violation, and Respondent had actual or constructive knowledge of the violation.

Section 1926.651(c)(2), provides that

> a stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

The trench in which Respondent's employees were working was 14 feet long, eight feet wide, 10 feet deep nearest the manhole, and eight feet deep at its shallowest point. Finding F4. Thus, the standard applies to Respondent's trench.

When Inspector Stelmack arrived at the work site, two of Respondent's employees were working in the trench. There was no ladder or other safe means of egress from the trench. Findings F1 and F9. Without a ladder or other safe means of egress from the trench, the employees would not have been able to exit the trench rapidly in the event of an emergency, such as a sidewall failure.

It is clear that Respondent had knowledge of the lack of safe egress from the trench because one of the employees in the trench was Respondent's foreman. Findings D4 and F1. Complainant has established a violation of 651(c)(2).

2. Complainant established that the violation of 651(c)(2) was properly characterized as a serious violation

"Under Commission precedent, a serious violation is established if an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Secretary of Labor v. Consolidated Freightways Corp.*, 15 BNA OSHC

1317, 1324 (Rev. Comm. 1991) citing *Dravo Corp.*, 7 BNA OSHC 2095, 2101, 1980 CCH OSHD ¶ 24,158, p. 29,370 (No. 16317, 1980), *pet. for review denied*, 639 F.2d 772 [9 OSHC 2144] (3d Cir. 1980). *See also* 29 U.S.C. § 666(k). In the event of an emergency, such as a sidewall failure, employees would be unable to rapidly exit the trench. Inspector Stelmack's testimony that the most likely injury in the event of a trench collapse would be death was unrebutted. Findings F9 and F12. This evidence establishes a serious violation.

3. Respondent has failed to prove any defense to the violation

At trial, Respondent attempted to establish an infeasibility defense through his cross-examination of Inspector Stelmack and through his own testimony that it was necessary to remove the ladder from the trench as the trench dimensions were tight and the men would have been unable to work with the ladder in place. (Tr. 107-111, 132). In order to prevail on this defense, Respondent must prove that "(1) literal compliance with the terms of the cited standard was infeasible under the existing circumstances and (2) an alternative protective measure was used or there was no feasible alternative measure." *Secretary of Labor v. Mosser Construction Company*, 15 BNA OSHC 1408, 1416 (Rev. Comm. 1991), citing *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226, 1228, 1981 CCH OSHD ¶ 29,442, p. 39,678, 39,682, 39,685 (Commission 1991). "Employers must alter their customary work practices to the extent that alterations are reasonably necessary to accommodate the abatement measures specified by OSHA standards." *Seibel*, 15 BNA OSHC at 1227.

Respondent did not prove that literal compliance with the terms of 651(c)(2) was infeasible at the time of the inspection, either through cross-examination of Inspector

Stelmack, or through Mr. Lynch's own direct testimony. (Tr. 107-111, 132). Respondent seemed to be arguing that it could not comply with 651(c)(2) by keeping the ladder in the trench and still accomplish its job. This argument is not persuasive. The standard requires that a safe means of egress be provided from a trench excavation that is more than four feet deep. Respondent did not show that literal compliance with 651(c)(2) was infeasible. The mere suggestion that compliance would have made the laborer's job harder does not establish infeasibility.

The second element of the infeasibility defense requires Respondent to prove that it either used an alternative means of protecting the laborer, or that no alternative means existed. On cross-examination, Inspector Stelmack stated that the ladder should have been moved to a location in the trench where it would have been out of the way of the work area, but still located so that employees would not have to travel more than 25 feet to reach it. (Tr. 109). Respondent did not present any evidence showing that this means of complying with the standard was infeasible.

For the foregoing reasons, Respondent did not establish the infeasibility defense.

D. Complainant Sustained Her Burden of Proving That Respondent Violated 29 C.F.R. § 1926.651(k)(1)

1. Section 1926.651(k)(1) applies to the cited condition

Section 1926.651(k)(1) provides in pertinent part, that

> [d]aily 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. . . .

29 C.F.R. § 1926.651(k)(1). The standard applies as employees were working in a trench. 29 C.F.R. § 1926.650(a).

2. Respondent violated the terms of 651(k)(1), Respondent's employees were exposed or had access to the violation, and Respondent had actual or constructive knowledge of the violation of 651(k)(1)

On observing Respondent's employees working in an unprotected trench, Inspector Stelmack interviewed Respondent's foreman, Mr. Corrigan, at the work site. Despite his substantial experience as an excavation contractor and his position as foreman, Mr. Corrigan stated that not only was he unfamiliar with the OSHA trenching regulations, he was not responsible for employee safety and health and that he was not sure that anyone was. Finding F10. Mr. Corrigan has denied that he was the person responsible for employee safety, and Respondent has not suggested that any other individual was responsible. Complainant has established a serious violation of § 1926.651(k)(1).

E. Complainant Sustained Her Burden of Proving That Respondent Violated 29 C.F.R. § 1926.21(b)(2)

1. Section 1926.21(b)(2) applies to the cited condition.

Section 1926.21(b)(2) provides that

> [t]he employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

This general training standard applies to all construction sites covered under the Act. Because Respondent is a covered employee under the OSHA Act, 21(b)(2) applies.

2. Respondent violated the terms of 21(b)(2), Respondent's employees were exposed or had access to the violation, and Respondent had actual or constructive knowledge of the violation.

Inspector Stelmack determined that Respondent violated the terms of 21(b)(2) when Mr. Corrigan stated that he was not familiar with the OSHA trenching regulations. Finding F10. At the hearing, Respondent seemed to believe that by hiring employees who had trenching experience, he fulfilled his responsibilities with respect to training. However, the law is clear that training by former employers does not fulfill the requirements of 21(b)(2). *Ford Development Co.*, 15 BNA OSHC 2003, 2009 (Rev. Comm. 1992) (Serious citation for violation of 29 C.F.R. § 1926.21(b)(2) upheld where company failed to provide its foreman with adequate training in excavation hazards, relying on the foreman's on-the-job training with a previous employer). "Each worksite presents a different work environment posing its own specific set of safety considerations." *Siegel Interior Specialists Co.*, 15 BNA OSHC 1665, 1666 (ALJ 1992) (serious violation of 29 C.F.R. § 1926.21(b)(2) affirmed). Complainant has established a serious violation of 21(b)(2).

3. Complainant established that the proper penalty was assessed for items 2a, 2b, and 2c of serious citation no. 1

The Secretary grouped the penalty for these items because of the similarity in the nature of the violations. (Tr. 67). Inspector Stelmack testified that the first step in assessing a penalty is assigning a value for the severity of the injury to be expected and a value for the probability of injury. (Tr. 68). These violations were classified as high severity because the resulting injury could be death. Findings F9 and F12. Inspector Stelmack, however, assessed the probability of injury as lesser, because when he observed the trench and trench sidewalls he did not notice any materials spalling from the sidewalls, any visible tension cracks or

fissures along the excavation face, or any water either in the trench or seeping from the sidewalls. Finding F8. The gravity-based penalty for a high severity/lesser probability injury is $2,500. (Tr. 69).

The $2,500 penalty was then reduced by 60% because of the small size of Respondent's company. (Tr. 69-70). No other adjustments were made. The final recommended penalty was $1,000.00. Inspector Stelmack's testimony regarding the assessment of the penalty for these items was not rebutted by Respondent. Accordingly, the appropriateness of the penalty was established.

F. Complainant Sustained Her Burden of Proving That Respondent Violated 29 C.F.R. § 1926.652(a)(1)

1. Section 1926.652(a)(1) applies to the cited condition, Respondent violated its terms, Respondent's employees had access to the hazard, and Respondent had actual or constructive notice of the hazard.

Section 1926.652(a)(1) provides that

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

This standard clearly applies. Inspector Stelmack observed two of Respondent's employees working in an excavation that was made in Type B soil rather than stable rock, that was greater than 5 feet deep, and that was not protected against cave-ins. One of the employees was Respondent's foreman. Findings D4, F1, F4 through F6.

At the hearing, Respondent suggested that given the confined space in the trench, no protective system was available that would allow the employees to still do the work necessary

to install the drop connection. Inspector Stelmack testified that he believed manufactured systems are available that could have been used to shore the trench. (Tr. 114). Moreover, Respondent's own foreman testified that speed shoring or widening the trench might have worked as protective systems that did not interfere with the employees ability to install the drop connection. (Tr. 157). Respondent's suggestion appears to raise the infeasibility defense. That defense fails here for the same reasons that it failed in connection with the violation of § 1926.652(c)(2). Complainant has proved a violation of § 1926.651(a)(1).

2. Complainant established that the violation of 652(a)(1) was properly characterized as a willful violation and that the appropriate penalty was assessed

Although the term "willful" is not defined in the statute, one accepted definition states that a willful violation is one "involving voluntary action, done either with an intentional disregard of, or plain indifference to, the requirements of the statute." ***Ensign-Bickford Co. v. OSHRC***, 717 F.2d 1419, 1423 (D.C. 1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1909 (1984); *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 319 (5th Cir. 1979); *A.C. Dellovade, Inc.*, 1987 OSHD (CCH) ¶ 27,786 at p. 36,341 (Commission 1987); OSHA Instruction CPL 2.45B, ch. IV, B(3)(b) (June 15, 1989), *reprinted in* O.S.H. Rep. (BNA) "Reference File" volume 3, at 77:2510 *and* 3 Empl. Safety and Health Guide (CCH) ¶ 7966.290. This standard describes misconduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. *E.g., Ensign-Bickford Co.*, 717 F.2d at 1422-23, *Georgia Elec. Co.*, 595 F.2d at 318-19.

The Court of Appeals for the Third Circuit has held that

> willfulness connotes defiance or such a reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful

> means more than merely voluntary action or omission--it involves an element of obstinate refusal to comply.

Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1207 (3d Cir. 1974), *aff'd*, 519 F.2d 1215 (1975) (*en banc*), *aff'd on other grounds sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 97 S.Ct. 1261 (1977).

While some courts have suggested that this is a narrower definition of willful, requiring a showing of "bad purpose", the Court of Appeals for the Third Circuit has taken the position that there is little, if any, difference between their approach in *Frank Irey, Jr., Inc.* and the approach of other circuits.

> To our way of thinking, an "intentional disregard of OSHA requirements" differs little from an "obstinate refusal to comply;" nor is there in context much to distinguish "defiance" from "intentional disregard."

Babcock & Wilcox v. OSHRC, 622 F.2d 1160, 1167 (3d Cir. 1980). *See also Universal Auto Radiator Mfg. Co. v. Marshall*, 631 F.2d 20, 23 (3d Cir. 1980).

Respondent knew of the necessity to shore or otherwise protect the employees in the trench and refused to do so. From the time that Respondent first became involved in bidding for the sanitary sewerage system construction project, it was on notice that it had sole responsibility for ensuring employee safety and that it was required to comply with all federal safety regulations. (Tr. 20-21, 82, GX 1). Specifically, the contract directed that "[t]he Contractor is required to do such trench bracing, sheathing, or shoring necessary to perform and protect the excavation and as required for safety and to conform to governing laws." (GX 1, p. 74).

Additionally, during the pre-construction conference on March 17, 1992, during the discussion of the general project responsibilities, it was again made clear that the Contractor

was "responsible for compliance with all applicable federal, state, and local laws and ordinances such as . . . OSHA, and other safety codes." (GX 4, p. 3). Not only were Respondent's foreman and another representative present at the pre-construction conference, but Mr. Lynch was sent a copy of the minutes of the meeting. (Tr. 24).[1]

Nonetheless, Inspector Stelmack did not see anything on the work site which could have been used as shoring in the trench. (Tr. 84). And when Inspector Stelmack questioned him, Respondent's foreman disavowed any responsibility for employee safety and indicated that he was not aware that anyone was responsible. Finding F10. This certainly illustrates an "intentional disregard of OSHA requirements" which may also be characterized as an "obstinate refusal to comply." A contractor who permits excavation to go forward without having both a competent person in charge of the work and the equipment necessary to ensure safety present repudiates its obligation for employee safety imposed by the Act.[2] Complainant has established a willful violation of § 1926.652(a)(1).

Having established the violation as willful, Inspector Stelmack also testified in detail as to how he determined the penalty. (Tr. 91-92). The violation was classified as high severity because the possible injury that could be expected would be death. The inspector rated the violation as lesser probability as the trench sidewalls showed no visible signs of imminent failure such as material spalling from the sides, tension cracks that could be

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[1] Inspector Stelmack also testified that when he spoke with the observer from G. Edwin Pidcock Co., he learned that Respondent had been apprised of the need for shoring in the trenches. Tr. 84.

[2] There is some indication in the record that Respondent may have fallen victim to a reluctance on the part of Mr. Corrigan, an individual with substantial excavation experience, to become involved with OSHA. Tr. 159-60. However, if Mr. Corrigan was unwilling to assume that responsibility, Respondent had an obligation to provide a competent person who would.

observed, cracks or fissures in the sidewalls, or water either seeping from the sidewalls or standing in the trench. The gravity based penalty for a high severity/lesser probability violation is $2,500. (Tr. 91).

That amount was multiplied by 7 for a total of $17,500.00 to reflect the element of willfulness. Inspector Stelmack then gave a 60% reduction for the company's small size, giving a final recommended penalty of $7,000.00. (Tr. 91). No adjustments for good faith or history are given when a violation is classified as willful. (Tr. 92). The Inspector's testimony regarding the factors used to determine an appropriate penalty was not rebutted by Respondent. Accordingly, the appropriateness of the penalty was also established.

II. FINDINGS OF FACT

A. Respondent, Supermason Enterprises, is a corporation with a principal place of business at Box 533, Portland, Pennsylvania. (Complaint, ¶ 1).

B. In May of 1992 Respondent was engaged in excavation work at Bayberry and Crestmont Streets, Pen Argyl, Pennsylvania. (Tr. 33-34). The construction project involved the installation of a sanitary sewer. (Tr. 33).

C. G. Edwin Pidcock & Company was engaged by Plainfield Township to oversee the design and construction of the Bayberry Area Sanitary Sewerage Construction Project. (Tr. 10).

D. Respondent had approximately 6 employees at the work site who identified themselves as employees of Supermason Enterprises. (Tr. 34, 70).

1. The contract for the sewerage system project required that at least 60 percent of the major portions of the project be accomplished by the bidders own personnel, a requirement of which Respondent was aware. (Tr. 13, GX 1).

2. Respondent engaged in correspondence with the attorney for the Township and G. Edwin Pidcock regarding the amount of subcontracting Respondent intended to use. On December 9, 1991, by letter to Attorney Layman, Township Solicitor, Supermason stated that they would supply all equipment, labor and material. (Tr. 14-16, GX 2.)

3. Supermason Enterprises filed weekly Payroll Certification records with Plainfield Township, which identified Kevin Corrigan and Richard Schwind as laborers employed by Supermason Enterprises during the workweek which includes May 6, 1992 on the Payroll Certification records. (Tr. 18, 36, GX 3).

4. Kevin Corrigan, the owner of C&S Contracting, was hired by Respondent as a site foreman, with the responsibility for getting the other men working in the morning, ordering pipe and ensuring that the job was completed. He was paid by Supermason by employee check, rather than as a subcontractor for this particular project. (Tr. 145, 146, 149, 152, GX 11).

5. Mr. Lynch testified that Richard Schwind was employed by Supermason Enterprises on May 6, 1992. (Tr. 165).

E. On May 6, 1992 Mark Stelmack, a Compliance Safety and Health Officer with the Occupational Safety and Health Administration inspected Respondent's work site. (Tr. 33). F. Upon first arriving at the work site on May 6, 1992, Mr. Stelmack observed the

area where the excavation was taking place, introduced himself, and asked to speak to the foreman. Kevin Corrigan was introduced as the foreman on the site. (Tr. 33, 61).

1. Inspector Stelmack observed two employees, Kevin Corrigan and Richard Schwind, working in a trench adjacent to an existing sanitary sewer manhole, which had live lines running out of the manhole. Mr. Stelmack also observed that a Case backhoe, manufactured in Racine, Wisconsin, was in use. (Tr. 34, 36, 39, 43, 60, GX 6, 7, 8, 9).

2. The employees in the trench were installing a drop connection, a connection placed outside the manhole to direct sewage so that it enters the manhole closer to the bottom, adjacent to the existing manhole. (Tr. 39, 43, 60, 76, 147).

3. The existence of the live lines into the manhole created the possibility that employees would be exposed to methane and hydrogen sulfide gasses when working on the drop connection to the existing manhole. (Tr. 42).

a. Methane and hydrogen sulfide are commonly found in the decomposition of organic materials such as raw sewage. Their infiltration into the trench would create a hazard of oxygen displacement or explosion. (Tr. 46).

b. This potential hazard was limited by the fact that a mechanical plug had been placed in the sewer lines, which, if working properly, would prevent the escape of gasses from the live lines. Nevertheless, employees working in trenches where sewer gasses may be present need to be aware of how to identify the gasses and the precautions to be taken in the event of their presence. (Tr. 45).

c. Supermason Enterprises did not have a written hazard communication program covering these gasses. (Tr. 41-42). Material safety data sheets for these gasses were

not available to employees at the work site. (Tr. 45, 47). Supermason Enterprises did not provide information and training on hazardous materials at the work site to employees. (Tr. 53). Supermason Enterprises was aware of these deficiencies and had been previously cited for violations of §§ 1926.59(e)(1), 1926.59(g)(1) and 1926.59(h). (Tr. 41, 45, 53; GX 5). Inspector Stelmack did not observe any monitoring equipment, such as an oxygen meter or combustible gas meter, on the work site. (Tr. 53, 55).

4. Using a steel tape, Inspector Stelmack measured the trench dimensions. (Tr. 59, 73). The trench was 14 feet long, 8 feet wide at both the bottom and the top, and approximately 8 to 10 feet deep. (Tr. 59, 73, 85, 111). The trench walls were vertical. (Tr. 59, 72, GX 7, 8, 9).

5. No protective system was utilized in the trench. (Tr. 71, 73, 76). Protective systems which might have been used include sloping or benching of the sidewalls of the trench, a shoring system such as timber, balloon, or hydraulic shoring, or a trench box or trench shield. (Tr. 77).

6. Using the OSHA trenching standards definitions, Inspector Stelmack classified the soil in the trench as type "B" soil. The material surrounding the manhole was angular gravel backfilled around the manhole. The soil in the trench had also previously been disturbed when a water line was installed. The remainder of the material in the trench was compacted clay interspersed with various sized gravel. (Tr. 74, 101).

7. Inspector Stelmack determined that the manhole he observed in the trench was not a new manhole, but an existing manhole because the road surface above the manhole was intact. (Tr. 98, GX 6, 7, 8, 9). Kevin Corrigan confirmed this. (Tr. 147).

8. There was no evidence of materials spalling from the sides of the trench walls, no tension cracks visible along the excavation face, no fissures in the face and no water observed either in the trench or seeping from the sidewalls of the trench. (Tr. 69).

9. Inspector Stelmack observed that there was no ladder or other means of egress from the trench. However, a ladder was lying on the ground, outside of the trench. (Tr. 58, 107, GX 6). In the event of a sidewall failure or trench collapse, employees would not be able to exit the trench rapidly and would probably die. (Tr. 60, 62).

10. Daily inspections of the excavations and surroundings areas for situations that could result in cave-ins or failure of the protective systems were not being made by a competent person. The site foreman, Kevin Corrigan, told Inspector Stelmack that he was not familiar with the OSHA trenching regulations, although apparently he had substantial experience as an excavation contractor. Mr. Corrigan also told Inspector Stelmack that he was not responsible on site for employee safety and that he was not sure who was responsible. (Tr. 62-63, 65, 152-53).

11. The employees had not been trained in the recognition and avoidance of unsafe conditions. (Tr. 66).

12. The employees working in the unsloped, unshored trench 8-10 feet deep were exposed to a hazard of trench wall collapse. (Tr. 64). The most likely injury to result from failure of a trench sidewall would be death. (Tr. 65, 68).

G. The project manual supplied to Supermason Enterprises advised that under the terms of the contract, the contractor was responsible for complying with applicable safety and health laws governing construction and trenching. (Tr. 20, 21, 81, 82, GX 1). The last

paragraph on page 74 of the project manual addresses the responsibility to protect trenches during the excavation. (Tr. 21, GX 1).

1. Supermason Enterprises was aware of the provisions in the project manual, as the specifications in the project manual are used by the contractor in order to draw up the bid. (Tr. 21, 83).

2. Supermason Enterprises was also aware of the responsibility to comply with applicable federal, state and local laws and ordinances by virtue of the pre-construction conference. (Tr. 22, 83, GX 4).

3. Mr. Steven Goffredo and Mr. Kevin Corrigan were in attendance at the pre-construction conference as representatives from Supermason. (Tr. 23, GX 4)

4. Mr. Lynch was informed about the topics that were discussed at the pre-construction conference as the minutes of the meeting were transmitted to Supermason's office. (Tr. 24, GX 4).

III. CONCLUSIONS OF LAW

A. Respondent utilizes tools, equipment, machinery, materials, goods and supplies which have originated in whole or in part from locations outside the Commonwealth of Pennsylvania and is therefore engaged in business affecting commerce and is subject to the requirements of the Act. 29 U.S.C. § 652(5).

B. Respondent is an employer within the meaning of the Act and is therefore subject to its requirements.

C. Respondent failed to comply with the terms of 29 C.F.R. § 1926.59(e)(1) as charged in Citation 1, Item 1(a). A civil penalty of $00 is appropriate.

D. Respondent failed to comply with the terms of 29 C.F.R. § 1926.59(g)(1) as charged in Citation 1, Item 1(b). A civil penalty of $00 is appropriate.

E. Respondent failed to comply with the terms of 29 C.F.R. § 1926.59(h)(1) as charged in Citation 1, Item 1(c). A civil penalty of $00 is appropriate.

F. Respondent failed to comply with the terms of 29 C.F.R. § 1926.651(c)(2) as charged in Citation 1, Item 2(a).

G. Respondent failed to comply with the terms of 29 C.F.R. § 1926.651(k)(1) as charged in Citation 1, Item 2(b).

H. Respondent failed to comply with the terms of 29 C.F.R. § 1926.21(b)(2) as charged in Citation 1, Item 2(c).

I. Citation 1, Items 2(a), 2(b), and 2(c) were properly characterized as serious violations of the Act. The proposed penalty for these violations of $1000 was calculated in conformity with the requirements of section 17(j) of the Act and is appropriate.

J. Respondent failed to comply with the terms of 29 C.F.R. § 1926.652(a)(1) as charged in Citation 2, Item 1. This failure was properly characterized as a willful violation of the Act. The proposed penalty of $7,000 was calculated in conformity with the requirements of section 17(j) of the Act and is appropriate.

IV. ORDER

A. Citation 1, Items 1(a), 1(b), and 1(c) are affirmed as other than serious violations of the Act.

B. Citation 1, Items 2(a), 2(b), and 2(c) are affirmed as serious violations of the Act.

C. Citation 2 is affirmed as a willful violation of the Act.

D. Total civil penalties of $8,000 are assessed.

JOHN H FRYE, III
Judge, OSHRC

Dated: JUN 11 1993
Washington, D.C.