BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

YATES CONSTRUCTION COMPANY, INC.,

RESPONDENT.

DOCKET NO. OSHANC 93-2967
OSHA INSPECTION NO. 122136021
CSHO ID NO. K0050

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 10th day of March, 1995 in the Conference Room in the office of the Safety and Health Review Board of North Carolina at 217 West Jones Street, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, and Hugh M. Wilson, Members of the North Carolina Safety and Health Review Board.

APPEARANCES

Linda Kimbell, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Kenneth R. Keller, of Carruthers & Roth, P.A., Greensboro, North Carolina for Respondent.

ISSUES PRESENTED

1. Do the evidence, the findings of fact and the conclusions of law support a finding that Respondent committed a serious violation of 29 CFR 1926.1053 (b)(1), the ladder standard, by failing to have the side rails of a ladder extend three feet above the upper landing surface of a trench?

2. Do the evidence, the findings of fact and the conclusions of law support a finding that Respondent committed a serious violation of 29 CFR 1926.652(a)(1), the trenching standard, by failing to have the sides of a trench sloped at an angle no steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal) as is required by 29 CFR 1926.652(b)(1)(i)?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1926.1053 (b)(1) which provides "that when portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet above the upper landing surface to which the ladder is used to gain access "

2. 29 CFR 1926.652(a)(1) which provides that each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with several options one of which is to slope the sides of the excavation. Exceptions to this requirement are excavations that are made entirely in stable rock or are less than 5 feet in depth <u>and</u> an examination by a competent person provides no indication of a potential cave-in.

3. 29 CFR 1926.652(b)(1)(i) which requires that if the sloping option is chosen then the sides of the excavation must be sloped so that it is no steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal). The regulations further provide that if the soil type is type "A" or type "B", then a steeper slope is

allowed but if the soil type is type "C", then it must be sloped no steeper than one and one-half horizontal to one vertical.

4. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ...".

Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review Board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(9).

4. The employer (Respondent) Yates Construction Company, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

5. On July 21, 1993, Compliance Officer Walter D. Kissick observed an excavation and pursuant to the National Emphasis program initiated an inspection of Respondent's worksite located in Greensboro, North Carolina.

6. As a result of that inspection , Complainant on October 4, 1993 issued citations for three serious violations which were contained in Citation No. 1 and three nonserious violations which were contained in Citation No. 2. Total penalties in the amount of $2,750.00 were assessed for the serious violations and no penalties were assessed for the nonserious violations. The abatement date for Citation No. 1 serious violations was October 12, 1993 and the abatement date for the Citation No. 2 nonserious violations was October 14, 1993.

7. The Respondent timely exercised its right to contest the violations and penalties (N.C. Gen. Stat §§95-129, 95-137). The notice of contest was timely filed with the Safety and Health Review Board of North Carolina on October 20, 1993.

8. The Safety and Health Review Board of North Carolina (Review Board) assumed jurisdiction over the issues in contest. (N.C. Gen. Stat § 95-135).

9. The Respondent's Statement of Employer's/Respondent's Position was filed on October 25, 1993 contesting the violation, proposed penalties and abatement dates for Item 1a, 1b and 2 of Citation No. 1 and Items 1, 2 and 3 of Citation No. 2.

10. A hearing was scheduled and held on February 15, 1994 before the Honorable Carroll D. Tuttle. At the hearing the Respondent made a motion to withdraw its notice of contest to Citation No. 2, Items 1, 2 and 3 and said motion was allowed.

11. On July 15, 1994, Officer Tuttle filed an Order in this matter affirming serious Citation Number One, Items 1a and 2 and dismissing Citation Number One, Item 1b.

12. The Respondent timely filed an appeal with the Review Board on August 4, 1994 objecting to and excepting to the Order of the hearing examiner upholding Citation Number one, Items 1a and 2 as serious violations and objecting to certain enumerated findings of fact and conclusions of law.

13. The Respondent filed a brief with the Review Board on November 21, 1994 and the Complainant filed its brief with the Review Board on December 21, 1994.

14. On March 10, 1995, the issues on appeal were heard by the full Review Board.

Findings of Fact with respect to the violation of the trenching standard 29 CFR 1926.652 (a)(1).

15. The excavation was oval in shape with the west wall of the trench 7 feet six inches deep and the east wall deeper. (T p 15).

16. The excavation was 18 feet 6 inches wide at the top and 7 feet wide at the bottom. (T p 16).

17. A slope of one and one-half horizontal to one vertical for this excavation which was 7 feet six inches deep and 7 feet wide at the bottom would result in a width at the top of 29 feet six inches. (Calculations made by Board Members by applying mathematical knowledge known to Board Members to the facts in this paragraph).

18. The excavation was sloped at an angle steeper than one and one-half horizontal to one vertical. (T pp 18, 72 & 76).

19. The excavation was not shored and there were no trench boxes in use in the excavation. (T p 15).

20. The soil was classified as type "C" based upon samples from the spoil pile using a thumb penetration test and ribbon test. A water test confirmed the findings of the first tests that the soil was classified as type "C". (T pp 16-17).

21. The hazard created by digging the excavation in type "C" soil without proper sloping or shoring or use of a trench box is that the sides of the excavation could cave-in onto the workers in the trench. (T p 21).

22. The hazard of the improperly sloped excavation created the possibility of an accident. (T p 21, LL 9-10).

23. The substantial probable result of the sides of the excavation caving-in would be fractures, a serious injury or death. (T p 21, 24).

24. Respondent's employees were exposed to the hazard in that they were observed entering the excavation and observed inside the excavation during the inspection. (T pp 21-22).

25. Respondent's employees were also exposed to the hazard on the Friday previous to the inspection in that they entered the excavation for the purpose of installing a plug on the end of the pipe. (T p 22).

26. Respondents employees were also exposed to the hazard on the Tuesday previous to the inspection in that one of the employees, Mr. Steele entered the pipe to get a water sample. (T p 22).

27. Respondent knew of the condition of the excavation in that its superintendent, Mr. Church observed the excavation, knew it was classified as type "C" soil, and knew that it was not sloped to one and one-half horizontal to one vertical but determined on his own that it was safe to go into the excavation. (T pp 76-78).

28. The Respondent employs approximately 200 employees. (T p 12).

29. The Respondent had a written safety program which was contained in its handbook which was issued to all of its employees. (T pp 38-39).

30. The Respondent had two competent persons on site who were qualified to classify types of soil. (T p 55).

31. The Respondent received a serious violation of the Occupational Safety & Health Act in February of 1991. (T p 25).

32. The penalty calculation was in accordance with the Field Operations Manual and adjustments were given to Respondent based upon size, good faith, history and gravity of the violation. The Respondent's size, (200 employees) entitles it to a penalty reduction of 20%. The Respondent's written safety program entitles it to an

additional 25% reduction for good faith (T pp 38-39). The previous violation allows no reduction for history. The severity factor was rated as "high" based on the assessment that if an accident occurred death or permanent injury could result and the probability was rated as "lesser" because the company attempted to slope the sides of the excavation somewhat. The "high/lesser" rating results in a gravity based penalty of $3,500.00. Applying the total of 45% reduction to the gravity based penalty of $3,500.00 give a final assessed penalty of $1,925.00 for the violation of 29 CFR 1926.652(a)(1). (T pp 23-25).

33. Hearing Examiner Tuttle reduced the final penalty as assessed by the Commissioner for this violation of 29 CFR 1926.652(a)(1) from $1,925.00 to $1,000.00.

34. Hearing Examiner Tuttle made no findings of fact to support the further reduction of the penalty.

35. The record is devoid of any evidence justifying this further reduction in penalty.

Findings of fact with respect to the violation of the ladder standard, 29 CFR 1926.1053(b)(1) .

36. At the time of the inspection a ten foot long ladder was sitting with its base on the bottom of the seven foot six inch deep excavation and the top of its side rails were below the top of the excavation. (T pp 35-37).

37. The ladder was not secured to the side walls of the excavation. (T pp 40, 83).

38. The ten foot ladder when placed in a vertical position would be two feet above the top of the excavation but would still be below the three foot that the standard requires. (T p 81).

39. The ladder slipped down the walls of the trench while an employee was climbing down the ladder into the excavation. (T p 83).

39. The hazard associated with the failure to have the ladder extend 3 foot above the top of the excavation is that an employee could fall to the lower level or could disturb the walls of the excavation causing a cave-in. (T pp 36-37).

40. The hazard created the possibility of an accident. (T p 37, LL 1-8, T p 41, LL 10-11).

41. The substantial probable result of the accident would be fractures which is a serious injury. (T p 37).

42. Employees were exposed to the hazard in that employees entered and exited the excavation by climbing down and up the ladder and there was no other means of ingress or egress from the excavation. (T p 36-37).

43. The Respondent had knowledge that the ladder did not extend three feet above the top of the landing in that the ladder was readily visible to Respondent's supervisory personnel on site. (T p 38).

44. The penalty calculation was in accordance with the Field Operations Manual and adjustments were given to Respondent based upon size, good faith, history and gravity of the violation. The respondent was given a credit of 20% for size, the maximum of 25% for good faith, but was not given any credit for history because of prior violations. (See finding of fact # 32 for more detail on the application of the penalty adjustment factors). The severity assessment was "low" and the probability assessment was "lesser" giving a gravity based penalty of $1,500. Applying a total of 45% reduction to the gravity based penalty of $1,500.00 give a final assessed penalty of $825.00 for the violation of 29 CFR 1926.1053(b)(1). (T p 41).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The Board has jurisdiction of this cause and the parties are properly before this Board.

3. The Commissioner has proved by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1926.652(a)(1) by failing to provide each employee in the excavation protection from cave-ins through the use of an adequate protective system designed in accordance with 29 CFR 1926.652(b) or 29 CFR 1926.652(c).

4. The Commissioner has proved by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1926.1053(b)(1) by failing to provide ladders that extend at least three feet above the surface level of the excavation.

5. The Commissioner has proved by the greater weight of the evidence that the $1,925.00 penalty assessed for the violation of 29 CFR 1926.652(a)(1) was calculated according to the Field Operations Manual and is therefore fair, reasonable in amount and assessed equitably and uniformly.

6. The Respondent has not carried its burden of proof to present strong and persuasive evidence to justify a further reduction of the $1,925.00 penalty assessed for the violation of 29 CFR 1926.652(a)(1) and the Hearing Examiner made no findings specifying the factors upon which he based the further reduction of the penalty to $1000.00.

7. The Commissioner has proved by the greater weight of the evidence that the $825.00 penalty assessed for the violation of 29 CFR 1926.1053(b)(1) was calculated according to the Field Operations Manual and is therefore fair, reasonable in amount and assessed equitably and uniformly.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schloss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The Board follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." Rule .0514(a) of the Rules of Procedure of the Safety & Health Review Board of North Carolina, revised February 3, 1992, amended effective April 1, 1993. OSHA enforcement proceedings are civil in nature, rather than penal, and the applicable burden of proof is the ordinary burden of proof for civil actions, the preponderance of the evidence. Brooks v. Daniel Construction Company, 2 NCOSHD 299 (RB 1981); Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

I. THE VIOLATION OF THE TRENCHING STANDARD, 29 CFR 1926.652(a).

In order to prove that the Respondent committed a serious violation of a specific standard the Commissioner of Labor must prove by a preponderance of the evidence the following elements:

1. A hazard existed;

2. employees were exposed;

3. the hazard created the possibility of an accident;

4. the substantial probability of an accident would be death or serious physical injury and

5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniels, supra) of the condition or conduct that created the hazard.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered five above. See, Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

The trenching standard 29 CFR 1926.652 requires that employees in excavations that are not dug entirely in solid rock or are five feet or more in depth must be protected by an adequate protective system which can be proper sloping of the sides of the excavation, proper shoring of the sides of the excavation or the use of a trench box. Both sides agreed that the excavation was greater than five feet in depth and that the excavation was dug in Class "C" soil. Evidence was presented by both sides that the excavation was not shored and that trench boxes were not used. If was admitted by both Officer Kissick and Superintendent Church that the regulations required that the sides of an excavation dug in Class "C" soil be sloped as a angle of one and one-half horizontal to one vertical. (T p 76). It is uncontroverted that the excavation was not properly sloped as is required by the regulations.

The Commissioner is required to prove each and every element of a violation by a preponderance of the evidence. If the commissioner fails to meet its burden of proof on any one of the above elements then the violation cannot be sustained. Compliance Safety Officer Kissick testified that the hazard created by the improperly sloped trench was that the sides of the trench could cave in on the workers. The superintendent, Mr. Church, testified that if there had been a collapse of the trench he did not feel that it would cause serious injury or death. The Hearing Examiner heard the testimony of both and gave greater credence to the testimony of Officer Kissick and the Board sees no reason to disturb that finding which is based on "substantial evidence". The testimony of a Compliance Officer who is trained in the hazards associated with trenching violations is certainly relevent evidence that a reasonable person would accept as adequate to support the conclusion that the walls of the improperly shored excavation could cave in on the workers.

Officer Kissick presented uncontradicted testimony illustrated with photographs that two employees were in the excavation at the time of the inspection so the Commissioner has met his burden of proof that there was employee exposure.

Officer Kissick also testified that the condition of the trench dug in the Class "C" soil created the hazard that it could possibly cave-in onto the workers in the trench. This proves the possibility of an accident. Under McWhirter, in proving the possibility of an accident, the Commissioner must only show that an accident could happen and not that an accident is probable.

> Where violation of a regulation renders an accident resulting in death or serious injury possible, however, even if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation. When human life or limb is at stake, any violation of a regulation is "serious".

Brooks v. McWhirter, 2 NCOSH 115, at 127-128, 303 NC 573 (Supreme Court, 1981), quoting with approval, California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986, at 988 (9th Cir. 1975). Superintendent Church knew that the standard required that the "Class C" soil be sloped at one and one-half but looked at the excavation and did not see anything that posed a danger. (T pp 77-78). He guessed at the probability of an accident

occurring and decided not to obey the regulation, which is exactly what McWhirter prohibits. Again, the hearing examiner heard the testimony of both and gave greater credence to the testimony of Officer Kissick and the Board sees no reason to disturb that finding. Again, this finding is based on the testimony of a trained compliance officer which is "substantial evidence".

The testimony of Officer Kissick indicates that the most likely injury that would result form a cave-in would be fractures or death (T-p. 21, LL 9-14). In discussing why he gave the violation a "High" severity rating, he stated that he felt that permanent injury or death could occur if an accident happened. (T p 24). These statements support a finding that the substantially probable result of the sides of the excavation caving-in could be serious injury or death. There was testimony by Superintendent Church that he didn't think that anyone was in danger but again the Hearing Examiner heard the testimony of both and gave greater credence to the testimony of Officer Kissick and the Board sees no reason to disturb that finding. This finding, also, is based on the testimony of a trained compliance officer and is "substantial evidence".

Superintendent Church had been trained as a "competent" person to identify the different types of soil. He did not dispute that the soil was classified as type "C" and he knew that type "C" soil should be sloped at an angle no steeper than a ratio of one and one-half horizontal to one vertical (34 degrees from the horizontal). He also knew that the trench was deeper than five feet and that it required sloping at 34 degrees measured from the horizontal. He stated that he thought that it was safe enough even though it was not sloped at the proper angle. When someone knows the standard and consciously decides to ignore the standard based on his own assessment that the conditions are safe enough, our Court of Appeals has held that a "willful" violation can be upheld. Commissioner v. Associated Mechanical Contractors, Inc., Ct. of Appeals File No. 9410SC362 (filed February 21, 1995), OSHANC No. 90-1794. This issue was not raised by the parties, however, and is therefore not decided here. Superintendent Church was certainly knowledgeable of the conditions of the trench that gave rise to the citation and this knowledge can be attributed to the Respondent. Brooks v. Schloss Outdoor Advertising Co., 2 NCOSH 552, at 565 (RB 1985). The Commissioner has proved by a preponderance of the evidence all five elements that he must sustain to prove a serious violation of the trenching standard, 29 CFR 1926.652(a).

II. THE REDUCTION OF THE PENALTY FOR THE VIOLATION OF 29 CFR 1926.652(a) FROM $1, 925.00 TO $1,000.00.

N.C.G.S. § 95-138(a) requires that "The report of the hearing examiner and the report, decision, or determination of the Board on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner." (emphasis added) Hearing Examiner Tuttle in his order specified the standards that were used by the compliance officer but did not indicate what specific standards resulted in Hearing Examiner Tuttle's reduction of the penalty. It is well settled law that the Hearing Examiner has discretion to review the proposed penalty of the Commissioner and that he or she is to do a de novo review which is subject to an abuse of discretion standard on review. Brooks v. Household Building Systems, Inc., 3 NCOSH 836 (RB 1991). "Before such a reduction is permitted, evidence must be documented to support it as there must be evidence elicited during the hearing on which a Hearing Examiner may justify changing the penalty proposed by the Department of Labor." Id. at 840. This "evidence must be 'strong and persuasive in order to result in a further reduction of the penalty'". Id. at 841 quoting Brooks v. Southmet Recycling Corporation,1 NCOSHD 942, at 944 (1985).

The burden of proof is on the Commissioner of Labor "to show that the proposed penalty is fair, reasonable in amount, and assessed equitably and uniformly. The burden then shifts to the Respondent to show why he should be treated exceptionally. Failure of Respondent to carry its burden usually results in affirmation of the penalty. (citations omitted) . . .The Respondent can present as mitigating factors evidence concerning business size, history, financial incapacity, good faith efforts, and gravity of the violations." Brooks v. Southmet Recycling Corporation,1 NCOSHD 942, at 943 (1985).

The only evidence of any mitigating factors presented by Respondent in the record was in the closing argument of Respondent's counsel in which he objected to the high severity rating assigned to the violation of 29 CFR 1926.652(a). Hearing Examiner Tuttle in his finding of fact number 20 based the high severity on the likelihood of death or seriously bodily injury if a cave-in were to occur. He therefore did not reduce the penalty on the basis

of the severity rating being too high. "An abuse of discretion standard requires that the discretion be plausibly based on the evidence presented before the Hearing Examiner." Brooks v. Household Building Systems, Inc., 3 NCOSH 836, at 840 (RB 1991). No other evidence is presented to justify the reduction of the gravity based penalty and the Respondent has failed to meet its burden of proof justifying a further reduction in a penalty that has been calculated in accordance with the Field Operations Manual. This issue was not appealed by either party and we have addressed it on our own motion pursuant to the mandate of N.C.G.S. § 95-138(a) that the decision of the Board "shall specify the standards applied in determining the reduction . . . of the penalty assessed by the Commissioner."

III. THE VIOLATION OF THE LADDER STANDARD, 29 CFR 1926.1053(b)(1).

The same five elements that are listed above must be proven by a preponderance of the evidence to sustain a serious violation of the ladder standard. Again, the burden of proof for the commissioner is a preponderance of the evidence. See the discussion above for the violation of the trenching standard.

Officer Kissick testified that the ladder was the only means of exit from the excavation and that the hazard created by the ladder not extending three feet above the landing surface of the excavation was first that employees could fall when trying to climb out of the excavation and more seriously disturb the walls of the excavation and cause a cave-in. Officer Kissick observed and took photographs of two employees in the excavation which shows employee exposure. In addition, employees told Officer Kissick that they had been in the excavation the week previous to the inspection to cap off the pipe.

The possibility of an accident is shown by Officer Kissick's testimony that the employees "could slip and fall while they were climbing and fall and strike--and be hurt in the trench by falling on something or falling onto the dirt." (T-p. 37, LL 1-3). He also testified that the walls could cave-in while an employee was climbing out of the excavation. (T-p. 37, LL 3-8). He also testified that he gave the ladder violation a "Lesser" probability assessment meaning that he felt that"it was unlikely to happen but it could". (T p 41, LL 10-11). Under McWhirter, in proving the possibility of an accident, the Commissioner must only show that an accident could happen and not that an accident is probable.

Officer Kissick testified that the most likely result if an accident occurred in a fall from a ladder would be fractures which is a serious injury. (T p 37, LL 18-20). "The Review Board has consistently found theoretical or actual falls sufficient to sustain a serious violation, and broken bones are routinely found to be serious physical harm. See, Brooks v. U.S. Steel Erectors, OSHANC 78-396 (RB 19810; Brooks v. Clear-Day, inc., OSHANC 82-952 (RB 1984)." Brooks v. International Minerals & Chemical Corporation, 3 NCOSH 393 (RB 1989).

Employer knowledge of the violative condition is imputed to the Employer through Superintendent Church who was present when two of his employees were using the ladder. (T p 38, LL 10-16). In addition, actual knowledge of the ladder requirement was proven by a paragraph in the Employer's handbook which is given to all of its employees and which was introduced into evidence. "Number 3 of their Rules and Regulations states:

> The ladder must extend past the ground level, thirty-six inches past the ground level so that there is something to hold onto when climbing out.

T p 39, LL 15-21). The ladder was approximately two feet below the top of the trench and there was an employee sitting on the ladder near the bottom of the trench when the officer inspected the site. Superintendent Church was present and observed his own men on the ladder. This meets the requirement that there be employer knowledge of the violative condition.

There was conflicting testimony by Superintendent Church that the ladder was a safe means of ingress and egress from the excavation (T p 81). He testified that the partial sloping of the top of the trench constituted a ramp which when combined with the ladder met the requirements of the standard. Although this is a creative assertion, the Hearing Examiner did not assign it much credence and neither does the Board. Superintendent Church also gave his opinion that if an employee had fallen off the ladder, the fall would not have caused him any serious injury or death. Again, the Hearing Examiner gave greater credibility to the testimony of Officer Kissick and the

Board is not inclined to disturb that finding. These findings are based on the testimony of a trained compliance officer and is "substantial evidence". The Commissioner of Labor has met his burden of proving by a preponderance of evidence each of the five elements required to prove a serious violation of the ladder standard, 29 CFR 1926.1053(b)(1).

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's July 15, 1994 Order in this cause be, and hereby is, **AFFIRMED** in all parts except it is hereby **REVERSED** insofar as it reduces the penalty for the violation of 29 CFR 1926.652(a)(1), and the Respondent is ordered to pay the $2,750.00 in penalties.

This the 31st day of July, 1995.

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ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

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HUGH M. WILSON, MEMBER