UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SJ LOUIS CONSTRUCTION OF TEXAS LTD, Respondent.	DOCKET NO. 16-1220

Appearances:

Lindsay A. Wofford, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

John P. Dibiasi, Esq. of Lewis, Dibiasi, Zaita & Higgins, Saddle River, New Jersey
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

As he was driving along a public roadway, Compliance Safety and Health Officer Matthew Hoover noticed an open excavation at the intersection of Cypress Creek Bend Drive & Tuckerton Road in Cypress, Texas, which he stopped to inspect pursuant to Complainant's National Emphasis Program on trenching. (Tr. 37). When he arrived at Respondent's worksite, he observed Rubin Calzada, Respondent's foreman, standing at the edge of the excavation and looking down upon two employees, who were installing cathode wires to previously installed water mains. Those wires prevent the creation of corrosive environments for the pipe. (Tr. 61, 190). Based on CSHO Hoover's observations, he concluded that Respondent committed three violations of the trenching and excavation standards found at Subpart P. These violations included a failure to provide proper

ingress/egress from the trench and failure to provide adequate means of protection against cave-ins. *See* Citation and Notification of Penalty.

Complainant issued a Citation and Notification of Penalty, alleging three separate violations of the Occupational Safety and Health Act. *Id.* Respondent filed a timely notice of contest, arguing that both the means of egress and the walls of the trench were compliant with the cited standards. This brought the matter before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. Prior to trial, Complainant withdrew Citation 1, Item 2, leaving only two citation items for the Court's review. (Tr. 19–20). With Citation 1, Item 2 thus withdrawn, the total penalty proposed by Complainant is $45,100.

This matter was originally assigned to Judge John Schumacher, who is no longer with the Commission. On December 15, 2017, the case was re-assigned, and a trial was held on June 22, 2018 in Houston, Texas. Two witnesses testified at trial: (1) CSHO Matthew Hoover, and (2) Lucus Menebroker, Respondent's Vice President and Area Manager. Both parties submitted post-trial briefs for the Court's consideration.

Jurisdiction & Stipulations

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 18–19). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties also stipulated to other factual matters, which were read into the record. (Tr. 18–19).

Factual Background

Respondent is a large underground utilities contractor. On the day of CSHO Hoover's inspection, one of Respondent's crews was in the process of installing cathode wires to a section of water main that it had previously installed as part of a larger project for the West Harris County Regional Water Authority. (Tr. 61, 166–67). As noted earlier, CSHO Hoover observed two of Respondent's employees working in the bottom of a trench that had no immediately visible signs of protection installed and appeared to be lacking an adequate means of ingress/egress. (Tr. 37, 42; Ex. C-1 at 1 to 3). Calzada directed the employees to exit the trench after CSHO Hoover arrived. (Tr. 93; Ex. C-1 at 3).

Calzada told CSHO Hoover he opted not to use the available trench box because certain structural pins for the box did not fit or match up correctly. (Tr. 62). Instead, Calzada opted to use the benching method memorialized in an engineer-approved plan for this project. (Stip. No. 8; Tr. 65–66).[1] The engineer-approved plan provided two options for its implementation:

> Option I The Contractor can use Slope as shown in the Option I section of the specification. Applicable slopes may be obtained by *either straight cut or benched method*. Vertical cuts for the benched method shall not exceed four (4) feet. Easement restrictions may limit the use of this option. See Drawing Option I.
>
> Option II The Contractor may use a Trench Shield as shown in the Option II section of this specification. Requirements set forth in in this Option shall include curricular trench shield(s) and or manhole boxes. All slopes above trench shield(s) shall conform to the guidelines set forth in Option I.

(Ex. R-8 at 8) (emphasis added). This set of options is similar to the way Subpart P provides employers the option to utilize sloping/benching or to use physical implements, such as shoring, to protect against cave-ins. (Ex. R-8). *See generally* 29 C.F.R. § 1926.652. Because no functional shoring was available, Calzada opted to use Option I. (Tr. 62).

1. Respondent did not provide CSHO Hoover with a copy of the engineering plan until after the inspection concluded and Hoover had returned to his office. (Tr. 64–65).

According to CSHO Hoover, Calzada told him that they had benched and sloped the excavation to a horizontal-vertical (H/V) ratio of one to four, which more or less aligns with CSHO Hoover's estimate of the height of the benches versus their width.[2] (Tr. 63). Calzada also told CSHO Hoover that he did not take any measurements of the benching or sloping and that the job was supposed to be a quick in-and-out operation, lasting approximately 15 minutes. (Tr. 63). Based on his measurements, CSHO Hoover determined Respondent's trench was not in compliance. The trench itself measured 20-feet long, 12-feet wide across at the top, and was approximately 7 feet deep.[3] (Tr. 47, 52–53, 75; Ex. C-11). As illustrated in Exhibit C-1, the trench also had benches along either side of the excavation that started roughly half-way up the wall, thus measuring approximately 3 to 3.5 feet in height. (Tr. 49; Ex. C-1 at 1). According to Hoover, the bench running along the right-hand side of the excavation (indicated by an "R" on C-1) was roughly two-feet wide, though it did have a substantial portion of the bench missing roughly half-way down the length of the trench.[4] (Tr. 83; Ex. C-1 at 1). The left-hand side had a bench of sorts; however, as indicated by CSHO Hoover, the bench varied in width throughout the length of the trench and was never more than one-foot wide. (Tr. 54; Ex. C-1 at 1). Further, according to Hoover, the left-side bench wall slope measured 60 degrees, and the sloped wall opposite the excavator measured 50 degrees. (Tr. 49, 57; Ex. C-11 at 4, 8, 12 and 13). CSHO Hoover did not measure the slope of the wall beneath the excavator because he did not feel safe performing the measurement. (Tr. 50–51).

2. CSHO Hoover testified the slope was 4:1, but later clarified he was using the ratio of rise over run, or vertical to horizontal. (Tr. 63). The Court has expressed the ratio of horizontal to vertical, which is the way it is expressed in R-8 and Subpart P.

3. CSHO Hoover's initial measurement of 8 feet was off by approximately one foot because he forgot to account for the angle of the trench rod, which he used to measure the trench. (Tr. 75).

4. The Court will continue to refer to the sides of the trench in this manner; however, for clarification, the Court notes the labels "right" and "left" are based on an individual looking lengthwise down the trench to the location of the excavator, which is also noted on Ex. C-1 at 1.

In addition to the alleged slope-related deficiencies, CSHO Hoover also determined the trench did not have an adequate means of ingress/egress. (Tr. 94). After arriving at the site, CSHO Hoover observed two employees exit from the trench at a point adjacent to the wall where the excavator was parked. (Ex. C-1 at 3). To exit the trench, the employees walked toward the excavator and began walking up the sloped portion of that wall. (Tr. 93). Then, they turned to the right wall of the trench and crawled onto the bench while using the trench wall as a handhold. (Tr. 94; Ex. C-1 at 3). CSHO Hoover determined this was a violation based on the impediment posed by the excavator and the roughly three-and-a-half-foot step they had to take onto and off the bench in order to fully exit the trench. (Tr. 94; Ex. C-1 at 3).

After the inspection, CSHO Hoover proposed, and Complainant approved, the issuance of a Citation and Notification of Penalty, alleging three separate violations of the Act. As noted above, Complainant withdrew Citation 1, Item 2, which leaves the two citation items discussed below.

Discussion

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were more than 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees.
>
> On or about March 3, 2016, near the intersection of Cypress Creek Bend Dr. and Tuckerton Rd., where employees were exposed to fall hazards when entering and exiting the eight foot deep excavation without utilizing a stairway, ladder, ramp, or other safe means of egress.

Citation and Notification of Penalty at 6.

The Standard Applied and Was Violated

Respondent concedes that 1926.651(c)(2) applied to the trench at issue. *See* Resp't Br. at 11. The primary issue with respect to this alleged violation is whether Respondent installed or

otherwise constructed a safe means of ingress/egress from the trench. Based on the evidence introduced by the only witness that personally observed the trench and the manner in which Respondent's employees exited from it, the Court finds Respondent failed to ensure a safe means of ingress/egress from the trench. The cited standard requires a ladder, stairway, ramp, or other safe means of egress. Because there was no ladder or stairway, the question remains as to whether Respondent provided a ramp or other safe means of egress. It did neither.

First, Respondent contends the exit path taken by Respondent's employees was, in fact, a 'ramp' as defined by Subpart P. *See* 29 C.F.R. § 1926.651(c)(2). A ramp "means an inclined walking or working surface that is used to gain access from one point from another, and is constructed from earth or from structural materials . . . ." *Id.* Whatever Respondent prefers to call the path Respondent's employees crawled up to exit the trench, it is surely not a ramp. To exit the trench, the employees first moved up the slope towards the side of the trench occupied by the excavator. (Tr. 93–94; Ex. C-1 at 3). Just a couple of feet up the slope, the employees then turned to their right to step up onto the bench on the right-hand side of the trench. (*Id.*). From there, the employees used their hands to push or pull themselves up the remaining three-plus foot wall to exit. (*Id.*). This "pathway" as Menebroker referred to it, is little more than an afterthought and certainly not an intentional surface designed to facilitate access from one point to another. (Tr. 197–98). Contrary to Respondent's assertion, the standard does not "merely" require a ramp, but one that was clearly designed as such and provides a safe means of egress. Respondent's employees used multiple surfaces and means to climb out of the trench, none of which qualify, either individually or in tandem, as a ramp.

Nor, for that matter, was the pathway used by Respondent's employees a safe means of egress, as the phrase is employed under the cited standard. As observed by CSHO Hoover, the

employees exited in the direction of the excavator, which, as depicted in Exhibit C-1, was parked at the far edge of the trench. (Ex. C-1 at 3). Respondent's own trench safety policy states, "No spoil or equipment shall be permitted nearer than 2 feet from the edge of the excavation." (Ex. R-8 at 9). As the photographic evidence illustrates, however, the excavator was parked at the precipice of the trench's far edge. (Ex. C-1 at 3). Thus, not only were additional loads imposed on that portion of the trench wall, but any reasonable and prompt means of escape were blocked by the excavator. *See, e.g.,* 29 C.F.R. § 1926.651(j)(2) (requiring material and equipment to be placed at least 2 feet from edge of excavation). *See Degen Excavating, Inc.*, 22 BNA OSHC 1904 (No. 08-1271, 2009) (ALJ) ("While Robey and Maxwell may believe that Maxwell had no trouble exiting the trench, the photo demonstrates this was more likely due to Maxwell's dexterity than the suitability of the means of exit. Indeed, in the event of a collapse, it is very possible the bank Maxwell was required to climb could have been adversely affected.").

By way of comparison, the Court reviewed the maximum allowable distances between the steps of a ladder, which is an acceptable (and explicitly provided) means of providing safe egress under the standard. The maximum allowable distance between ladder rungs (10 to 14 inches) is less than half of the vertical distance Respondent's employees had to climb in order to exit the trench. *See* 29 C.F.R. §§ 1926.1053(a)(3)(i); *see also* 29 C.F.R. § 1926.1051(a) ("A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided."). Further complicating matters was the fact that the trench exhibited signs of sloughing and failure. Though Menebroker attempted to characterize the area of failure as an intentional "notch" used to facilitate ingress/egress, his characterization is rejected as not credible for three reasons: (1) the employees did not use the alleged "notch" when they actually exited the trench;

(2) Menebroker did not personally observe the trench or the conditions at the worksite; and (3) his testimony appeared to be post-citation speculation as to a possible explanation for the collapsed portion of the bench. (Tr. 196, 219–220; Ex. C-1, p.1). The Court finds there was no safe means of egress at the time of the inspection. The requirements of the standard were violated.

Respondent's Employees Were Exposed to the Hazard

To establish exposure under Commission precedent, the Secretary must show Respondent's employees were actually exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). *See Oberdorfer Industries, Inc.*, 20 BNA OSHC 1321 ("The zone of danger is determined by the hazards presented by the violative condition that presents the danger to employees which the standard is designed to prevent."). The photographs show Respondent's employees in the trench, then actually using an unsafe means to exit the trench, thereby exposing them to potential slip and fall hazards, as well as potential cave-in hazards imposed by the excavator. (Ex. C-1 at 3). Thus, Complainant established employee exposure.

Respondent Had Knowledge of the Violation

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a

supervisor is, or should be, aware of the noncomplying conduct of a subordinate, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC,* 623 F.2d 155, 158 (10th Cir. 1980).

As with the previous element, Respondent's knowledge of the violative conditions is not in serious dispute. Calzada, Respondent's foreman, was standing at the edge of the trench watching them work in the violative trench. Because Calzada was their supervisor, his knowledge is properly imputed to Respondent. Accordingly, Complainant established actual employer knowledge of the violation.

The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

CSHO Hoover testified the lack of proper egress from the trench exposed Respondent's employees to slip and fall hazards that could lead to broken bones and contusions. (Tr. 100). Further, as discussed in more detail below, Respondent's employees were exposed to crushing hazards imposed by an improperly protected trench, thereby heightening the hazards imposed by the lack of safe and prompt exit. Whether due to falling into the trench or being crushed by a collapsing trench without adequate egress, Respondent's employees were exposed to the

possibility of serious injuries up to, and including, death. Accordingly, the violation was properly characterized as serious.

Citation 2, Item 1

> Complainant alleged a repeat violation of the Act in Citation 1, Item 1 as follows:
>
> 29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(b) or (c).
>
> On or about March 3, 2016, near the intersection of Cypress Creek Bend Dr. and Tuckerton Rd., where employees were exposed to crushed-by hazards without being protected when working in an excavation that was 8 feet in depth that had no protective system.
>
> **S.J. LOUIS CONSTRUCTION OF TEXAS WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD, WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 316045335, CITATION NUMBER 2, ITEM NUMBER 1 AND WAS AFFIRMED AS A FINAL ORDER ON NOVEMBER 8, 2012, WITH A FINAL ABATEMENT DATE OF JANUARY 8, 2013, WITH RESPECT A WORKPLACE LOCATED AT 860 W. AIRPORT FRWY, HURST, TX 46054.**

Citation and Notification of Penalty at 6.

The Standard Applies and Was Violated

Respondent was cited for violating 29 C.F.R. § 1926.652(a)(1), which is the general requirement for protecting the occupants of a trench. As with the previous citation item, Respondent does not dispute the applicability of the standard. Instead, Respondent contends that it procured, implemented, and followed a plan approved by a registered professional engineer in accordance with 29 C.F.R. § 1926.652(b)(4). While Respondent may have procured a plan designed by a professional engineer, the Court finds that it failed to abide by the plan's terms.

In lieu of abiding by the standard-imposed requirements for trench protection, an employer has the option to hire a professional engineer to design a plan that will provide equivalent protection. *See* 29 C.F.R. § 1926.652(b)(4). Depending on the type of protection used, the plan

will be governed by 1926.652(b)(4) or (c)(4), which address sloping/benching and support systems, respectively. In this case, Respondent's plan appears to comply with 1926.652(b)(4). However, while the plan itself may be compliant, Respondent failed to adhere to its terms.

To recap, CSHO Hoover measured the slope of the walls as follows: (1) left wall, 60 degrees; and (3) wall opposite excavator, 50 degrees. CSHO Hoover did not measure the wall beneath the excavator because he felt there was no safe way to do so. None of these walls were compliant with the OSHA standard of 45 degrees (H:V ratio of 1:1) for Type B soil. *See* 29 C.F.R. § 1926.652(b)(1)(ii); *see also* Pt. 1926, Subpt. P, App. B. Thus, we compare the trench measurements with the allowable configurations under Respondent's engineer-approved plan.

Respondent's plan provides two options: sloping or shielding. (Ex. R-8). Because Calzada did not use the trench box, the only other available option is Option I – Sloping. (Ex. R-8 at 9). According to the general description of Option I, which governs the use of slope as a protective measure, "Applicable slopes may be obtained by *either straight cut or benched method*." (Ex. R-8 at 8) (emphasis added). This point is clarified on the following page, which includes a notation on the Option I diagram, stating, "The contractor may use the *benched method of slope*." (Ex. R-8 at 9) (emphasis added). In other words, benching is simply another method by which the required slope can be attained, which is consistent with the dictates and structure of 29 C.F.R. § 1926.652.

As an alternative to a pure application of either slope or benching, Option I allows for a single 3'6" vertical bench in "stiff clay."[5] (Ex. R-8 at 9). Nevertheless, the diagram still indicates the remaining portion of the wall above 3'6" must be sloped or benched according to the soil type and depth of the trench. (*Id.*). The parties stipulated the trench was dug in Type B soil and was less than 12-feet deep, which means that the maximum allowable slope, per the plan, was 3/4:1

5. Respondent's plan does not appear to define the term "stiff clay". CSHO Hoover stated that this can refer to Type B soil, though he did not agree that the trench at issue was dug in stiff clay. (Tr. 130–31).

(H/V), or 53 degrees. (Tr. 19 at Stip. No. 9; Ex. R-8 at 9). Complainant maintains that, even when applying the terms of Respondent's engineer plan, at least one wall of the excavation was not in compliance. The Court agrees.

Utilizing the somewhat vague parameters provided by the engineering plan, Respondent attempts to argue the trench complied with the plan by cherry-picking certain maximum and minimum measurements—including the single-bench option discussed above—and suggesting that compliance with those is all that is required. (Tr. 182–83). Menebroker testified that Respondent did not have to comply with the overall 53 degree slope requirement in the engineering plan. He asserted that the plan allowed multiple benches of 4 feet vertical for every 1 foot horizontal. *Id*; R-8, p. 8, Section 5.2.3; *see also* Resp't Br. at 17. What Respondent disregards is that those maximum and minimum measurements are restrictions within the overall scheme of a maximum 53 degree slope to protect against cave-ins. Put simply, if the required overall slope is not achieved, then the trench is not compliant with the plan irrespective of whether the benches comply with the mandatory minimum and maximum measurements for width and height.[6]

Because the left wall exceeded the maximum allowable slope provided in both the standard and the engineer-approved trench safety plan, as it was 60 degrees, the Court finds Respondent violated 29 C.F.R. § 1926.652(a)(1).

Respondent's Employees Were Exposed and Respondent Had Knowledge

As with Citation 1, Item 1, Respondent did not specifically dispute its employees were exposed to a hazard or that it had knowledge of the violation. Both of its employees were working in the bottom of the improperly protected trench for a period of roughly fifteen minutes. This

6. To further illustrate Respondent's loose reading of the engineer's excavation plan, multiple four-foot vertical to one-foot horizontal benches in a trench would result in an overall slope angle of approximately 75 degrees, or nearly vertical.

activity was observed and photographed by CSHO Hoover and clearly illustrates exposure to the cave-in hazard. (Ex. C-1 at 1 to 3). Second, Calzada, whom the Court has already found to be a supervisor, directly observed his employees working inside the non-compliant trench. As supervisor, his knowledge is properly imputed to Respondent. *See Mountain States Tel. & Tel. Co.*, 623 F.2d at 158. Accordingly, the Court finds Complainant established a *prima facie* violation of 29 C.F.R. § 1926.652(a)(1).

The Violation was Properly Characterized as Repeat

According to the Commission, "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeat violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). Though substantial similarity can be shown in a number of ways, Complainant can establish a *prima facie* case of similarity "by showing that the prior and present violations are for failure to comply with the same standard." *Id.* The Commission noted "it may be difficult for an employer to rebut" a showing of substantial similarity when the repeat designation is based on violations of the same specific standard "because in many instances the two violations must be substantially similar in nature to be violations of the same standard." *Id.* Respondent can rebut Complainant's *prima facie* case of substantial similarity by "evidence of the disparate conditions and hazards associated with these violations of the same standard." *Id.* However, this is more likely when a general, performance-based standard is at issue, such as 29 C.F.R. § 1926.28(a). *Id.* at nn. 9 & 10.

Complainant established Respondent had been previously cited for violating 29 C.F.R. § 1926.652(a)(1) on August 6, 2012, and the citation had become a final order of the Commission in November 2012. (Exs. C-6, C-7). In both instances Respondent's employees were exposed to

cave-in hazards while they were working inside a non-compliant trench. *Compare* Citation and Notification of Penalty *with* Ex. C-7. Although the relative size of the trenches was different, the basic facts surrounding the employees' exposure and the plan governing trench protection were substantially similar: (1) the CSHO found employees inside the trench; (2) the soil was Type B; (3) the trench was more than 5 feet deep; (4) the bench method of slope was incorrectly applied; and (5) a site-specific trench safety plan was utilized, albeit incorrectly. (Exs. C-7, C-8). The Court rejects Respondent's claim that the differences in depth—7 feet in the current trench; 10 feet in the previous citation—illustrate a "significant difference". Accordingly, the Court finds Complainant established that Citation 2, Item 1 was properly characterized as a repeat violation.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Several factors that are applicable to both Citation 1, Item 1, and Citation 2, Item 1, such as number of employees, good faith, and history. Therefore, the Court agrees with Complainant's findings, if not his overall penalty assessment. Respondent has approximately 500 employees,

which Complainant considers to be a large company and, therefore, ineligible for a size-based reduction in penalty. Complainant did not calculate any reduction for good faith attempts to comply based on Respondent's failure to timely provide CSHO Hoover with documentation of a safety and health program and evidence of training. Although Respondent provided such material at trial and post-inspection, the Court finds the general state of the trench and the labored interpretation of the trench safety program provided by Menebroker indicate a lack of attention to trench safety requirements. As such, the Court finds, albeit for different reasons, that Respondent did not exhibit good faith in this case. Further, Respondent has been cited for serious violations in the preceding five years, which Complainant used to increase the penalty by 10% under the guise of poor compliance history. The Court is not convinced that the existence of a single violation over the previous five years, without additional explanation or evidence, is sufficient for an increase in the proposed penalty. (Tr. 118–19; Ex. C-14). Further, Respondent's history has been adequately addressed through the "repeat" characterization of Citation 2, Item 1.

As to Citation 1, Item 1, specifically, Complainant proposed a gravity-based penalty of $6,000, which it increased by 10% for history, as discussed above. Regarding gravity, Complainant argued the violation presented a greater probability of occurring due to the *ad hoc* nature of the egress "ramp", the presence of sloughing on one of the benches, and the presence of the excavator at the edge of the trench where employees exited. (Tr. 42, 117). That said, he also determined that the likely injuries would be "reversible injuries with a limited period of disability" and assessed the severity of the violation as medium. (Tr. 117). The Court finds the foregoing adequately addresses both the conditions observed by CSHO Hoover and his assessment of the violation's gravity. Accordingly, the Court adopts Complainant's assessment of gravity and hereby imposes a penalty of $6,000 for Citation 1, Item 1.

As to Citation 2, Item 1, Complainant proposed a gravity-based penalty of $7,000. This assessment was premised on CSHO Hoover's determination that the violation was of high severity and greater probability. The Court agrees with both assessments. The two employees occupied a non-compliant trench, which was showing signs of failure, for approximately 15 minutes. (Tr. 63. In so doing, those employees were exposed to cave-in hazards, which can cause severe contusions, crushing injuries, and death. (Tr. 104). In addition, Complainant applied a multiplier of five to the original penalty based on Respondent's size and the repeat nature of the violation. Given that Respondent was cited for the exact same violation under substantially similar conditions, the Court finds that the multiplier imposes the necessary "pocketbook deterrence" and, hopefully, encourages "prospective compliance". *See Joel Yandell d/b/a Triple L Tower*, 18 BNA OSHC 1623 (No. 94-3080, 1999) (quoting *Bae v. Shalala*, 44 F.3d 489, 494 (7th Cir. 1995)). Based on the totality of the circumstances discussed above, the Court hereby assesses a penalty of $30,000.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED as a serious violation, and a penalty of $6,000 is ASSESSED; and
2. Citation 2, Item 1 is AFFIRMED as a repeat violation, and a penalty of $30,000 is ASSESSED.

/s/ Brian A. Duncan

Date: January 3, 2019
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission