

4967
086-94

MN OSHD No.
OSHI No. B1819
9-1901-10044-2

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

**Gary Bastian, Commissioner,
Commissioner of Labor and Industry,
State of Minnesota,**

Complainant,

**FACT
vs.
AND**

Kenko, Inc.,

Respondent.

**FINDINGS OF
CONCLUSIONS
ORDER**

The above-entitled matter came on for hearing before Phyllis A. Reha, Administrative Law Judge, of the Minnesota Office of Administrative Hearings on June 11, 1996, in Minneapolis, Minnesota.

Mark W. Traynor, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101, appeared on behalf of the Commissioner of the Department of Labor and Industry ("Complainant" or "Department"). Robert D. Peterson, Attorney at Law, 3300 Sunset Boulevard, Suite 110, Sunset Whitney Ranch, Rocklin, California 95677, appeared on behalf of Kenko, Inc. ("Respondent" or "Kenko").

The record closed on October 2, 1996, the date upon which the Department's reply memorandum was received.

NOTICE

Notice is hereby given that under Minn. Stat. § 182.664, subd. 5, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or

any party, within 30 days following the service by mail of this decision. The procedures for appeal are set out at Minn. Rules Ch. 5215.

STATEMENT OF ISSUE

The issue in this contested case proceeding is whether or not the Respondent was in violation of OSHA standards at its workplace in St. Paul, Minnesota, on October 24, 1994, and if so, what penalty is appropriate.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. During the summer and fall of 1994, the Respondent was the general contractor on the Grand/St. Albans Storm Sewer City Project ("the Project") in the City of in St. Paul for excavating trenches to expose water supply pipes for replacement, expose storm sewers for separation, and refilling the excavated soil after the pipes had been replaced by workers for the St. Paul Water Utility. Worksites on the Project were located throughout the area bounded by Lexington Avenue, Interstate 35E, Selby Avenue and St. Clair Avenue, an area of several square miles. The intersection of Fairmont and St. Albans streets was one of those worksites.

2. On October 24, 1994, at approximately 1:00 p.m., Ray Bastyr, a senior safety investigator for the Occupational Safety and Health Division of the Minnesota Department of Labor and Industry was passing through the intersection of Fairmont and St. Albans. He noted that a trench had been excavated without the use of any safety devices. The trench appeared unsafe. The trench exposed two intact, undamaged pipes at the deepest end of the trench. Soil surrounding these pipes could not have been removed with a backhoe without damaging them. Two employees of the St. Paul Water Utility were in the trench working on the water hookup. No one was present outside the trench. When Mr. Bastyr stopped at the worksite, the two employees of the St. Paul Water Utility left the trench by way of a ladder placed in the trench and immediately left the scene.

3. Using a tape measure, Bastyr measured the trench at the intersection of Fairmont and St. Albans streets as approximately 31.5 feet in length, extending to a depth of 6-1/2 feet, 32 inches wide at the bottom and 11-1/2 to 12 feet wide at street level (top width). The bottom width was estimated by comparison to the width of the backhoe bucket. There was no trench box or other type of protective device placed within the trench to prevent the collapse of the trench walls. While inspecting the worksite, Bastyr noted that an

unrestrained spoil pile was positioned at the edge of the trench. The spoil pile was indistinguishable from the edge of the trench. Exhibit 8, photograph C. The spoil pile was directly above a water connection that had been worked on by St. Paul Water Utility employees. *Id.* photograph F. Bastyr visually determined that the site posed an imminent danger because of the improper slope and presence of the spoil pile. Due to this imminent danger, Bastyr cleared the site and secured it until an investigation could be completed.

4. Bastyr classified the soil in and around the trench located at the intersection of Fairmont and St. Albans streets as Type C, based on the previous disturbance of the soil, the lack of any soil analysis, and the opportunity for vibration from traffic. Bastyr's visual inspection of the soil revealed that it was sandy, or granular in nature. The standard practice for safety purposes is to consider all soils as Type C unless tested and shown otherwise. No such testing has been performed by Respondent.

5. Bastyr spoke with Raymond Freeman at the site. Freeman identified himself as working for an independent contractor, Raco Construction, Inc. (Raco), not for Kenko. Transcript, at 98. Bastyr questioned Freeman to determine what knowledge of trenching safety standards he possessed. During their conversation, Freeman indicated that he had dug the trench, but could not, or would not, answer questions about soil analysis, trenching standards, or what the difference was between different soil types. Based on the improper sloping of the trench admittedly dug by Freeman and the unwillingness, or inability, of Freeman to answer technical questions regarding trenching, Bastyr determined that he did not meet the requirement of a competent person at the worksite.

6. While Bastyr was at the worksite, Respondent's representative, John Zehner, arrived. Bastyr then conducted the opening conference that is done whenever an OSHA inspection is initiated. Zehner said that Respondent was responsible to insure job site safety and that Steve Dahlmer was the competent person for the worksite. Transcript, at 105-06.

7. Having completed his inspection, Bastyr held a closing conference and advised Zehner that Kenko would be cited for violating standards regarding proper trench construction and use of safety devices.

8. Respondent's contract with the City of St. Paul expressly requires Kenko to meet OSHA standards for protection of employees against cave-ins by trench boxes, shoring or sloping or other methods and by having a competent person on site. Exhibit 4. The contract states:

The excavating operations shall be conducted so as to carefully expose all in place underground structures without damage. Wherever the excavation extends under or approaches so close to an existing structure as to endanger it in any way, precautions and

protective measures shall be taken as necessary to preserve the structure and provide temporary support. Hand methods of excavating shall be utilized to probe for and expose such critical or hazardous installations as gas, water and sewer mains and services; and power, telephone, street lighting and traffic signal cables and conduits.

Exhibit 4, at 29 (orange pages).

9. The contract between Kenko and the City requires water main trenches to be of “sufficient length, width and depth to allow the Water Utility to safely install new main, . . . and tie into existing mains.” Exhibit 4, at 40 (orange pages). The contract also requires that the contractor “is responsible to implement and monitor operations in accordance with the safety plan.” *Id.* at 12 (white pages). The General Excavation provision of the contract states:

The Contractor shall follow OSHA standards for excavations, trenching and shoring (Federal Register Part 1926, Subpart P). Employees shall be protected against cave-ins of excavations by adequate protective systems (such as trench boxes, shoring allowable sloping or other). The Contractor shall be responsible for excavation throughout the life of the trench. The Contractor shall have a duly authorized “competent person” on site. The competent person shall be capable of identifying hazards and taking prompt corrective measures to eliminate them. Inspections shall be in accordance with OSHA Standard Section 1926.651(K)(1). All soils shall be classified as Type C, unless otherwise determined by acceptable documented visual and manual tests.

Exhibit 4, at 51 (white pages).

10. Kenko prepared a safety plan for the Project that included identification of the “severe hazard” posed by “Cave In Excavating.” Exhibit 5, at 6. Specific controls are identified, together with the corresponding OSHA standard. *Id.* Included are “Classify Soils,” “Design Adequate Protective Systems,” “Inspection by Competent Person,” and “Maintain 2 feet at Top of Slope.” *Id.*

11. Raco is not included on the list of subcontractors provided to the City as authorized to work on the Project. Exhibit 6. Raco and Kenko are parties to a subcontracting agreement that gives Kenko complete control over Raco’s work, pays Raco by the hour, and requires all work be done in accordance with OSHA regulations. Exhibit J. The work is described as “Excavation for service lines at \$17.00 per hour.” *Id.* Approximately 500 water connection sites were required to be excavated during the Project. Of that number, Raco performed approximately 400.

12. The standard practice on all the worksites involving Raco was for Freeman to dig the access trench with a backhoe and for a laborer, who was a Kenko employee, to hand-dig the soil surrounding the pipe. Freeman did not do the hand-digging. On a daily basis, Respondent notified the St. Paul Water Utility representative, Mary Hiber, as to the number and the location of sites excavated. Hiber directed water utility workers to the job sites ready for water line replacement service. St. Paul Water Utility workers do not routinely enter a trench to perform their hookups until the water pipes are exposed. All work required to give the St. Paul Water Utility workers access to the water main at the Fairmount and St. Albans worksite was completed by the time Bastyr arrived on October 24, 1995.

13. Bruce Elder, Civil Engineer for the City of St. Paul, was the on-site engineer in charge of administration of the City's end of the project. In that capacity, Elder was on the project site daily for eight to ten hours to observe the work performed and assure the quality of that work. Elder observed work done by Freeman and saw that Freeman worked in conjunction with another Kenko employee. Transcript, at 29. Freeman would dig the trench using a backhoe and the Kenko employee would perform the digging work required within the trench to expose water pipes. *Id.*

14. Hiber visited worksites in the project area daily as part of her duties regarding water connections. Her best approximation of Raco's excavations were that 3 or 4 out of 5 were improperly sloped. Transcript, at 61. Hiber never saw Freeman doing any of the hand digging required to expose the water pipes. Freeman always worked with at least one Kenko employee. *Id.* at 66. That Kenko employee did the hand digging from within the trench. *Id.* at 67. Hiber had more than ten discussions with Freeman regarding unsafe trench conditions during the summer and fall of 1994. *Id.* at 62-63. Hiber communicated the safety problems she observed with the Raco trenches to Curtis Enerson, Superintendent for Kenko, several times. *Id.* at 68. After complaints by Hiber about improper sloping in Raco trenches, Kenko provided a trench box for use by Freeman. Transcript, at 71. Freeman did not consistently use the trench box. *Id.* Respondent was aware that the St. Paul Water Utility was concerned enough about the situation that it loaned a trench box to Raco for use at the sites that Freeman excavated. Transcript, at 61. The loaning of a trench box is a very uncommon occurrence. *Id.* at 62.

15. Hiber spoke to Freeman about the trenching job to be performed at Fairmount and St. Albans before he began work there. Transcript, at 81. Hiber took this step because she was aware the trenching was going to be difficult. *Id.* at 90. Freeman was told by Hiber that he would need a trench box for this excavation. *Id.*

16. Bastyr concluded that the conditions at the worksite violated 29 C.F.R. § 1926.652(a)(1) for improperly sloping the sides of the trench. He calculated the penalty for that citation by following the standard OSHA method, assigning a severity rating of F, due to the possibility of permanent injury or death to an employee from a cave-in. Transcript, at 145-146. The unadjusted penalty for that violation is \$3,000. Transcript, at 148.

17. Kenko received a citation for violating the same OSHA provision in 1993. See Finding 21, below. Bastyr assigned a repeat factor of two based on the prior violation, making the penalty \$6,000, before reducing the penalty for credit factors. Transcript, at 148.

18. Kenko received a 20 percent credit for good faith (out of 30 percent maximum), due to its safety program, training, and having a competent person. Transcript, at 147. Bastyr assigned a credit of 50 percent for Kenko's size, based on the number of workers employed by Kenko. *Id.* For Kenko's citation history, Bastyr assigned a 5 percent credit (of a maximum 10 percent). Transcript, at 148. Applying the total credit factors of 75 percent to the \$6,000 figure made the adjusted penalty \$1,500 for the trench sloping citation.

19. At the hearing, Complainant and Respondent stipulated that following the OSHA guidelines for penalty calculation the asserted penalty for violating 1926.651(j)(2), is \$1,000. The stipulation only extended to the claimed penalty, not whether the penalty should be imposed.

20. On November 18, 1994, the Department issued citations to Respondent for violation of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2). Kenko filed a Notice of Contest with the Department on December 6, 1994. A Summons and Complaint was served on Kenko on February 17, 1995. Kenko filed an Answer on March 9, 1995. The Department issued a Notice and Order for Hearing on September 19, 1995, scheduling this matter for a hearing before an administrative law judge.

21. As a result of an inspection on August 27, 1993, citations were issued to Kenko on December 13, 1993, for serious violations of 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(1). Exhibits 12 and 20. On July 7, 1994, Kenko entered into a Settlement Agreement with Complainant regarding citations of improper trenching and improper placement of a spoil pile adjacent to a trench. In the Settlement Agreement, Kenko withdrew its contest to citations for serious violations of 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(1). Exhibit 12.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Occupational Safety and Health Review Board and the Administrative Law Judge have jurisdiction herein and authority to take the action proposed pursuant to Minn. Stat. §§ 182.661, subd. 3, 182.664, and 14.50 (1994).

2. The Department gave proper notice of this hearing and fulfilled all relevant substantive and procedural requirements of law and rule.

3. Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7 (1994).

4. Complainant must establish the violations alleged and the appropriate monetary penalty for serious violations by a preponderance of the evidence. Minn. Rules 1400.7300, subp. 5 (1995).

5. The trench at the intersection of Fairmont and St. Albans was improperly sloped and no alternative safety device used, thus posing a threat of severe injury or death under the standards set by in 29 C.F.R. § 1926.652(a)(1).

6. The spoil pile situated at the edge of the trench at the intersection of Fairmont and St. Albans streets creating a threat of severe injury or death under the standards set by in 29 C.F.R. § 1926.651(j)(2).

7. At least one of Respondents employees was exposed to a hazard in violation of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2) when hand digging the soil from around the pipes exposed in the trench at the intersection of Fairmont and St. Albans.

8. Respondent's employees had access to a serious hazard in violation of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2) that was controlled by Respondent through its supervisory and safety authority on the job site.

9. Employees of other employers on the job site were directly exposed to the trench hazards violation of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2) on the job site which was under the supervisory authority and control of Respondent.

10. Respondent carries the burden of proof as to affirmative defenses excusing liability under 29 C.F.R. § 1926 and Minn. Rules 1400.7300, subp. 5 (1995).

11. Respondent has failed to establish that it either lacked control of the job site or that Repondent could not have discovered, with the exercise of reasonable diligence, the hazard represented by the improperly sloped trench. Respondent has failed to meet its burden of proof regarding any of its alleged defenses to the charge of violating 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2).

12. The Complainant has established a repeat violation of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2) by showing that Respondent was cited and formal judgment was granted against Respondent for an identical violation in Minnesota within three years of October 24, 1994.

13. Any Finding of Fact more properly termed a Conclusion, and any Conclusion more properly termed a Finding of Fact is hereby adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

1. Citation 1, Items 1 and 2, are affirmed.

2. Kenko, Inc., shall forthwith pay the assessed penalty of \$2,500 for the affirmed citations. Upon the penalty becoming a final order, if not paid within sixty days, the amount of the penalty increases to 125 percent of the penalty imposed. After that sixty days, the unpaid fine will accrue an additional penalty of ten percent per month compounded monthly until paid in full.

Dated: November ____, 1996.

PHYLLIS A. REHA
Administrative Law Judge

Reported: Tape Recorded
Transcript, One Volume
Jean A. Brennan
Brennan & Associates

MEMORANDUM

The evidence in the record demonstrates that, at the time of the inspection, the trench was improperly sloped. The trench was measured at 31.5 feet long, 6½ feet deep, approximately 32 inches wide at the bottom with a top width of 11½ - 12 feet. (Tr. pp.122-23). OSHA specifications require a slope of no

greater than 34 degrees, which would require the top width of this trench to be at least 22 feet wide. (Tr. p.123). The soil type here was Type C, based on the facts that (1) no soil testing was performed; (2) the soil had been previously disturbed; and (3) the soil's appearance was sandy or granular in nature. (Tr. p. 119). The proper slope for Type C soil is one and a half to one. (Tr. p. 119). There were no alternative protective devices such as benching, trench box, or shielding in place within the trench. (Tr. p. 124). Without these alternative protective devices, the trench must have a slope no greater than 34 degrees to avoid cave-ins. The purpose of this sloping standard is to protect exposed employees from caves-ins that pose the threat of severe injury or death. Photographs taken during the inspection clearly show the improper slope of this trench. As a result of the improperly sloped trench, St. Paul Water Utility employees were exposed to this hazard on October 24, 1994.

The testimony at the hearing and the photographs taken during the inspection clearly show that the spoil pile was situated closer than two feet from the edge of the trench. When the inspector arrived at the scene, the first thing he noticed was that the spoil pile was placed right at the edge of the trench. The spoil pile presents two potential hazards (1) when placed at the edge of the trench, the soil pile can spill into the trench and injure employees; and (2) the weight of the soil pile adds additional stress to the wall of the trench which could cause a cave-in. This situation was exacerbated by the vibrations from traffic passing by on the road. The purpose of this regulation is to prevent spills and cave-ins which could cause severe injury or death to an exposed employee. As a result of the precarious positioning of the spoil pile, St. Paul Water Utility employees were exposed to this hazard on October 24, 1994.

Respondent denied responsibility for the trench and asserted that none of its employees were exposed to the hazard. Raco excavated the trench and St. Paul Water Utility employees were in the trench to disconnect and reconnect water pipes. The Department argues that the Kenko-Raco relationship is fundamentally an employer-employee relationship when viewed by the economic realities of their dealings. The status of Respondent as general contractor is cited by the Department as imposing responsibility for the trench and employee safety on the jobsite.

The record is clear that Kenko employees were required to enter the trenches excavated by Raco. Witnesses to the normal process of preparing the excavation observed that Respondent's employees routinely entered trenches prepared by Raco to dig out the area around water mains. One of Respondent's employees was always working with Freeman, and this laborer was the one that went in the trench and did the hand digging. While Freeman, operating his backhoe, is able to dig out the majority of the trench with large equipment, the water main must be exposed by hand digging. Otherwise, the pipes would be damaged.

When Mr. Bastyr arrived on the scene, the water main had already been dug out by hand, as evidenced by the fact that the utility workers were doing the hookup. Since the St. Paul Water Utility workers did not expose the water pipe, either Freeman or one of Respondent's employees dug out the water main. The testimony of the usual practice engaged in by Kenko, covering a period of months between numerous job sites, is sufficient to demonstrate by a preponderance of the evidence that at least one Kenko employee was exposed to the hazard while uncovering the water pipe. That work cannot be performed from outside the trench.

Respondent relies upon the fact that Bastyr did not observe any Kenko employees in the trench to assert that Complainant cannot prove employees were exposed to the hazard created by an unsafe trench. As discussed above, the record shows that Kenko employees ordinarily performed the work that required them to be in the trench and that work had been performed. In addition, the OSHA standard for multi-employer work sites does not require that employees be in the trench during the inspection to support a citation. Rather, employees need only have access to the hazard to support a citation. Flint Engineering & Construction Co., 1993 OSHD & 29,923, at 40,853 (OSHRC 1992)(ladder in trench sufficient to show access). To support such a citation, the cited employer must control the area and be responsible for its maintenance. *Id.* Where those elements are present, the employees exposed to the hazard need not be the cited employer's employees. Classic Homes Div. of Elite, Inc., 1995 OSHD & 30,658 (ALJ decision filed December 16, 1994). The evidence in the record demonstrates by a preponderance of the evidence that at least one of Respondent's employees was exposed to the hazard. The control and responsibility issues will be discussed below.

To determine if a person is an independent contractor or an employee under Federal OSHA case law, the relationship is measured by the "economic realities test." See Secretary v. Griffin & Brand of McAllen, Inc., 1978 OSHD ¶ 22, 829, at 27,599 (OSHRC 1978). The primary questions to be resolved are:

(1) whom do the workers consider their employer; (2) who pays the worker's wages; and (3) who has the responsibility to control the workers.

Id. at 27,600.

Other factors that relate to the analysis are:

(1) does the alleged employer have the power to control the workers; (2) does the alleged employer have the power to hire, fire, or modify the employment condition of workers; (3) does the workers' ability to increase their income depend upon efficiency

rather than initiative, judgment, and foresight; and (4) how are the workers' wages established.

Id. at 27,601.

Raco's contract with Respondent specified that Raco (1) would be paid an hourly wage by Respondent; (2) agreed to perform in accordance with Respondent's schedule; (3) agreed to abide by any changes Respondent might require of his work; and, (4) indemnified his work against any claims or damages for bodily injury, sickness, disease, or death resulting from the performance of the subcontract. The contract did not specify what excavation work Raco was to do other than identifying the job site.

Respondent directed Freeman's work and inspected his trenches. Neither Freeman nor Raco were included on the subcontractors list submitted by Respondent to the city engineer. No sublet form for Raco or Mr. Freeman was submitted to the city engineer. Both the city engineer and the St. Paul Water Utility representative assumed that Freeman was an employee of Respondent, because his work was supervised, scheduled, and inspected by Respondent's employees. Applying the "economic realities" test, Freeman is closer to an employee than a subcontractor. The impact of this finding is minimal, however, since the normal practice for excavating trenches did not require Freeman to enter the trench, and Respondent is properly cited as the employer on the worksite under other grounds.

On a multi-employer job site, general contractors are liable for safety violations where the general contractor has control of the worksite or creates the hazard. Flint, at 40,852. Raco created the hazard. Even assuming that Raco cannot be considered an employee, Respondent can be cited if Kenko has control of the worksite. Respondent argues that it could not be responsible for the worksite because Kenko could not be expected to know of the hazard through the exercise of reasonable diligence. The OSHA standard for excavations states:

Daily inspections of excavations . . . shall be made by a competent person for evidence of a situation that could result in possible cave-ins . . . [a]n inspection shall be conducted by the competent person prior to the start of work . . . [t]hese inspections are only required when employee exposure can be reasonably anticipated.

29 C.F.R. § 1926.651(k)(1) (1993).

While Respondent claims daily inspections of job sites were performed, no records of such inspections were kept. Neither the St. Paul Water Utility representative nor the city engineer ever saw Respondent engage in any type of safety inspection of Freeman's work, even though Raco performed most of the excavations on this large project. Freeman was not a competent person.

Respondent employed a competent person who possessed knowledge of trench safety and the authority to halt dangerous exposures anywhere on the project. Respondent employed several superintendents and foremen who possessed the equivalent knowledge and authority of the competent person. Had any of these competent persons inspected the trench at Fairmont and St. Albans, the trench slope would have been adjusted or a safety device employed prior to allowing the Kenko worker into the trench to expose the water pipe or allowing St. Paul Water Utility workers in the trench to perform the pipe work. The presence of both groups of employees in the trench is sufficient to demonstrate that Respondent failed to exercise its responsibility to control the worksite.

Bastyr based his decision to cite Respondent on the fact that Respondent was (1) the general contractor for site control; (2) Respondent employed the competent person at the job site; and (3) Freeman was not a competent person, and therefore needed to have his trenches checked before any employees could enter the trench. The contract agreement between the City of St. Paul and Respondent included the following safety specifications: (1) Contractor [Kenko] shall follow OSHA standards for . . . trenching; (2) Contractor shall be responsible for the execution throughout the life of the trench; (3) Contractor shall have a duly authorized competent person on site; and (4) Employees shall be protected against cave-ins by adequate protective systems. Exhibit 4.

. The subcontract agreement between Raco and Respondent makes no mention of shifting responsibility for trench safety to Raco. This subcontract did give Respondent the right to terminate Raco's contract if it did not perform according to Respondent's directions. Respondent maintained supervisory control over Freeman's work on the job site and acted in a supervisory capacity by directing him as to where and when to dig trenches according to their project schedule. The evidence shows that Respondent provided Freeman with the same safety training and protection devices it provided for its own employees.

Respondent maintained control over safety of the entire worksite based on (1) its contract obligations to the City of St. Paul which cannot be abrogated by subcontracts; (2) its performance of safety inspections; (3) its employment of competent persons; (4) its provision of safety training and safety apparatus; and (5) its ability to abate the hazardous situations created by subcontractors at a given job site. While there is no evidence showing that Respondent had actual knowledge of the hazard at this job site, Respondent had a duty to cause a competent person to inspect each trench that was part of the Project prior to allowing any employee to enter any trench. Respondent failed to meet this duty on October 24, 1995.

Citing Respondent for violations 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2) is proper unless Respondent can show that it should not be cited because of its good faith efforts to abate the hazard or because it lacked the ability to discover the hazard, even with the exercise of reasonable diligence.

Respondents' project was a large one, encompassing many city blocks. Actual job sites changed as the project proceeded. Respondent's duty is not to watch over the trench minute by minute, but to ascertain that a trench is safe before workers initially enter the trench.

Respondent did provide safety training and a trench box for Mr. Freeman's use at trenches and on previous occasions had required Freeman to use the box. Several frequent visitors to Respondent's worksites were aware that Freeman was not using proper sloping techniques or alternative safety devices. Respondent has the authority under its contract with Raco, and the obligation under its contract with the City, to exercise control over the worksite. Had Respondent carried out even cursory inspections, these noncompliant items would have been known to Respondent. Respondent, through the exercise of due diligence, would have known that Freeman was not following OSHA standards in digging access trenches.

Respondent had adequate notice of where trenches were being dug at any given time and actually gave the orders to dig. Respondent knew of its responsibility to have a competent person inspect each trench prior to entry. The St. Paul Water Utility representative communicated the safety problems she observed with the Raco trenches to Freeman and to Respondent. Her best approximation of Raco's excavations were that 3 or 4 out of 5 were improperly sloped, with employees exposed. The St. Paul Water Utility representative estimates having had 10 - 15 discussions with Freeman and Enerson regarding unsafe trench conditions during the summer and fall of 1994 Respondent knew that Freeman had a propensity to dig unsafe trenches and therefore had a heightened duty to inspect every trench he dug. Respondent was correctly cited for violation of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2).

Respondent was aware that its direct employees consistently entered trenches dug by Raco. As discussed above, OSHA case law allows that not only actual exposure but access by employees to trenching hazards is a citable violation. There was a ladder in the cited trench, making it accessible to anyone who wanted to enter it.

The Citation Rating Guide (CRG) is the standard guide used by all investigators throughout the state of Minnesota and is applicable to general industry rules on construction in Minnesota. Bastyr used the CRG to determine the severity level of both citations imposed on Respondent. The severity levels for citations range from A through F. Mr. Bastyr rated the violations discovered at the trench located at the intersection of Fairmont and St. Albans streets at a level F. The CRG levels are based on the statistical probability of certain types of injuries arising from a specific hazard. The CRG rates exposure to trenching hazards at a level F because most of the accidents that occur in trenching result in either death or serious injury. The photographic evidence is clear that loose soil was piled directly above the location where employees were working. The

size of the pile was sufficient to bury the workers in the trench. Had a collapse occurred, there was no one outside the trench to render aid or go for help. The citations imposed in this case were correctly determined to be level F, or serious violations of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2).

- Respondent argues that the Department must prove that the type of hazard is identical in the former violations to demonstrate repeat violations in this matter. A *prima facie* case of a repeat violation is established when the same specific standard is violated. Edward Joy Co., 1993 OSHD & 29,938 (OSHRC 1993). Otherwise, the violations must be shown to be substantially similar. *Id.* The prior violations are for the same standard and no evidence has been introduced to show that the violations are not substantially similar. The violations are repeat violations.

Complainant has established that Respondent had control of the job site and that both Respondent's employees and the employees of others had access to the hazard. Respondent previously violated 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(j)(2) within the last 3 years. Respondent committed repeat violations of those sections on October 24, 1994.

P.A.R.