United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. CENTRAL FLORIDA EQUIPMENT RENTALS, INC., Respondent.	OSHRC Docket No. 08-1656

ON BRIEFS:

John Shortall, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Vincent F. Vaccarella; Vincent F. Vaccarella, P.A., Fort Lauderdale, FL
For the Respondent

DECISION

Before: ATTWOOD, Chairman and MACDOUGALL, Commissioner.

BY THE COMMISSION:

Central Florida Equipment Rentals, Inc., is an employer located in Medley, Florida, which provides labor and equipment for road construction and repair, excavations, and trenching. Following a July 22, 2008 fatality at a Central Florida worksite—the Miami-Dade County Water and Sewer Treatment Facility located in Homestead, Florida—the Occupational Safety and Health Administration conducted an inspection. As a result of the inspection, OSHA issued a one-item citation to Central Florida alleging a serious violation of the Material Handling Equipment standard, 29 C.F.R. § 1926.602(a)(3)(i) (access roadways and grades), and proposing a penalty of $4,900. Administrative Law Judge Dennis L. Phillips affirmed the citation and assessed the proposed penalty. Central Florida's timely Petition for Discretionary Review was

granted, and both parties filed briefs on review. We affirm the citation and penalty, but for reasons other than those set forth in the judge's decision.[1]

BACKGROUND

Central Florida was engaged to raise the elevation of a berm that formed the edge of a water retention pond at the treatment facility. The berm included a 250-foot long, straight man-made strip running between the pond and the facility's boundary fence, and functioned as a wall to hold the water in the retention pond. The parties stipulate that the berm was between 7.4 and 9.6 feet above ground level, and that it was made of rock, sandy soil, and gravel, and lacked visible holes.

On the morning of July 22, 2008, Central Florida began working on the berm around the water retention pond. The parties stipulate that on this morning, Central Florida foreman John Villa walked the berm to perform a visual inspection. Villa testified that he observed the condition of the berm, measured it and checked for holes, and determined it was fairly level. He recorded his observations on Central Florida's "Berm Daily Safety Checklist," which the company's safety director instructed him to use at the start of each work day to identify any unsafe conditions on the berm.

Central Florida was to raise the berm's height by about six inches by adding fill material on top of the berm. To place the fill material, Villa, along with Central Florida's general superintendent Martin Holman and project manager Marcus Themes, decided to use a Caterpillar Model 725 Articulating Dump Truck ("CAT"), which is a six-wheel dump truck that the parties stipulate is 9.5 feet wide from wheel to wheel, weighs approximately 25 tons without any payload, and has a maximum weight capacity of 51 tons when fully loaded. Central Florida loaded the CAT with fill at one end of the berm and unloaded it before exiting the berm at the other end. Between trips, Central Florida used a bulldozer to spread out the fill and then a roller to compact the material. At the same time, the CAT made a circular loop around the pond and returned to the beginning of the berm, where it reloaded with fill and dumped it on the berm once again as the other vehicles exited at the other end. Prior to July 22, 2008, Central Florida had not

[1] We deny Central Florida's request for oral argument, as the record and briefs are sufficient to decide the case. *See MetWest, Inc.*, 22 BNA OSHC 1066, 1067 n.2 (No. 04-0594, 2007), *aff'd*, 560 F.3d 506 (D.C. Cir. 2009).

used the CAT on this particular berm. Later that day, while the CAT was traversing the berm, it fell into the pond. There were no witnesses to the accident, in which the operator was trapped inside the CAT and drowned.

DISCUSSION

I. Serious Citation 1, Item 1 (safe movement on access roadways and grades)

The Secretary alleges that Central Florida's use of the CAT on the berm violated § 1926.602(a)(3)(i),[2] which states:

> No employer shall move or cause to be moved construction equipment or vehicles upon any access roadway or grade unless the access roadway or grade is constructed and maintained to accommodate safely the movement of the equipment and vehicles involved.

The judge found that the Secretary proved a violation and rejected Central Florida's alleged affirmative defense that the standard is unconstitutionally vague regarding an employer's compliance obligations.[3] On review, Central Florida argues that in rejecting its vagueness argument, the judge erroneously relied on the testimony of witnesses unfamiliar with industry practice, which Central Florida claims is impermissible under relevant Eleventh Circuit precedent.[4] In response, the Secretary argues that the testimony of his witnesses, along with

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[2] Specifically, the citation alleged that on or about July 22, 2008, "an employee was exposed to a drowning hazard while operating a Caterpillar Model 725, Articulating Truck on top of unstable soil of a berm at the edge of a retention pond."

[3] To establish a violation of an OSHA standard, the Secretary must show that: (1) the standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the violative conditions; and (4) the employer had actual or constructive knowledge of the violative conditions (i.e., the employer either knew or, with the exercise of reasonable diligence should have known of the violative conditions). *Atl. Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). We agree with the judge's finding that the cited standard applies and note that Central Florida does not challenge the judge's finding that the Secretary established employee exposure to the cited condition.

[4] Because the worksite and company headquarters are in Florida, this decision may be appealed to the Eleventh Circuit. *See* Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(a) & (b); *Kerns Bros. Tree Serv.,* 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) ("Where it is probable that a decision will be appealed to a certain circuit, the Commission generally applies the law of that circuit."). We note that the Eleventh Circuit has adopted Fifth Circuit decisions issued before September 30, 1981, as its body of precedent. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*); *see also Fla. Mach. & Foundry, Inc. v. OS[]HRC*,

other evidence, is sufficient to establish that a "reasonably prudent employer" in the industry would have recognized that use of the CAT on the berm was hazardous, and that, in any event, that hazard was obvious.

A. Vagueness/Fair Notice

As a threshold matter, we note that the judge and the Secretary incorrectly frame Central Florida's vagueness argument in terms of whether the company was on notice that its use of the CAT on the berm posed a hazard. "[I]t is well settled that the Secretary need not prove the existence of a hazard each time a standard is enforced, unless the standard by its terms is operative only when a hazard has been established." *Am. Steel Works,* 9 BNA OSHC 1549, 1551 n.4 (No. 77-553, 1981). Most OSHA standards regulate a particular condition and, therefore, presume the existence of a hazard. *See* Mark A. Rothstein, *Occupational Safety and Health Law* § 5:24 (2016 ed.) ("Before promulgating a standard the Secretary is required to consider the need for each measure of safety and health protection. Therefore, the Secretary is not ordinarily required to prove the existence of a hazard each time a standard is enforced because the promulgation of a standard presupposes the existence of a hazard.") (and cases cited therein). In other words, the promulgation of such a standard means OSHA has established that the specified condition presents a hazard. *See, e.g., Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 835 (5th Cir. 1981) ("When the violative element is only a condition, hazard is presumed, and the Secretary need only show the existence of the violative condition and worker exposure to the condition." (citing *Cent. of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620 (5th Cir. 1978); *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081 (7th Cir. 1975); *Lee Way Motor Freight, Inc. v. Sec'y of Labor*, 511 F.2d 864, 869 (10th Cir. 1975)); *Kaspar Electroplating Corp*., 16 BNA OSHC 1517, 1523 (No. 90-2866, 1993). This contrasts with standards in which the presence of a hazard is an element in the text of the standard itself. *See, e.g.*, 29 C.F.R. § 1910.132(a) (requiring equipment such as PPE "wherever it is necessary by reason of hazards"). The provision at issue here, § 1926.602(a)(3)(i), is typical of most standards; it regulates a condition without setting the existence of a hazard as one of its prerequisite elements: "No employer shall move or cause to be moved construction equipment or vehicles upon any access roadway or grade *unless* the access

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693 F.2d 119 (11th Cir. 1982) (noting that Fifth Circuit decisions cited are precedential in the Eleventh Circuit).

roadway or grade is constructed and maintained to accommodate safely the movement of the equipment and vehicles involved." (Emphasis added.)

The provision's "unless" clause constitutes an exception to the prohibition against moving equipment on an access roadway. WEBSTER'S NEW COLLEGIATE DICTIONARY (1977) ("unless" means: "except on the condition that"). Accordingly, under well-established court and Commission precedent, it is Central Florida's burden to prove that the berm was "constructed and maintained to accommodate safely the movement of" the equipment. *U.S. v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (party claiming benefit of exception to statute's prohibition bears burden to prove entitlement to claimed exception); *Bardav, Inc*., 24 BNA OSHC 2105, 2107-08 (No. 10-1055, 2014) (noting that "party claiming the benefit of an exception bears the burden of proving that its case falls within that exception," and finding that the respondent did not satisfy that burden) (citation omitted); *StanBest, Inc*., 11 BNA OSHC 1222, 1226 (No. 76-4355, 1983) (rejecting the respondent's claim of entitlement to exception because of failure to show factual basis to support the claim). In these circumstances, for purposes of the Secretary's prima facie case with regard to noncompliance, he need only show that the CAT was used on an access roadway, which violates the standard's prohibition against doing so. Central Florida would then have to show that the berm was constructed and maintained to safely accommodate the CAT.

Therefore, the vagueness inquiry is not whether Central Florida knew there was a hazard, but whether it knew or had fair notice of what actions are required under the standard. *See, e.g., J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205-06 (No. 87-2059, 1993) (finding employer had actual notice that compliance with accident prevention program required under broadly-worded training provision would require "specific measures for detecting and correcting fall hazards").[5]

[5] The Commission has held, when a respondent argues that it lacked knowledge of its legal obligations under a standard because it was either vague or ambiguous, that it is immaterial whether the respondent knew its practice violated the standard; rather, it is sufficient that the respondent had fair notice of the standard's requirements and was aware of the physical conditions and practices that violate it. *See, e.g.*, *Brock v. Williams Enters. of Ga. Inc.*, 832 F.2d 567, 572 (11th Cir, 1987) (" '[t]he constitution does not require that employers be *actually* aware that the regulation is applicable to their conduct.' ") (citation omitted); *Froedtert Mem. Lutheran Hosp. Inc.*, 20 BNA OSHC 1500, 1509 (No. 97-1839, 2004) (rejecting hospital's defense of

We also note that there is no question that the cited provision is a "performance" standard. It identifies an objective—ensuring that an "access roadway or grade is constructed and maintained to accommodate safely the movement of the equipment and vehicles involved"—but does not specify the means for accomplishing it. § 1926.602(a)(3)(i). *See Siemens Energy & Automation Inc.*, 20 BNA OSHC 2196, 2198 (No. 00-1052, 2005) (describing press inspection program requirement as "a broad, performance-oriented standard" that "provides employers with a certain degree of discretion in determining what . . . is appropriate to ensure that its program meets the standard's stated objective."). Under Commission precedent, "because performance standards . . . do not identify specific obligations, they are interpreted in light of what is reasonable." *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007).

Central Florida argues that the Secretary must prove that the company's actions were unreasonable based on evidence of industry custom and practice. In support, the company cites Eleventh Circuit precedent requiring such evidence in cases involving generally-worded personal protective equipment standards that, in contrast to this case, *do not* presume the existence of a hazard. *See Farrens Tree Surgeons, Inc.,* 15 BNA OSHC 1793, 1794 (No. 90-998, 1992) (applying Eleventh Circuit doctrine to § 1910.132(a)) (citing *Fla. Mach. & Foundry v. OS[]HRC*, 693 F.2d 119 (11th Cir. 1982); *see also Cotter & Co.*, 598 F.2d 911, 913 (5th Cir. 1979) (same).[6] However, regardless of whether the cited standard is a performance standard that presumes a hazard, the Eleventh Circuit has recognized that industry custom and practice evidence is "irrelevant" when the employer has actual knowledge of its compliance obligations.[7]

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mistaken belief that it was not temporary workers' "employer" and therefore was not required to comply with vaccination requirement, explaining that "any misunderstanding of law would not be relevant to whether a violation is established, especially where the statute plainly states that it applies to any 'employer,' and case law interpreting the meaning of that term under the OSH Act predates the . . . citation.") (citations omitted).

[6] Fifth Circuit precedent applicable in the Eleventh Circuit has also expressed this concept as a requirement that the Secretary demonstrate that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize the hazard in question. *See, e.g.*, *Ryder Truck Lines v. Brennan*, 497 F.2d 230, 233-34 (5th Cir. 1974) (addressing § 1910.132(a)).

[7] Actual knowledge in the context of a vagueness defense is distinct from the employer knowledge element necessary to prove a prima facie violation of section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2). *Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1117 n.5 (No. 84-696, 1987).

Cotter, 598 F.2d at 914 (recognizing that " 'the problem of fair notice does not exist' " where an employer is shown to have actual knowledge of what is required) (citations omitted).

Here, we find that Central Florida actually knew of measures that it understood were needed to ensure the berm, which was adjacent to the pond, would safely accommodate the CAT. First, Villa admitted that the amount of clearance between the sides of the CAT and the edges of the berm is an important safety consideration; so he attempted to determine that clearance. Second, Villa admitted that the weight of the loaded CAT is an "important factor in determining whether a berm is strong enough to hold a load," and he had assumed that the berm could support the loaded CAT because of Central Florida's prior experience working around the area of a nearby berm. Accordingly, Central Florida had actual knowledge that before using the CAT on the berm, it had to determine (1) the clearance and (2) the load-bearing capacity of the berm relative to the combined weight of the CAT and its load, so that it could then assess whether the clearance and load-bearing capacity were adequate "to accommodate safely the movement of the equipment and vehicles involved." § 1926.602(a)(3)(i). *See Cotter*, 598 F.2d at 914. Thus, Central Florida's awareness that clearance and load-bearing capacity are important safety considerations establishes that it knew obtaining the information necessary to assess them was required by the standard. Consequently, Central Florida's notice argument fails.[8]

B. Noncompliance

In affirming the violation, the judge concluded that Central Florida failed to comply with § 1926.602(a)(3)(i) because it was both foreseeable and obvious that it would be unsafe to repeatedly drive "a vehicle the size and the weight of the CAT 725 on top of the berm . . . ." Central Florida argues that it complied with its obligations by making "observations regarding the work on the berm and its capability to hold larger equipment, measuring the berm to ensure

[8] Because we reject Central Florida's fair notice defense based on its acknowledgement that the berm's clearance and load-bearing capacity were necessary considerations in determining whether the CAT could safely be used on the berm, it is unnecessary for us to reach the question of whether the record establishes that this was industry practice. *Cotter*, 598 F.2d at 914. We note, however, that two witnesses familiar with the industry—Villa and Holman—testified that they considered the clearance, the equipment weight when loaded, and the berm's load-bearing capacity. Indeed Central Florida asserts on review that "consistent with industry standard and practice," Villa and Holman testified that they "visually inspected the berm, observed larger vehicles safely crossing it [and] measured the berm to ensure the CAT had safe clearance . . . ."

clearance, prior use of the CAT 725 on a narrower berm, instructi[ng] . . . the crew how to properly drive the vehicles across the berm, and the creation of the berm safety checklist." On review, Central Florida also argues that the Secretary failed to prove that a hazard existed—specifically, that "the Secretary failed to introduce any evidence that the berm had any defects, detectable by basic human senses, which could have caused it to collapse."

As discussed above, the cited standard presumes a hazard by prohibiting the employer from moving construction equipment on an access roadway "*unless*" the roadway "is constructed and maintained to accommodate safely" that equipment. § 1926.602(a)(3)(i) (emphasis added); *see Am. Steel Works,* 9 BNA OSHC at 1551 n.4. The performance measures Central Florida itself understood were necessary here—ascertaining the clearance and determining that the berm could support the CAT's weight—were required irrespective of whether the berm actually presented a hazard. *See Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 588 (D.C. Cir. 1985) (stating that "[t]he fact that the hazard which the regulation protects against" had not occurred at the employer's workplace "is no defense to the violation."); *Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776, 1780 n.6 (No. 90-0050, 1996) (consolidated) (rejecting argument that a violation for failure to provide training on trenching hazards is contingent on a finding that the trench was actually hazardous). Indeed, in order to establish a violation, it need not be proved that the accident here was caused by the employer's failure to take these measures. *See Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated) ("Determining whether the standard was violated is not dependent on the cause of an accident."), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003).

The Secretary contends that Central Florida failed to comply with the cited provision because it drove the CAT on the berm without determining whether it could safely accommodate the CAT's movement on it, including both clearance and load-bearing capacity. We agree, and find that Central Florida failed to comply with the requirements of the standard.

Clearance

To determine the relevant clearance, Central Florida needed to ascertain the width of both the berm and the CAT. The record shows that Villa measured the berm "between the [elevation] stakes that were on the top of the berm" and determined that it was 12 to 14 feet wide. However, photographs in evidence show that there were several sets of stakes on the berm and Villa did not specify whether he measured one set of stakes that yielded a measurement of 12 to 14 feet, or

measured all sets of stakes and determined that the narrowest was 12 feet and the widest was 14 feet. In contrast, the testimony of the Miami-Dade Police Department officer who investigated the accident was clear and specific—he testified that his fellow detective measured the berm and found that it was 10 feet 4 inches at the narrowest point and 14 feet 2 inches at the widest point.[9] We credit the officer's more definite testimony over Villa's vague explanation and find, as did the judge, that in at least one location the berm was 10 feet 4 inches wide.[10] *See Atl. Battery Co.,* 16 BNA OSHC 2131, 2185 (No. 90-1747, 1994) (concluding that company president's vague, generalized testimony was insufficient to rebut industrial hygienist's specific testimony); *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

As to the width of the CAT, the parties' joint pre-hearing statement stipulates that it is "9.5 feet from wheel to wheel."[11] Even if we were to construe Villa's testimony most favorably

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[9] The officer testified that in the area where the accident occurred, some of the width of the berm was lost as a result of the accident, but that the measurements he attested to were not in that area; rather, they were made in the area leading to the accident scene.

[10] Villa testified that the stakes, which were used to mark how high to add the fill, were "in a little bit from the top of the berm" by "approximately a foot." It is unclear from this description exactly where the stakes were positioned.

[11] Chairman Attwood notes that when Villa was asked at the hearing about the CAT's width and whether he measured it, he testified that it was "between eight and a half and nine feet wide." The judge inferred that by giving a range for the CAT's width "it is clear that Mr. Villa had no actual knowledge of the precise width" and was providing only a "rough estimate," and found that "Respondent did not know the exact width of the CAT." Chairman Attwood agrees with the judge and would conclude that, in addition to Central Florida's failures—discussed below—regarding the berm's load-bearing capacity, Central Florida failed to satisfy its burden to ascertain the clearance by determining the CAT's width. *See StanBest*, 11 BNA OSHC at 1226 (noting that "party claiming the benefit of an exception has the burden of proving that its claim comes within the exception"). With respect to the stipulated width, Chairman Attwood accepts the parties' agreed-upon measurement. However, in her view, the parties' after-the-fact stipulation as to the CAT's width has no bearing on the question whether, *before* driving the CAT on the berm, Villa *measured* the CAT in order to determine its width. Indeed, Central Florida raised no objection when the Secretary's counsel asked Villa whether he had measured the CAT.

to Central Florida—that he measured the berm at each set of stakes and found the narrowest set was 12 feet wide—and even if we were to credit Villa with having known the CAT's actual width of 9.5 feet, Villa overestimated the berm's narrowest point by 1 foot 8 inches and thus believed there were 15 inches of clearance per side when, in fact, there were only 5 inches per side. In short, Villa thought there was at least three times the amount of clearance than was actually present. Holman, relying on Villa's information, took no measurements himself. In sum, the CAT's width allowed for only 5 inches of clearance on either side of the berm, which was approximately 8 feet above ground level on one side and bordered a 21- to 60-foot deep pond on the other. Based on the record, we find that Central Florida failed to determine the clearance on either side of the CAT between it and the berm's edges.

Load-bearing capacity

Central Florida next argues that, "[h]aving observed the conditions at the project site, knowing the berm had been trammed by heavy machinery, and having seen a larger backhoe go across the berms," the company "had no issues with the weight[-]bearing capacity of the berm or the weight of the CAT." We find, however, that Central Florida lacked critical information when it concluded that the berm had the capacity to support the weight of the CAT.

Villa believed that the berm was sufficiently strong, but he did not know the CAT's weight when it was loaded in accordance with his instructions (2/3 to 3/4 full), or what weight would be too heavy for the berm to accommodate. He also mistakenly relied on Central Florida's experience from previous work on a different berm at the same facility to determine that the berm in question had the capacity to support the CAT. Specifically, Villa relied on his observations a few days before the accident when Central Florida used a CAT to build a berm

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Commissioner MacDougall notes that the Commission is to give preclusive effect to the parties' stipulation as to the width of the CAT; thus, Central Florida may have deemed it unnecessary to address or clarify Villa's testimony on this issue, and in her view no inference should be drawn from it. Stipulations of fact bind the court and parties. This is their very purpose. *See Christian Legal Soc. Chapter of the University of California, Hastings College of Law v. Martinez*, 561 U.S. 661, 677-8 (2010) ("[F]actual stipulations are 'formal concessions . . . that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission . . . is conclusive in the case.' "); *U.S. ex rel. Miller v. Bill Harbert Int'l. Constr., Inc.*, 608 F.3d 871, 898 (D.C. Cir. 2010) ("Once a stipulation of fact is made, the one party need offer no evidence to prove it and the other is not allowed to disprove it."). *See also* 9 *Wigmore on Evidence* § 2590 (Chadbourn rev. 1981) (discussing "vital feature" of stipulations).

from scratch elsewhere at the worksite "with no problems at all." He believed that the two berms were "basically the same," with no significant difference in width or soil composition. However, Central Florida's contract for the other berm required it to perform compaction tests after every vertical foot of fill was deposited to ensure that the fill was "compacted and wo[uld not] settle." In contrast, Central Florida did not build the berm at issue here and did not know if such tests had been conducted during its construction. Consequently, Villa's judgment at the outset regarding the berm's ability to support the CAT was based on his speculation that it was "basically the same" as the other berm.

Holman also believed that the berm was sufficiently strong, but his assessment was based on having seen that "it had been trammed with heavy machinery." At the same time, he acknowledged that he did not know whether moving multiple pieces of heavy equipment on the berm would have any negative effect on the berm's stability; yet he took no steps to find out if the berm's load-bearing capacity had been compromised. Under these circumstances, we find that Central Florida failed to obtain information needed to assess whether the berm was able to support the weight of the CAT.

In sum, we find that Central Florida failed to obtain the information necessary to determine that the berm was "constructed and maintained to accommodate safely the movement of the [CAT]." *Cf. Greenleaf Motors Express, Inc.*, 21 BNA OSHC 1872, 1875 (No. 03-1305, 2007), *aff'd*, 262 F. App'x 716 (6th Cir. 2008) (unpublished) (finding employer failed to make reasonable inquiries regarding the substances that were introduced into its tankers); *Concrete Constr*., *Co*., 12 BNA OSHC 1174, 1178 (No. 82-1210, 1985), *aff'd*, 986 F.2d 1164 (6th Cir. 1986) (finding that with a minimum of foresight and effort, employer could have discovered that its rigging arrangement and pipe-laying procedure left no room in which to maneuver the backhoe arm even assuming the accuracy of its own estimate of the height of the lines, the height reached by the backhoe arm, and its ability to maneuver the machine precisely within very narrow limits); *Bland Constr. Co.*, 15 BNA OSHC 1031, 1036 (No. 87-992, 1991) (holding that whatever an industry's practice is, its members "are required to take into account all available, factual information" relating to whether violative conditions "exist, or reasonably could exist, where work is being performed"). Accordingly, we affirm the judge's finding that Central Florida failed to comply with § 1926.602(a)(3)(i).

C. Knowledge

To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation. *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015). The judge found that Central Florida had both actual and constructive knowledge through foreman Villa. On review, Central Florida argues that the Secretary failed to establish knowledge because he did not demonstrate that the company failed to comply with "industry standard or custom." In response, the Secretary argues that Central Florida had both actual and constructive knowledge that operating the CAT on the berm posed a hazard and therefore, the judge "correctly found that 'a reasonable person familiar with the circumstances of the industry would have recognized that driving the CAT along the berm constituted a hazard.' " To satisfy his burden, the Secretary must show knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard. *Id.*; *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007). We find the evidence here demonstrates that Central Florida's supervisors had actual knowledge of the violative conditions.

The conditions that are the basis of the alleged violation are the failure to ascertain (1) the clearance between the CAT and the edges of the berm, and (2) the berm's load-bearing capacity relative to the CAT's weight. The berm in question was constructed of earthen material with an exposed edge above the adjacent retention pond, which posed a drowning risk. At certain locations on the berm, there were as few as 5 inches of clearance between the CAT and the drop down into the 21- to 60-foot-deep retention pond. In addition, Villa's visual inspection by walking the berm to check for any holes did not provide any meaningful information about the soil composition and whether the berm could withstand a vehicle with the size and weight of the CAT operating close to its edge. As discussed above, Villa acknowledged that he knew neither the CAT's unloaded or fully-loaded weight, the CAT's weight when loaded according to his instructions, nor what weight would be too heavy for the berm to accommodate. Likewise, Holman acknowledged that he did not know whether use of heavy equipment on a berm diminishes its load-bearing capacity. Under these circumstances, we have little difficulty concluding that Central Florida knew that it failed to obtain the information necessary to determine whether the berm could safely accommodate the CAT.

In a decision issued subsequent to the judge's decision in this case, the Eleventh Circuit addressed the Secretary's burden of proving knowledge in circumstances in which he seeks to establish that an employer had knowledge of a violation through the misconduct of a supervisor. *See ComTran Group, Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (11th Cir. 2013). In *ComTran*, the court held that " 'it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate' " because he acts on the employer's behalf as its agent, but where the Secretary seeks to establish an employer's knowledge based on a supervisor's own misconduct, he "must do more than merely point to the misconduct itself." *ComTran,* 722 F.3d at 1317 (quoting *Mountain States Tel. & Tel. Co. v. Occupational Safety & Health Review Comm'n,* 623 F.2d 155, 158 (10th Cir.1980)). According to the *ComTran* court, in such situations the employer is left unaware of the supervisor's misconduct so it "would be fundamentally unfair" to impute the supervisor's knowledge unless the Secretary met his prima facie burden by putting forth evidence independent of the misconduct. *ComTran*, 722 F.3d at 1317. The *ComTran* court's rationale is, figuratively speaking, that "[t]he supervisor acts as the 'eyes and ears' of the absent employer" but that the employer is "blind and deaf" when the misconduct is the supervisor's own. *Id.* We find the facts here distinguishable from those in *ComTran*.

In *ComTran*, the Secretary sought to impute the knowledge of a foreman's own misconduct to his employer. There the foreman, while digging in a trench to find a utilities conduit, ended up enlarging it to the extent that the trench and spoil pile became noncompliant with OSHA's trenching requirements. *Id*. at 1309 & fn.10, 11. There was no evidence that any other company official knew of the conditions at issue; just prior to the foreman's entry, the company's project manager had inspected the site, but at that point the excavation was in compliance with OSHA requirements.[12] *Id.* at 1309.

[12] Chair Attwood also notes that the supervisor at issue in *ComTran* represented company management at its lowest level, and that cases in other circuits requiring evidence showing the foreseeability of a supervisor's misconduct similarly involve the same type of first-level supervisor. *See Dana Container*, 25 BNA OSHC 1776, 1789-90 n.32 (Docket No. 09-1184, 2015) (and cases cited therein), *appeal docketed*, No. 16-1087 (7th Cir. Jan. 14, 2016).

Commissioner MacDougall notes that *ComTran* contains no discussion regarding the type of supervisor impacting the court's analysis or holding, and she would find that any attempt to distinguish *ComTran* from the facts of this case on that basis is misplaced.

In contrast, the record here shows that Villa discussed the berm project with general superintendent Holman—described by Villa as "the superintendent over all the foremen"—who in turn conferred with Central Florida's project manager, Themes, and they all agreed, in the words of Holman, "on how to perform the work and what equipment would be used," which included the CAT.[13] Holman was aware that they did not know if the use of heavy equipment diminished the berm's load-bearing capacity. There is no dispute that the decision to drive the CAT along the surface of the berm was not made by Villa in isolation but rather was presented in advance to Holman. Three separate managers agreed to the method and equipment used to perform the work; thus, it cannot be said that there is unforeseeable supervisory misconduct. Unlike *ComTran*, where the foreman's actions were unplanned, the work at issue here was planned and approved. *See Id.* at 1316. Accordingly, we find *ComTran* distinguishable, and conclude that Central Florida had actual knowledge. Therefore, we affirm the citation.

II. Characterization and Penalty

The judge characterized the violation as serious and assessed the Secretary's proposed penalty of $4,900. On review, the parties do not challenge the characterization or penalty, and we find no reason to disturb the judge's findings. *E.g.*, *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty when characterization and penalty are not in dispute). Accordingly, we affirm the citation as serious and assess the $4,900 proposed penalty.

ORDER

We affirm Serious Citation 1, Item 1, and assess a penalty of $4,900.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: July 26, 2016

[13] The County required a written proposal for the work, including a breakdown of all labor and equipment.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR
Complainant

v.

CENTRAL FLORIDA EQUIPMENT RENTALS, INC,
Respondent

OSHRC DOCKET NO. 08-1656

APPEARANCES:

Melanie R. Paul, Esquire
Office of the Solicitor
U.S. Department of Labor
61 Forysth Street, Room 7T10
Atlanta, Georgia 30303
For the Complainant.

Vincent F. Vaccarella, P.A.
Vincent F. Vaccarella, Esquire
Andrew S. Douglas, Esquire
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Aventura, Florida 33180
For the Respondent.

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On July 23-24, 2008, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of the work site of Central Florida Equipment Rentals, Inc. ("Respondent" or "CFER") in Homestead, Florida. The site was a man-made berm where, on July 22, 2008, a wheel mounted Caterpillar Model 725 Articulating Truck ("CAT"or "CAT 725") operator drowned after the truck fell into a retention pond located at the edge of the berm. As a result of the inspection, OSHA issued a citation to CFER for a serious

violation of section 5(a)(2) of the Act alleging a violation of the standard at 29 C.F.R. § 1926.602(a)(3)(i).[1] The Secretary proposed a penalty of $4,900 for the violation. The citation alleges that on or about July 22, 2008, "an employee was exposed to a drowning hazard while operating a Caterpillar Model 725, Articulating Truck on top of unstable soil of a berm at the edge of a retention pond." Respondent contested the citation.[2] The hearing in this matter was held from September 29 through 30, 2009, in Miami, Florida and this matter is ready for disposition.

Respondent's Post-Hearing Brief is Stricken as Untimely

Also before me is Respondent's Response to the Order to Show Cause why its post-hearing brief should not be stricken for being untimely. The Court's Notice of Hearing and Scheduling Order dated December 11, 2008 ordered that "Post-trial briefs must be submitted no later than 33 days after the date of the hearing transcript." At the conclusion of the trial in this case, the Court similarly instructed the parties that "Counsel will have up to 33 days from the

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[1]The standard states:

§ 1926.602 **Material handling equipment.**

(a) *Earthmoving equipment.*

* * *

(3) *Access roadways and grades.* (i) No employer shall move or cause to be moved construction equipment or vehicles upon any access roadway or grade unless the access roadway or grade is constructed and maintained to accommodate safely the movement of the equipment and vehicles involved.

[2]In a footnote appearing on page 1 of Complainant's post-hearing brief, the Secretary asserts that OSHA received Respondent's notice of contest more than 15 business days after Respondent received its citation and notice of penalty. OSHA issued the citation and notice of penalty on September 25, 2008. The Secretary asserts that Respondent received its citation on September 26, 2008 and OSHA received Respondent's notice of contest on October 21, 2008. The Secretary offered no evidence to support its assertion that Respondent received its citation and notice of penalty on September 26, 2008. The United States Postal Service Certified Mail Receipt addressed to CFER in the Court's possession shows that mail dated September 26, 2008 was delivered to CFER and signed for by "C Feria" on September 29, 2008. Based on the information before it, the Court finds that CFER timely filed its notice of contest within 15 business days.

date of the official court transcript to file posthearing briefs,..." (Tr. 408).[3] The official court transcript was dated October 16, 2009. The parties' simultaneous briefs were due on November 18, 2009. The Secretary's brief was timely filed. Respondent's post-hearing brief was not filed until November 24, 2009. Respondent did not then, or before, file a motion for an extension of time or a motion setting forth good cause for delay as required by Commission Rule of Procedure 74(c), which states "Untimely briefs will not be accepted unless accompanied by a motion setting forth good cause for the delay." 29 C.F.R. § 2200.74(c).

In her Reply to Respondent's Post-Hearing Brief, dated December 4, 2009, the Secretary essentially "moved to strike" Respondent's post-hearing brief as untimely.[4] The Secretary alleged that, because her post-hearing brief was timely, she suffered prejudice because Respondent had the benefit of having her post-hearing brief for six days before filing its own.[5] Accordingly, the Court issued an Order to Show Cause giving Respondent 15 days to show cause why its post-hearing brief should not be rejected as untimely.

In its Response to the Secretary's Reply to Central Florida's Post-Hearing Brief, Memorandum Demonstrating Good Cause for the Filing Date of Respondent's Post-Hearing Brief, and Alternative Motion for Extension of Time to File Post-Hearing Brief dated December 14, 2009 ("Response to Show Cause Order"), Respondent attests that it did not receive an electronic copy of the official court transcript until October 21, 2009 and that the "final" paper copy was not received until October 22, 2009.[6] Respondent says that it "relied upon the delivery of the official transcript on October 22, 2009 as the date of certification of the official transcript and calculated all deadlines based thereon." The Court's directives regarding when post-hearing

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[3]Transcript cites are cited as Tr., followed by the page number. Exhibits are cited as C-(number) for the Secretary and R-(number) for the employer. The Secretary's brief is cited as SOL Brief at (page).

[4]The Court views Complainant's Reply to Respondent's Post-Hearing Brief as including a Motion to Strike Respondent's post-hearing brief.

[5]The Court finds that the Secretary was prejudiced to the extent that Respondent had six additional days to prepare its brief.

[6]This date coincides with the date that the Court received its paper copy of the transcript.

briefs were due to be filed did not refer to the date of the transcript's delivery or receipt. The Court's orders used the date of the official court transcript as the benchmark from which the post-hearing brief due date was measured. The Court's directives were clear. Respondent's attempt to allude to confusion on its part is self-serving and rejected. The Reporter's Certification in the transcript is dated October 16, 2009. (Tr. 247, 410). CFER's Response to Show Cause Order made no persuasive argument to explain why it did not either file its post-hearing brief within 33 days of October 16, 2009 or request an extension of time before December 14,

Because of the possibility that Respondent's copy of the transcript contained a date other than October 16, 2009, on January 20, 2010 the Court ordered Respondent to submit the signed and dated copy of the Reporter's Certificate of its transcript. Respondent timely complied with the Court's order. As with the copy received by both the Court and the Secretary, Respondent's copy was dated October 16, 2009.

Having failed to articulate any persuasive reason why its post-hearing brief was not timely filed despite being given the opportunity to do so, the Court concludes that Respondent has failed to Show Cause why its post-hearing brief should not be stricken. Accordingly, the Secretary's Motion to Strike Respondent's Brief is GRANTED.[8]

The Court also notes that in Sections II and III of its Response to Show Cause Order, Respondent includes arguments responding to substantive portions of the Secretary's post-hearing brief that bear no relationship to the Order to Show Cause. In essence, Respondent is attempting to piggyback a reply brief to its Response to Show Cause Order. Having stricken its post-hearing brief, it would be inappropriate to allow Respondent to submit a reply brief through the "back door." At the hearing, the Court directed that the "parties also have an additional ten calendar days thereafter [from the date of the post-hearing briefs] to file reply briefs if the parties

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[7]Respondent's motion for an extension of time *nunc pro tunc* within which to file its post-hearing brief contained within its Response to Show Cause Order is DENIED.

[8]*See Norvelle v. City of Hobart*, 862 P.2d 82 (Okl. App. 1993)(appellate brief filed four days late stricken.); *T. Smith & Son, Inc.,* 1974 WL 4337, at *14 (No. 2240, 1974)(brief dates within discretion of the judge.), *Westway Motor Freight, Inc. et al.*, 1973 WL 4017, at *6 (Nos. 849 through 851 (consolidated), 1973)(striking post-hearing briefs "tend more to penalize the judge than the delinquent party.").

so desire." (Tr. 408). Ten calender days from the due date of its post-hearing brief was November 28, 2009. However, its Response to the Show Cause Order was not filed until December 14, 2009, more than two weeks after the date for filing a reply brief had passed. Accordingly, any representations or arguments in Sections II and III of Respondent's Response to Show Cause Order will not be addressed in this decision. *Alaska Trawl Fisheries Inc.,*15 BNA OSHC 1699, 1701, n.4 (Nos. 89-1017, 89-1192, 1992)(consolidated).

In striking its post-hearing brief and not considering any arguments responding to substantive portions of the Secretary's post-hearing brief contained within its Response to Order to Show Cause, the Court notes that Respondent's defenses to the citation were made clear in its pleadings, Supplemental Joint Pre-Hearing Statement, dated July 15, 2009 ("SJHS"), and at the hearing. Therefore, the decision in this case would not have been altered by acceptance of Respondent's Post Hearing brief or consideration of substantive arguments submitted by Respondent in its Response to Show Cause Order.

Background

On May 8, 2008, Respondent[9] entered into a subcontract no. HPA 756-S3 ("subcontract") with General Contractor Harry Pepper & Associates, Inc. ("Harry Pepper") to perform work required for the South District Wastewater Treatment Plant HLD Upgrade to 285 MGD, Temporary Office Facilities Contract No. S-825 ("Contract S-825", "project" or "job"). The work under the subcontract was to be performed at the Miami-Dade County Water and Sewer waste water treatment facility at 23300 Southwest 97th Avenue, Homestead, Florida. (Tr. 42, 89-91, 139, 177-178; G-23). The subcontract called for Respondent to be paid $2,350,000 for work satisfactorily performed. Pursuant to the subcontract, Respondent represented that it was responsible for investigating "the nature, locality, and site of the Work and the conditions, including subsurface and latent physical conditions at the site, under which the Work is to be performed. The Subcontractor enters into this subcontract on the basis of his own investigation and evaluation of all such matters and not in reliance upon any other opinions or representations." The subcontract also stated that Respondent "shall be responsible for and will prepare for

[9]CFER is a company that performs road construction or repair, excavations, trenching, and equipment rentals. (Answer ("Ans."), ¶ III; Tr. 117).

performance of all Subcontractor's Work, including without limitation thereto, the submission of shop drawings, samples, test, determination of all field dimensions associated or interfaced with its Work, determination of labor requirements, and the ordering of all equipment and materials as required to meet the CPM Schedule and the plans and specifications."[10] (Tr. 140, 155, 157; G-23, pp. 3-4). The subcontract further required Respondent to "take all reasonable safety precautions in the execution of its work and to comply with all federal safety regulations (including OSHA), ..." The subcontract also called for Respondent to "provide all necessary engineering, technical support, and field coordination as required for the proper execution of this agreement." (G-23, pp. 3-6, 13).

On June 24, 2008, the Miami-Dade County Water and Sewer Department ("County" or "Owner") issued a Request for Proposal No. 12 ("RFP") under Contract S-825 to Harry Pepper to provide labor and equipment to raise "the north berm of Ponds 1, 2 and 3 to an elevation of approximately 9.0."[11] The County required the proposal to include a breakdown of all labor and equipment. The work was to be performed on a time and material basis. (SJHS Nos. 1, 4; G-24). The berms were to be raised approximately six inches. (SJHS Nos. 1, 4; Tr. 178; G-24). To accomplish the job, Respondent's foreman, John Villa ("foreman" or "site supervisor"), decided that he would use a CAT to drive along the top of the berm and dump the fill.[12] (SJHS No. 9; Tr. 180-81). The CAT has an empty weight of approximately 49,075 pounds ("lbs.") and a fully loaded maximum weight capacity of 101,000 lbs. (SJHS Nos. 13-14; Tr. 124). Respondent's superintendent, Marty Holeman, agreed with the foreman's choice of equipment. (SJHS No. 9; Tr. 318). On the morning of July 22, 2008, Foreman Villa walked along the berms to "see" that there were no holes and that the ground was fairly level. (SJHS No. 16; Tr. 183-84).

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[10]The subcontract also called for Respondent to be responsible for "All testing required for the Subcontractor's work that is not provided or paid for by the Owner/Engineer." (G-23, p. 16). The subcontract identified Hazen & Sawyer Environmental Engineer & Scientists as the "Engineers". (G-23, p. 2).

[11]The RFP included a diagram that showed that the existing elevation of Pond 2's berm ranged at or above 8.2 feet. (SJHS No. 3; G-24, p.3).

[12]The CAT had not been used on the North Beam, Pond 2 prior to July 22, 2008. (SJHS No. 15; G-26, p. 4; Respondent's Answer to Interrogatory No. 5).

According to a decision by Respondent's site supervisor, after the CAT unloaded the fill on top of the berm, a bulldozer would drive over the berm to spread the fill while the CAT circled around the retention pond to bring the next load. (Tr. 46, 179-82). This would continue until the berms were raised to the required level. (Tr. 181). Finally, a roller would go over the berm to compact the soil. (SJHS No. 17; Tr. 181).

Neither the County nor Harry Pepper made any representations to Respondent regarding the condition of the berms, the composition of the soil, or whether the berm could support the weight of the CAT. (Tr. 94, 197, 322-23). CFER never asked anyone from either the County or Harry Pepper if they knew the carrying capacity of the berm or whether it was capable of supporting the weight of the CAT. (Tr. 94, 191, 199). Respondent assumed that the berm was capable of supporting the fully loaded CAT because of its prior experience working around the area of the berm. (Tr. 199).

On the afternoon of July 22, 2008, the north berm at pond no. 2 gave way while Respondent's employee, Tod William LaRoche, age 42, was operating the CAT on the berm. (SJHS Nos. 25-26; Tr. 35, 96; R-7, p. 1, G-25). There was very little clearance on either side of the CAT atop the berm. (Tr. 76). The berm gave way and the CAT fell into the retention pond which was 20-60 feet deep, drowning Mr. LaRoche. (SJHS Nos. 5, 28; Tr. 35, 49, 201). There were no eye witnesses to the accident. (Tr. 70). Detective Nichols of the Miami-Dade Police Department Traffic Homicide Division was the lead detective at the scene. (Tr. 35). He concluded that the CAT fell into the pond while still carrying a load of fill. (Tr. 77). He also concluded that the accident occurred when the berm gave way under the weight of the CAT. (Tr. 45-47, 49, 65).

Stipulated Facts

The parties represented and stipulated to the following facts:

1. On July 22, 2008, employees working for Central Florida Equipment Rentals, Inc. were working at the Miami-Dade County Water Treatment Facility located at 23300 SW 97th Avenue, Cutler Bay, Florida for the purpose of raising the berm around the water retention ponds by 6 inches.

2. The berm is owned by Miami-Dade County.

3. The berm around the retention ponds ranged from approximately 7.4- 9.6 feet high.

4. Respondent was a subcontractor hired by the General Contractor, Harry Pepper & Associates to raise the level of the berm by about 6 inches.

5. Tod LaRoche, an equipment operator, employed by Respondent, died from drowning and blunt force trauma when the CAT 725 he was operating fell into the water, trapping Mr. La Roche.

6. On the day of the accident, John Villa worked as a Foreman for Respondent. Mr. Villa supervised four employees, including Tod LaRoche, at the job site.

7. As foreman, Mr. Villa is responsible for the safety practices at the job site.

8. Mr. Villa discussed the job with his supervisor, the Superintendent, Martin Holeman.

9. Mr. Villa made the decision to use the CAT 725 on the berm to perform the job and Mr. Holeman agreed.

10. Mr. Holeman also discussed the job and how to perform the work with Project Manager Marcus Themes, and a consensus was reached on how to perform the work and what equipment would be used, including the CAT 725 Articulating Dump Truck.

11. Stakes were placed 1 foot from the edge of the berm by Respondents' surveyors to indicate to the employees how much fill to add to the berm.

12. The CAT 725 is 9.5 feet from wheel to wheel.

13. The CAT 725 weighs approximately 49,075 lbs. without any load.

14. According the CAT 725 equipment specifications, the CAT 725 has a maximum weight capacity of 101,082 1bs. when fully loaded.

15. Prior to July 22, 2008, Respondent had not used the CAT 725 on the berm of Pond 2 where the accident occurred.

16. On the morning of the accident, Mr. Villa walked along the berm to see if there were any holes in the soil and to ensure its composition.

17. On the morning of the accident, Mr. Villa instructed his employees to go one at a time in succession with the heavy equipment on the berm: First, the CAT 725 driven by Mr. La Roche would unload the material; Second, the bulldozer operated by Santiago Salazar would level the material; Third, an earth roller compactor operated by Saturnino Polon would compact the soil.

18. Mr. Villa advised the employees to be careful on the berm because the level of the berm was not the same in every spot.

19. Tod LaRoche was an experienced heavy equipment operator and had worked for Respondent for many years.

20. Mr. Villa told the employees not to fill the CAT 725 to capacity.

21. Respondent did not weigh each load.

22. Respondent's employees followed the instructions of Mr. Villa. Prior to the accident, the employees had made one trip of dumping and spreading the soil using the truck and bulldozer on Pond 2.

23. Mr. Villa was not present at the worksite when the accident occurred.

24. No one witnessed the berm collapse; employees only saw the CAT 725 after it was in the water.

25. Mr. LaRoche was operating the CAT 725, which was the only equipment on the berm at the time it gave way and the CAT 725 fell into the pond.

26. The accident occurred at approximately 1:30 P.M. on July 22, 2008.

27. At the time of the accident, the weather was sunny and clear.

28. The CAT 725 was submerged under water until police rescue was able to recover the truck on July 23, 2008.

29. The depth of the retention ponds range from 21 feet at the edges to 50 - 60 feet in the middle.

30. The Secretary cited Respondent alleging a violation of 29 C.F.R. § 1926.602(a)(3)(i), which stated that "The employer moved or caused to be moved construction equipment or vehicles upon access roadways or grades that were not constructed to accommodate safely the movement of the equipment and vehicles involved."

(SJHS, pp. 12-14).

The Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of

reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The relevant testimony as to the four elements is set out below.

The Relevant Testimony

1. Detective Brett Nichols

At the time of the accident, Brett Nichols was a detective in the Miami-Dade Police Department Traffic Homicide Division.[13] In his seven years in traffic homicide, he conducted approximately 300 investigations involving fatalities, including 5-6 investigations that involved vehicle accidents on worksites. (Tr. 34). During the course of his traffic fatality investigations, he looked for causation of the accident and who was at fault. On the afternoon of July 22, 2008, Detective Nichols received a call that a commercial vehicle had fallen into a retention pond at the Miami-Dade Water and Sewer Treatment Facility.[14] (Tr. 34-35). When he arrived at the site, there were divers, fire rescue, and uniformed police already at the scene.[15] (Tr. 35). He was the lead investigator for the case. Detectives Ralph Hernandez, Zubair Khan and Bertrand, along with Sergeant Greenwall, supported Detective Nichols at the accident scene. Miami-Dade police investigators A. Utset and H. McPherson also prepared a FTCR for the accident. While at the accident scene, Detective Nichols coordinated with the divers and a tow truck company to remove the CAT and Mr. LaRoche from the water. Mr. LaRoche was trapped inside the driver's cab portion of the CAT and under water. Three large tow trucks were hooked up to the CAT to remove it from the water. A fence along the north side of the berm was removed to allow access for the tow truck cables. Divers took the cables and attached them to the CAT under water. The CAT, with Mr. LaRoche still seated inside the driver's cab, was removed from the water at about 4:30 a.m., July 23, 2008. (Tr. 39-40, 57-58; G-13-14, 16). Detective Nichols inspected the CAT

[13]Detective Nichols has since retired. (Tr. 31-32, 61).

[14]The Florida Traffic Crash Report ("FTCR"), dated July 22, 2008, indicated that the CAT was traveling an estimated 5 miles per hour ("mph"). (R-7, pp.1, 3).

[15]The FTCR indicated that the accident occurred at 1:35 p.m., July 22, 2008. (R-7, p.1).

after it was recovered from the retention pond. He did not observe any obvious mechanical or electrical problems with the CAT.[16] (Tr. 41).

The FTCR stated that:

> VEHICLE 1 [CAT] WAS TRAVELING WEST BOUND ON A DIRT ROAD ON THE NORTHSIDE [SIC] OF THE LAKE, WHEN THE DIRT GAVE WAY CAUSING VEHICLE 1 TO FALL INTO THE LAKE. FIRE RESCUE RESPONDED AND WAS UNSUCCESSFUL IN THEIR ATTEMPTS TO REMOVE THE DRIVER. TRAFFIC HOMICIDE #1722 NICHOLS RESPONDED AND TOOK OVER SCENE.

(R-7, p.3). The FTCR's diagram showed the CAT was proceeding due west between a fence and a lake when it then entered the lake at a relatively slight angle veering a bit in a south western direction. (R-7, p.4). The FTCR indicated that the CAT driver had no known physical defects, was not drinking or using drugs, and was wearing a seat belt/shoulder harness at the time of the accident. (R-7, p. 1). The FTCR reported that "No Improper Driver/Action" contributed to the cause of the accident. It reported that the CAT driver's vision was not obscured. The FTCR further reported that the "ROAD CONDITIONS" at the time of the crash were "Road under Repair/Construction," the "TRAFFICWAY CHARACTER" was "Straight - Upgrade/ Down-grade" and "Type Shoulder" was unpaved. (R-7, p. 2).

At Detective Nichol's direction, Detective Hernandez measured the width of the berm where it gave way between ten feet, four inches and fourteen feet, two inches, and the tread width of the CAT at 9.4 feet. (Tr. 37, 76).[17] This, he testified, left very little clearance on either side of the vehicle. (Tr. 76). The steepness of the berm was between eight and nine feet.[18] He testified that the berm was made of rock and gravel and was fairly level. (Tr. 50-51). Detective

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[16]The FTCR reported "No Defects" in the CAT. Due to the CAT being submerged in water, the estimated vehicle damage was reported by the police to be $300,000. (Tr. 7, p. 1-2).

[17]Detective Nichols further testified that the berm extended in an east-west direction, just south of Southwest 230nd Street. He recalled that it was about 150 feet from the east edge of the beam to the area where the beam was damaged. The damaged beam area was 20 feet long and ran along the north perimeter of the retention pond. (Tr. 39-40, 50; C-5).

[18]Detective Nichols testified that the beam was so steep that divers needed to use a ladder to get into and out of the water. (Tr. 56; G-5, G-14).

Nichols testified that several photographic exhibits depicted the area where the berm collapsed beneath the CAT. (Tr. 50-54; G-5 through G-13).[19] Photograph G-9 depicts a close-up of the area where the beam collapsed and shows tire marks in the dirt road leading up to the collapsed area. Detective Nichols testified that these prints were likely from the CAT. (Tr. 52-53, 77; G-9).[20] There were no witnesses to the accident. (Tr. 70). Detective Nichols concluded that the accident occurred when, while traveling on the top of the berm, a portion of the berm gave way causing the CAT to tumble into the retention pond. (Tr. 47, 65, 76). It was the Detective's opinion that the damage to the berm was caused by the CAT going into the water. (Tr. 74; G-5 through 14). The CAT was found in the water right below the damaged berm section. (Tr. 75; G-5 through G-14). It was his opinion that the berm gave way because the weight of the vehicle was too great for the unsupported berm that was constructed of rock and fill. (Tr. 49). Detective Nichols believed that the CAT was still loaded with fill when the CAT fell into the water. (Tr. 77). It was sunny and hot on July 22, 2008 and the weather had no effect on the accident. (Tr. 40).

Detective Nichols testified that he interviewed several people at the accident scene and over the course of the next few days. (Tr. 42). He interviewed Santiago Salazar, CFER's bulldozer operator, who was working with Mr. La Roche at the berm on July 22, 2008. Mr. Salazar told Detective Nichols that he believed that the CAT was loaded with fill when the CAT entered the pond. (Tr. 77-78; R-2, p.2). He also interviewed Mr. Villa, who told him that it was his decision to have the CAT drive and deliver its load on top of the berm. (Tr. 45-46, 69).

2. John Chorlog

John Chorlog is the Associate Director for Priority Capital Projects for the Dade County Water and Sewer Department. (Tr. 80). According to Mr. Chorlog, because the capacity of the retention ponds 1 through 3 was going to be increased, it was necessary to raise the elevation of

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[19]Detective Khan took photographs G-5 through G-14 at the accident scene during the day on July 22, 2008 and Detective Nichols took photographs G-15 through G-19 during the night on July 22-23, 2008. (Tr. 63-64).

[20]The Court finds that it is more probably than not that the tire print shown on Photograph G-8, at A, was made from the CAT before it fell into the water.

the north berms of the ponds to about 9 feet.[21] (Tr. 90-91; G-24, G-25). To accomplish this task, the County contracted with its prime contractor, Harry Pepper, who, in turn, subcontracted the job to CFER. (Tr. 91).

Mr. Chorlog testified that the County does not supervise the day to day activities of the subcontractors on its worksites. (Tr. 82). Mr. Chorlog testified that the County never made a representation to Respondent about the physical condition and composition of the berm. Moreover, nobody from CFER ever asked the County about the condition of the berm or inquired whether any tests were conducted on the soil. (Tr. 94-95). He further testified that nobody from the County ever talked to Respondent about how to raise the berms, or what equipment to use on them.[22] (Tr. 94-95).

When he heard about the accident, Mr. Chorlog went to the site. He gave the following testimony concerning CFER's use of the CAT on the north berm:

> Q. What was your reaction to Central Florida's use of that piece of equipment [CAT] on the berm?
>
> A. Well I; I couldn't believe that they would have put that large dump truck out there on the berm.
>
> Q. Why?
>
> A. Because of the size of the truck, the wheel pressure that would have been imposed on the berm, the width of the truck wheels compared to the width of the berm. The wheels

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[21]The water treatment facility property contained fifteen to twenty water retention ponds all around the property that control the storm water. (G-25; Tr. 86). The ponds were created in the late 1970's to provide lime rock to build the wastewater treatment plant. The ponds are now used for storm water control and as a water impoundment site for dewatering that needed to occur because of new construction at the plant. (Tr. 86, 90, 104). The deepest depth of Pond 2 where the accident occurred was fifty to sixty feet. (Tr. 132).

[22]Mr. Chorlog testified that the County did not expect work on raising the north berms to begin until the County received information about how the job was to be performed, including a breakdown of labor and equipment to be used at the site. Although the County never received this information, CFER began work on raising the berm without the prime or subcontractor first receiving any direction from the County. Mr. Chorlog testified that the County did not know CFER was working on the north berms before learning of the accident on July 22, 2008. (Tr. 92-94, 102, 106).

> of the truck tracks - - I mean it appeared that the wheels of the truck tracked very close to the very edge of the berm. The berm was very steep. It just didn't seem reasonable to me to put such a large vehicle out there on that berm.

(Tr. 96).

Mr. Chorlog further testified that the job was completed by another contractor who dumped the fill at the ends of the berm and pushed the fill out onto the berm using a small bulldozer. (Tr. 97-100; G-7, G-11, G-25). He acknowledged that the purpose of the berms was to retain water in the ponds. He also testified that "there is no vehicle traffic on these berms." (Tr. 104).

3. Miguel Leorza

Miguel Leorza has been an OSHA Compliance Officer (CO) for five years.[23] Over that period, he has conducted approximately 130 inspections, of which approximately 90% involved construction sites. (Tr. 111). He has investigated about 30 fatalities. (Tr. 111). Three inspections involved accidents or fatalities that did not result in a citation. (Tr. 112).

CO Leorza visited the accident site at 11:30 a.m., July 23, 2008, again on July 24, 2008, and another time thereafter. (Tr. 115, 142). He took photographs of the accident site on July 23, 2008. (Tr. 119-35; G-1 through G-4). Mr. Leorza testified that the berm consisted of a sandy, gravel material that had been brought to the site and put into place. (Tr. 121). He measured the height of the berm to be about seven feet above the retention pond, and the width of the berm was 12.4 feet at the point just before where the ground had been disturbed due to the accident. (Tr. 121-25; G-2). He also determined the width of the CAT, from the outer edge of the wheel on one side, to the outer edge of the wheel on the other side, to be 9.5 feet. This left a clearance of approximately 1.5 feet on each side of the truck. (Tr. 125, 166). The gross weight of the truck when empty was 49,075 lbs. and 101,000 lbs. fully loaded. (Tr. 124).

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[23]Prior to OSHA, CO Leorza retired from the United States Navy as a Lieutenant Commander, Environmental Health Officer, after serving 22 years. (Tr. 109-10).

It was Mr. Leorza's understanding that this was the first time Respondent used this equipment on the berm. (Tr. 126; G-26, p.4).[24] He testified that he considered the north berm of Pond 2 to be an access road or grade because it was being used as a pathway to get from one point to the other on the berm. (Tr. 130). The CO further testified that there was very little clearance on either side of the berm, and that the embankment leading to the water was fairly steep. (Tr. 130). According to the CO, with the berm touching the pond, the water could filter into the berm impacting on its stability. (Tr. 131). Moreover, he considered the soil to be Class C, the most unstable soil classification, because it was composed of fill. (Tr. 131).

The CO noted that, before work began, the foreman conducted a cursory site inspection by walking on top of the berm, looking for holes, to make sure that it was in good shape. (Tr. 126). In Mr. Leorza's opinion, Respondent could have tested the berm to determine the load it could safely carry. He stated that a CFER representative had told him CFER had not performed any such testing. (Tr. 172). CO Leorza testified that it was CFER's responsibility to perform the testing. (Tr. 173-74). He regarded the foreman's walk-over of the berm as insufficient and thought someone should have thought about the possibility that the ground could give way. (Tr. 132, 170). The CO testified that Respondent should have considered the clearance of the truck, the proximity of the berm to water, the steepness of the embankment, and the hazards involved in falling into the water. (Tr. 132, 166). CO Leorza also testified that he considered the CAT to be both earthmoving equipment and an off-road truck. (Tr. 130).

CO Leorza also testified that CFER was the controlling employer at the job site. He stated that CFER created the hazard by operating the CAT on the north berm. He further testified that CFER exposed its employees to the hazard by allowing its employees to operate the CAT atop the north berm. (Tr. 141-42). On cross-examination, Mr. Leorza testified that it was CFER's burden to determine the load capacity of the berm. (Tr. 173-74).

4. John Villa

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[24]CO Leorza testified that Respondent planned to raise the berms by driving the CAT, loaded with fill, atop the berms from east to west, dumping the fill atop the berm whereupon a bulldozer would level the fill, to be eventually followed by a compactor to compact the ground. The CAT was to circle around the pond and repeat the process. (Tr. 123-24).

John Villa was Respondent's foreman at the site at the time of the accident. (Tr. 176-77). On July 22, 2008, he supervised the three to four workers on the job and told them what to do. (Tr. 177). He testified that CFER was hired to raise the level of the berms around the retention ponds by approximately six inches. (Tr. 178). Neither Harry Pepper nor the County instructed Respondent on how to do the job. CFER decided upon the method and means to do the job. Mr. Villa determined what equipment to use. He decided to use the CAT already at the job site. His superintendent, Marty Holeman, agreed with his choice. (Tr. 178-79, 197). Mr. Villa testified that CFER controlled the job site. CFER was the only company working on the north berm, pond 2 when the accident occurred. (Tr. 196). CFER never discussed "safety" with regard to working on top of the north berm with either Harry Pepper or the County. (Tr. 198). Mr. Villa did not ask the County if the berm could accommodate the use of the CAT on it. He admitted that nothing prevented him from asking the County about the weight bearing capacity of the north berm. (Tr. 198-99).

Mr. Villa explained the technique used to raise the berm. Foreman Villa decided that Mr. "Ugaro" would load the CAT with fill.[25] Mr. LaRoche would then drive the CAT along the berm, dump the fill on top of the berm, proceed on the berm in a westerly direction, make a circular path around the pond, and then repeat the activity. A third employee followed with a roller to compact and level the fill on top of the berm. Only one piece of equipment was to be on top of the berm at one time. (Tr. 180-182). According to Mr. Villa, the north berm, pond 2, was approximately 250 feet long, by 12-14 feet wide. (Tr. 182). On July 22, 2008, Mr. Villa watched Mr. La Roche complete a few passes around a pond on the first berm CFER worked on that day, and that pond was not pond 2. He then departed to go to another job site. He was not at pond 2 when the accident occurred. (Tr. 195, 219-20).

Mr. Villa further testified that on one side of the berm was the retention pond and on the other side was a chain link fence. Grass was growing on the berm. (Tr. 183). On the day of the accident, Mr. Villa testified he walked two berms, including apparently the north berm at pond 2, to check for holes and to see that the ground was fairly level. (Tr. 183-84, 220-21). He did not

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[25] "Herman Ogarro" is one of the four CFER employees identified on the "Burm [*sic*] Daily Safety Checklist" ("checklist"). (R-2, p.2).

know what the ground looked like beneath the grass on the berms. The grass did not indicate anything regarding the strength or stability of the berms, or the nature of the soil. (Tr. 184, 195). Mr. Villa did not test or evaluate the compactness of the material that composed the north berm and it never occurred to him to inquire about its compactness. (Tr. 191, 199).[26] He assumed it was stable because the condition of the material was similar to that in areas between the berms and leading up to the berms.[27] He also testified that it was his understanding that an underground crew installing pipes between two ponds had walked a "345 backhoe" across the berms to get from one side of the lake to the other. (Tr. 221-22). He assumed the north berm could support the CAT and the fill CFER was loading into the CAT. (Tr. 199, 203). Mr. Villa did not consider the compactness of the berm when deciding how much fill to load into the CAT. (Tr. 190).

He did not know the weight bearing capacity of the berm. (Tr. 191). He agreed that the combined weight of the CAT and load is an important factor in determining whether a berm is strong enough to hold a load. (Tr. 201). Prior to the accident, he did not know the combined weight of the CAT and the load; the carrying capacity of the berm; how steep the north berm was, the depth of the water in pond 2, and if there was any soil erosion on the side of the berm in contact with the pond. (Tr. 192, 200-02). Mr. Villa testified that CFER was "very familiar" with the materials at the job site. He did not consider the berm to be composed of Class C soil. (Tr. 199, 223).

Mr. Villa stated that the CAT was only 8-9 feet wide, and expressed surprise that anyone measured its wheel to wheel width at 9.5 feet. (Tr. 192). He agreed that the width of a truck is a safety consideration when using it on a berm. (Tr. 202). He believed that he berm was wide

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[26]CFER sometimes performed compaction tests on its jobs and worked with density engineers. (Tr. 206). CFER had performed a job using the CAT on a twelve foot wide roadway on the side of the berm, where it conducted compaction tests on a berm that it was constructing. (Tr. 225-26).

[27]Mr. Villa admitted that these areas were wider than the north berm and CFER's equipment was further away from any edges. (Tr. 203). He also testified that the materials in the area between the berm where work was completed and the north berm where the accident occurred was "very rocky." (Tr. 221).

enough for the CAT. (Tr. 204, 219). He testified that had he used a lighter truck, the job would have taken longer. (Tr. 206).

Mr. Villa agreed that CFER had a copy of the CAT's Operation and Maintenance Manual ("CAT Manual"). (Tr. 206; R-14). When operating the CAT, the CAT manual warned:

Do not get too close to the edge of cliffs, excavations and overhangs.

The CAT manual also warned:

1. Check for adequate clearance around the machine.

(Tr. 215-16; R-14, pp. 71-72).

Mr. Villa testified that CFER did not read manuals for every piece of its equipment. (Tr. 216).

Mr. Villa testified that he told employees to use a light load so that it would not spill off the berm and tear up the chain link fence. He estimated that the CAT was filled from between 2/3 and 3/4 of capacity. (Tr. 193) Mr. Villa testified that it was his understanding that approximately three loads were dumped on the berm before the accident. (Tr. 196). Mr. Villa conceded that the job could be accomplished using equipment lighter than the CAT, which would require a little longer time. (Tr. 205).

5. John Tomich

Respondent's first witness was John Tomich who is the principal consultant for Northstar Consultants. (Tr. 257). Mr. Tomich spent 32 years as an OSHA supervisor and manager, including 24 years as Area Director of the Albany, New York office. (Tr. 258). His specialty was construction and maritime operations. (Tr. 259). His duties included determining the appropriate standard for various workplace conditions. (Tr. 261). The Court found Mr. Tomich to be qualified as an expert under the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") on OSHA procedures and policies, with a focus on investigations, workplace and job site safety with a focus on causes of accidents, and the application of the cited standard to the facts of the case. (Tr. 276-77).

Mr. Tomich never visited the worksite where the accident occurred. (Tr. 272-73). He was also "not recently' familiar with the CAT. (Tr. 297). He did not perform any outside research of the CAT. (Tr. 299). He also had no experience where the standard at issue was cited. (Tr. 271). Mr. Tomich opined that the cited standard was not applicable to CFER's conduct on July 22, 2008. In his view, the standard was more germane to road construction and large

excavations. (Tr. 281). He noted that this was "not a road way job." It is a berm, "a configuration to hold back water." (Tr. 280-81). He also found the standard to be vague. (Tr. 281). He characterized the standard as a performance standard and opined that the burden to prove a *prima facie* case was on the Secretary. (Tr. 282). He did not understand why the Secretary did not ask for the assistance of an engineer to analyze the accident, determine the weight of the CAT and its load, test the berm and do sampling. (Tr. 183).

Mr. Tomich considered this to be a multi-employer worksite and the County to be the employer who created the hazard. (Tr. 284). Furthermore, he considered Harry Pepper to be the controlling employer because Harry Pepper set the terms of the contract. Finally, he considered Respondent to be the exposing contractor because its workers were actually exposed to any hazard. (Tr. 285). In his view, the Secretary should have gone to the County and asked for specifications for the design requirements of the berms. (Tr. 285).

Mr. Tomich also took the view that, in regards to safety, CFER was "an above average employer." He was impressed that the foreman walked along the berm before beginning work. He considered it evidence, along with industry practice, that the company's safety and health program was real and vital.[28] (Tr. 288). In all, Mr. Tomich concluded that Respondent did not violate the cited standard.

On cross-examination, Mr. Tomich agreed that the evidence demonstrates that neither the County nor Harry Pepper made any representations to Respondent regarding the condition of the berm and that no other entity directed the work of CFER. (Tr. 291-93). He noted that there was no determination of the composition of the berm. He maintained that the OSHA investigation was insufficient to meet the Secretary's burden to make a *prima facie* case. (Tr. 293). Mr. Tomich testified that 29 C.F.R. § 1926.602(a)(3)(ii), which states "Every emergency access ramp and berm used by an employer shall be constructed to restrain and control runaway vehicles," also did not apply to the case. He conceded that the provision at § 1926.602(a)(3)(ii) was a subpart to the cited section entitled "Access roadways and grades." (Tr. 297). He agreed that there was not a lot of clearance on either side of the CAT's wheels when driving along the berm.

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[28]He testified that CFER had conducted a documented safety and health meeting on July 22, 2008 and that "You don't see that on most construction sites." (Tr. 288).

(Tr. 302). He testified that it was reasonable for CFER to perform only a visual inspection of the berm to insure that the berm was strong enough to hold the CAT's weight. Mr. Tomich also expressed his view that common sense did not require the employer to conduct anything other than a visual inspection to ensure that the berm is strong enough to hold the weight of a truck the size of the CAT. (Tr. 303). The duty of an employer, he suggested, was to do what it feels is prudent within its industry practice. Given the vagueness of the standard, and with the burden on the Secretary to prove its case, he was of the opinion that the visual inspection of the berm conducted by the foreman was sufficient and reasonable. (Tr. 305-06).

6. Martin Holeman

Martin Holeman is CFER's General Superintendent and has approximately 40 years experience in heavy highway and underground construction. (Tr. 309-10). Mr. Holeman stated that, on numerous occasions, CFER was hired to raise the height of berms around lakes and retention ponds. (Tr. 314). He testified that the company had frequently dug in the vicinity of the north berm to lay pipes and, therefore, was familiar with the composition of the soil (Tr. 310, 314-15). He stated that the berm was of "Rocky stable soil." (Tr. 321). He testified that Mr. La Roche had driven off-road dump trucks on a part time basis for the last year. (Tr. 316). He testified that he had no concern about using the CAT on the berm due to any lack of clearance on either side or the weight of the CAT loaded with fill. He noted that there were no turns and the vehicle had only to drive 250 feet straight across the berm. (Tr. 316-17). Moreover, he testified that machines, including a back hoe, crossing the berm prior to the CAT far exceeded the weight of that vehicle.[29] (Tr. 317). Mr. Holeman testified that it was not standard practice to conduct any sort of density tests or compaction testing prior to putting equipment on a job site. Indeed, he testified that such tests would have no relevancy to the decision regarding the type of truck to be placed on the berm. (Tr. 317). He stated that the compactness of the berm was not one of his concerns. (Tr. 321).

[29]He testified that CFER had performed some digging and excavating around the berm area, but not on the berm itself. It was in an area between the canals that was wider than the north berms. (Tr. 319).

Mr. Holeman testified that he agreed with Mr. Villa's decision to use the CAT on the north berm. He was not aware of the weight capacity of the CAT. (Tr. 319). He did not check out the berm. Only John Villa checked the north berm. Mr. Holeman did not measure the north berm. He relied upon Mr. Villa's representations as to the berm. (Tr. 324-25). He agreed that CFER had used geotechnical engineers and compact tests to determine soil density at other sites away from the north berm. (Tr. 321). He agreed that CFER did not ask the County what the weight capacity of the berm was or whether it was appropriate to use the CAT on the berm. (Tr. 321-22). He also agreed that the wheels of the backhoe that had previously driven across the north berm were close to the edge of the berm. (Tr. 318-20). Mr. Holeman agreed that the type of soil is a factor when determining the safeness of a driving surface. (Tr. 323). He testified that the presence of some grass atop the berm provided no meaning as to the softness or stability of the berm's soil. (Tr. 323-24). Mr. Holeman stated that he did not know the slope of the berm, but opined that the slope of the berm was not relevant to its stability. (Tr. 324). He did agree that the consistency and sloping of soil are factors to be considered to ensure that there is no collapse. (Tr. 324). Mr. Holeman also had no idea whether the proximity of the north berm to the water affected its stability. (Tr. 332). Mr. Holeman agreed that weight is a factor when determining whether it is safe to put something on the berm. (Tr. 326). Respondent made no assessment regarding the weight of the loaded CAT on the berm. (Tr. 326). Mr. Holeman did not know the weight capacity of the berm. (Tr. 327). He also testified that the job plan called for one piece of equipment to move over the berm at a time. He did not know whether using multiple pieces would have had any negative effect on the stability of the berm. (Tr. 327).

On redirect, Mr. Holeman explained why he did not believe it necessary to test the soil either for compactness or density. According to Mr. Holeman, the density test tells the weight of the soil and how dense the material is in relation to pounds per square foot. A compaction test tells only the weight of the soil per square inch. Moreover, the compaction test only measures the compaction of the soil to a depth of one foot. Mr. Holeman testified that neither test gives any indication of whether a berm is safe to travel on. (Tr. 330).

7. David Scheiner

David Scheiner has been Respondent's Safety Director for eight years and has been working in construction safety for approximately ten years. (Tr. 336). Mr. Scheiner developed

the checklist that was used daily by Foreman Villa.[30] (Tr. 337, Ex. R-2). Among other things, the checklist requires that the foreman and operators walk the berm, check that safety rules are followed, and inquire about weather conditions. The checklist also indicated a "Yes" to the question "Is burm [*sic*] and job site adequate." The checklist comment's section included a statement that "We also talked about not overloading the truck and taking it easy while on the berm because it was covered with grass." (Tr. 338-39; R-2, p. 2). The checklist does not require any form of testing. (Tr. 338-340). Mr. Scheiner explained that the checklist was generated for the protection of employees. (Tr. 339). He testified that County vehicles and big dump trucks traveled on the "road [berm]." (Tr. 340). He further testified that he found nothing about the berm that led him to believe that it required any sort of special soil testing. (Tr. 340).

On cross-examination, Mr. Scheiner testified that he was not knowledgeable about how much weight a berm could hold and did not know whether the earlier presence of vehicles on the berm would have affected its stability. (Tr. 343). He opined that, if such vehicles left gullies or anything out of the ordinary, it would have been detected on the foreman's daily inspection of the berm. (Tr. 345).

8. Jaime Lopez

In rebuttal, the Secretary called Jaime Lopez, an OSHA lead safety engineer (Tr. 348).[31] CO Lopez testified that he had previously used the standard to cite an employer where an excavator fell into a canal after the soil underneath collapsed, drowning the operator. (Tr. 351). He testified that OSHA used the standard in this case because CFER made the top, or "grade," of the north berm a "road" and an "access road" on which CFER operated the CAT and other equipment.[32] (Tr. 351). He stated that there was a drowning hazard in the case because CFER's

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[30]The checklist, dated July 22, 2008, identified Messrs. Santiago Salazar, Tod LaRoche, Saternino Polan, and Herman Ogarro as CFER employees on Job No. C0723, Job Name "SDWWTP", and was signed by John Villa as foreman. (R-2, p.2).

[31]CO Lopez is a mechanical engineer with a degree in engineering. CO Lopez supervised CO Leorza for about three years. He assigned CO Leorza to conduct the CFER inspection, reviewed the case file, discussed the case with him, and together they decided what standard was appropriate for the case. (Tr. 349-51).

[32]CO Lopez testified that "Grade" is a piece of land, section, or part of a road. (Tr. 352).

employees were exposed to drowning when they were operating equipment on a section of the berm right next to a water retention pond where the soil gave away and equipment fell into the pond. (Tr. 352).

CO Lopez visited the job site in July, 2009. He stated that he "could see how dangerous it could be to operate a truck, that type of truck [CAT] on that berm." (Tr. 356). In Mr. Lopez' view, nothing foreman Villa did on the day of the inspection, specifically walking along the berm, did anything to prevent a heavy piece of equipment from collapsing the berm if he did not actually check the soil.[33] (Tr. 353). He stated that there was a concentrated load under each wheel of the CAT, and that differs from a tracked vehicle where weight is distributed alongside and under the equipment. (Tr. 354). In his view, according to the principles of soil mechanics, a berm will act like a trench (Tr. 355). Water will affect soil's cohesiveness and the berm's embankment angle will affect its stability. He did not know whether the pond was lined to prevent erosion. (Tr. 379). Here, because this was a man-made berm made of pre-disturbed soil, the berm was not as stable as it would have been in a natural state. (Tr. 355). He also noted that the probability of an accident was increased because the weight of the load was concentrated under the tires, only about a foot and a half from the edge of the berm. The hazard this creates is recognized by the trenching standards that do not allow a static load within two feet of the wall of an excavation. (Tr. 358). Here, there was a dynamic load that was closer to the edge than two feet. (Tr. 358).

According to Mr. Lopez, Respondent could have avoided the hazard by several means. For example, Respondent could have talked to the designer of the berm or used a smaller vehicle. Also, Respondent could have used a different method, such as leaving gravel on the side of the berm and pushing it into place, rather than have a dump truck drop it at the berm. (Tr. 360). Mr. Lopez noted that this alternative process was used by another contractor after the accident. (Tr. 360).

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[33]He stated that his 9 year old son could have looked at the north berm the way Mr. Villa did. He further stated that Mr. Villa's inspection would not prevent a heavy piece of equipment from collapsing if the soil is not checked. (Tr. 353, 381-82).

He also testified that OSHA performed no soil testing and that he did not know the load capacity of the berm. He knew that the berm collapsed. (Tr. 370). He agreed that nobody saw the accident. (Tr. 371-72). However, based on the police investigation, he concluded that the berm collapsed under the weight of the CAT. Mr. Lopez also testified that there was no evidence that erosion was an issue in the accident. However, he maintained that the water affected the cohesiveness of the soil. (Tr. 380).

Mr. Lopez testified that he considered the berm to be more like an access road. He testified that CFER made the north berm a road on July 22, 2008 by operating vehicles on it. (Tr. 376-78). In his view, it was a road because it was used to travel from one section of the berm to another. (Tr. 377). He opined that if a section is used to move equipment on it and employees are instructed to operate on a particular path, it becomes a road. (Tr. 378). CO Lopez stated that CFER was required "to make sure that it is safe to operate on top of the berm." (Tr. 374). CO Lopez testified that CFER should not have considered the berm safe to drive the CAT on just because other trucks may have driven on it, just as one could not conclude that a person exposed to a fall hazard for thirty years could not fall in a building without a railing. (Tr. 375).

On redirect, Mr. Lopez maintained that it was the responsibility of the employer to know the stability of the soil and the characteristics of the berm. (Tr. 383). He explained that OSHA did not do its own soil testing because, in its view, a berm collapsed. OSHA knew that the berm failed and that the employer was operating a heavy piece of equipment on it. It was OSHA's expectation that the employer would give OSHA the relevant information. (Tr. 384).

Discussion

Applicability of the Standard to the Cited Conditions

The first element that must be considered when determining whether the Secretary established a *prima facie* violation is whether the standard applies to the allegedly hazardous condition. The Court finds that it does.

First, the Court finds that the CAT 725 is Earthmoving Equipment and an off-highway truck. (R-14, p. 25; Tr. 124, 180). The CAT 725 is a subclass of construction equipment that is considered earthmoving equipment within the meaning of the Material Handling Equipment Construction standard, 29 C.F.R. § 1926.602(a)(3)(i). The regulations define earthmoving equipment as "scrapers, loaders, crawler or wheel tractors, bulldozers, off-highway trucks,

graders, agricultural and industrial tractors, and similar equipment." 29 C.F.R. § 1926.602(a)(1).[34] Respondent was using the CAT 725 to move tons of fill to raise the elevation of the berms. (Tr. 123, 178-80, 318; G-24, p. 1). The Commission has previously treated dump trucks as earthmoving equipment. *See Donohew An Individual Trading as Donohew Excavating Co.*, 1980 WL 10415, at *2, *4 (No. 79-4599, 1980) (upholding violation of 29 C.F.R. § 1926.602(a)(9)(ii) for dump trucks that were not equipped with reverse signal alarms); *S. J. Groves & Sons Co.*, 5 BNA OSHC 1846 (No. 15573, 1977)(parties agreed that Caterpillar off-highway end dump trucks were earthmoving equipment under 29 C.F.R. § 1926.602(a)(1) and court found that Secretary improperly cited the dump trucks for violations of 29 C.F.R. § 1926.601(b)(14)).

Second, the Court finds that Respondent used the north berm at pond 2 as an "access roadway" on July 22, 2008. The Secretary asserts that the north berm is an access roadway under the standard. The Commission gives substantial deference to the Secretary's reasonable interpretations of her standards. *Secretary of Labor v. OSHRC et al.,* 499 U.S. 144 (1991).[35] I find the Secretary's interpretation of the standard to be reasonable. The subsection, of which the cited standard is a part, is entitled "Access roadways and grades."[36] 29 C.F.R. § 1926.602(a)(3). The cited standard, which constitutes the first subdivision, specifically applies to "any access roadway or grade." 29 C.F.R. § 1926.602(a)(3)(i). However, the next subdivision specifically

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[34]No definition of "off-highway trucks" appears in the standard. Mr. Villa admitted that the CAT 725 was an off-road vehicle. (Tr. 202).

[35]*See also Beverly Healthcare-Hillview,* 2005 WL 1061669, at *3 (Nos. 04-1091 and 04-1092, 2005). "The agency's interpretation is 'reasonable ... so long as the interpretation sensibly conforms to the purpose and wording of the regulations.'" *Id.*

[36]The term "access road" is not defined by the regulations. The title of a statute and heading of a section may be used to shed light on an ambiguous word or phrase. *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.,* 331 U.S. 519, 529 (1947). *See, e.g., Wray Electric Contracting, Inc.,* 6 BNA OSHC 1981 (No.76-119, 1978) (holding that section (b) of 29 C.F.R. § 1926.556, entitled "Extensible and articulating boom platforms," is not unconstitutionally vague as applied to equipment that is not an 'extensible boom' or 'articulating platform' where equipment still falls under general heading of "Aerial lifts" under subsection (a) of 29 C.F.R. § 1926.556), *aff'd* 638 F.2d 914 (6th Cir. 1980).

references "access ramp[s]" and "berm[s]." 29 C.F.R. § 1926.602(a)(3)(ii). The inclusion of berms within the subsection entitled "Access roadways and grades" demonstrates that a berm may be considered an access road within the meaning of 29 C.F.R. § 1926.602(a)(3) when used as a path for the movement of an earthmoving vehicle. Moreover, I find that the Secretary's interpretation comports with the common interpretation of the term "access road." The Secretary points out that the Random House Dictionary defines an "access road" as "a road that provides access to a specific destination, as to a main highway or to a property that lies within a property." Dictionary.com Unabridged, Random House, Inc. (2010), available at http://dictionary.reference.com/browse/ access road. Courts may look to the common usage of undefined words in dictionaries. *See*, *e.g.*, *Big Sky Well Serv.*, 22 BNA OSHC 1642 (No. 07-1290, 2009)(ALJ looked to common meaning in The American Heritage Dictionary for the definition of the word "floor," which is undefined in 29 C.F.R. § 1910.23(c)(1)); *State Sheet Metal and Roofing Co.*, 1973 WL 4248, at *5 (No. 2579, 1973)(looking to Webster's Third New International Dictionary for definition of "platform" because "statutory construction necessitates that one must give words of common usage their commonly understood meaning unless it is clear from a reading of the statute that a different meaning was intended.").

Third, it is undisputed that CFER's CAT 725 and other CFER equipment were operating on top of the berm, driving its length to get to other areas of the property, to pick up more fill and to circle and complete the process. This was done at least once on the north berm at Pond 2 on July 22, 2008, where the berm was used by the CAT to go from point A to point B, after dropping off the load of soil on the berm. (SJHS No. 22; DOL Brief at 12). The Court also finds that the CAT 725 "moved" at the job site for purposes of 29 C.F.R. § 1926.602(a)(3)(i) on July 22, 2008. The evidence shows that CFER both moved, and caused to be moved, the CAT 725 atop the north berm at pond 2.

Lastly, the Court finds that the preponderance of the evidence establishes that the north berm at pond 2 was not constructed or maintained in a manner to safely accommodate the movement of the CAT 725 on July 22, 2008. The primary purpose of the berm was to hold water in the water retention pond. (Tr. at 104). There is no evidence that the north berm was maintained by CFER, or anyone, to regularly handle highway, or off-highway vehicle traffic in a

safe manner. Respondent drove its CAT 725 on the berm despite the fact that the berm was not constructed and maintained to accommodate the safe movement of such a vehicle.

The testimony of Respondent's expert witness, Mr. Tomich, a former OSHA Area Director, that the standard was not applicable, is not persuasive. Mr. Tomich concluded that the standard does not apply to Respondent based on reading the compliance officer's report, deposition testimony, and listening to the testimony in court. (Tr. 266). Notably, Mr. Tomich never visited the worksite. (Tr. 272). Mr. Tomich did not know anything about the CAT 725 prior to being hired by Respondent for his testimony in this case, and did not do any independent research on the specifications of the CAT 725 and its uses. (Tr. 297, 299). Mr. Tomich claims he is familiar with 29 C.F.R.§ 1926.602(a)(3)(i), but has never cited it in all his years with OSHA. (Tr. 270-71). Mr. Tomich testified that the standard was not meant to apply to berms, yet that standard contains a subsection specifically addressing berms, which falls under the same heading as the subsection cited, as discussed, *supra.* (Tr. 281). Mr. Tomich had no role in the drafting or promulgation of the cited standard, but merely gave his own interpretation of what the standard meant. *Offshore Shipbuilding Inc.*, 18 BNA OSHC 2169, 2172 (No. 99-257, 2000). The testimony of an expert witness is not necessarily controlling, even if it is not rebutted. *Id.* An expert's opinions are "entitled to little weight" where they are not based on any professional studies or personal experience and are merely his own interpretations of OHSA standards. *Avcon, Inc. et al.*, 2000 WL 1466090, at *30 (Sept. 19, 2000)(Nos. 98-0755 and 98-1168). The Court gave little weight to Mr. Tomich's testimony that the standard was not applicable here.

Accordingly, the Court finds that the standard cited by OSHA, 29 C.F.R. § 1926.602(a)(3)(i), is applicable to the construction work activity being performed, the equipment being used to perform that activity by Respondent at the worksite, and the cited condition.

Did Respondent Comply With the Terms of the Standard?

The second element that the Secretary must establish is that the employer failed to comply with the terms of the standard. The Secretary has met her burden of proof here. Detective Nichols testified that the day of the accident was clear and sunny and that the weather was not the cause of the accident. (Tr. 40). He also determined that, because none of the CAT's

load was left on the berm, the CAT was carrying its load when it fell into the water. (Tr. 78). According to Detective Nichols, the truck was in the water directly below an area where the berm had collapsed. (Tr. 51-54; G-10 through G-12).[37] Detective Nichols concluded that the accident was caused when a portion of the berm gave way because the weight of the CAT was too great for the unsupported berm, which was constructed of rock and fill. (Tr. 47-49, 76).

Compliance Officer Leorza measured the width of the berm in the area of the collapse at twelve feet, four inches. (Tr. 125). With the width of the CAT being nine feet, five inches, he calculated that there was roughly only 1.5' clearance on each side of the berm. (Tr. 125). Mr. Lopez also explained that the angle of embankment affects the stability of a wall. (Tr. 355). In this regard, both CO Leorza and OSHA safety engineer Lopez were concerned about the steepness of the berm, which affected the distribution of the weight of the CAT along the berm walls. (Tr. 130, 355). CO Leorza was also concerned that the water abutting the berm could have filtered into the berm and adversely affected its stability. (Tr. 131). This concern was echoed by Mr. Lopez. (Tr. 355, 358).

Mr. Villa's cursory, visual inspection of the surface of the berm looking for holes on July 22, 2008 should have given him pause not to summarily dispatch the CAT 725 to repeatedly drive atop the north berm with loads of fill. CFER's management decided to take advantage of the ready availability of the CAT 725 in the pond area. Use of the larger CAT 725 reduced the anticipated time needed to distribute fill on top of the berms. Mr. LaRoche was fortunate to have completed one pass atop the north berm without incident. Using a CAT 725 to haul fill atop a man-made berm that provided less than 6 inches of clearance on either side of its wheels to the berm's edge was not prudent by any measure. Mr. Villa assumed that the north berm was stable because he thought that the condition of the material was similar to that in areas between the berms and leading up to the berms. (Tr. 199, 203). Mr. Villa's assumption was not only faulty; it proved to be fatal to Mr. LaRoche. CFER's management's plan to complete the job using a

[37]Detective Nichols noted that tracks led directly to the point where the berm collapsed. (Tr. 51-52; G-8).

CAT 725 to distribute the fill atop the berms was a recipe for failure.[38] It should have been foreseeable to Mr. Villa, and to any prudent management official who inspected the berm, that the dispatch of the CAT 725 to repeatedly drive atop the north berm in order to deliver fill without conducting further analysis would likely result in a calamity of some kind.

It was obvious to Mr. Chorlog that putting a vehicle the size and weight of the CAT 725 on top of the berm was unreasonable. (Tr. 96). The Court finds Mr. Chorlog to be a creditable witness, more so than Messrs. Holeman and Scheiner. Mr. Holeman initially testified that Respondent had previously driven a 345 Caterpillar backhoe track hoe ("backhoe"), which weighs 100,000 lbs., on the berms. (Tr. 311, 314). Mr. Holeman later admitted on cross examination that the work previously done was not on the berms, but in the area between the retention ponds. (Tr. at 319). Mr. Holeman also testified on cross-examination that the backhoe exceeds eleven feet in width, yet it was not right up on the edge but "close" to the edge when driving on top of the berm. (Tr. at 320). This testimony is not credible in light of the measurements of the width of the berm taken by the police. If the backhoe did exceed eleven feet, it would have been over the edge and would have fallen into the water at the point of the berm that was less than eleven feet wide. Mr. Scheiner testified that the County had previously had heavy dump trucks traveling "on that road." Mr. Scheiner also refers to "that same berm area" in that answer. (Tr. at 340). First, it is noteworthy that Mr. Scheiner referred to the berm as a "road." Second, Mr. Scheiner gave conflicting testimony when he said that the County had equipment on the berm, and then in the same sentence said in the area of the berm. The Court finds Mr. Scheiner's testimony in this regard to be contradictory and lacking in detail as to the precise

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[38]CFER's approach was ill-conceived and ignored any analysis that a mishap may happen. *See National Engr. & Contracting Co., and Meroe Contracting & Supply Co. ("Nat'l Engr."),* 14 BNA OSHC 1448, 1454 (Nos. 88-2059, 88-226, 1989)(upholding violation of 29 C.F.R. § 1926.602(a)(3)(i) where employer operated front-end loader on ramp without a stop log or curb on the side noting that the employer "should have taken into account that mechanical equipment is subject to malfunctioning and that an accident could always happen."). A large dump truck is difficult to control and drive completely straight, even with an experienced operator. CFER should have reasonably anticipated that in operating the dump truck within inches and at most a foot or two from the edge of a nearly nine-foot drop, the dump truck could accidently go over the edge.

location that he was referring to.

The Court finds that Detective Nichols is correct that the most likely cause of the accident was that a portion of the north berm gave way because the weight of the CAT 725 was too great for the narrow berm. The photographic exhibits demonstrate that a large portion of the berm gave way, directly above where the truck fell into the pond. Respondent posits no theory that demonstrates that the accident occurred for other reasons.[39] Whether the accident occurred because the berm could not support the weight of the CAT or because the CAT was too wide to safely navigate the berm, the evidence established that the berm was not constructed or maintained to allow the CAT to operate safely and that the standard was violated. CFER failed to comply with the standard when its foreman ordered Mr. LaRoche to drive the CAT on top of a berm that was not constructed or maintained in a manner to safely accommodate the movement of the CAT.

Employee Access to the Hazard

The third element the Secretary must establish is that employees had access to the hazard. *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd* 79 F.3d 1146 (5th Cir., 1996). It is not disputed that CFER's CAT 725 operator, Mr. LaRoche, operated the truck on the berm pursuant to instructions conveyed by Mr. Villa. Accordingly, actual exposure to the hazardous condition was established. When Mr. LaRoche drove the CAT 725 along the top of the berms around Ponds 1 and 2, he was exposed to a drowning hazard. The fact that Mr. LaRoche actually drowned is undeniable proof of his exposure. *See Yonkers Contracting Co., Inc.*, 2002 WL 264529, at *2 (No. 00-2011, 2002)(ALJ)(employees exposed to drowning hazard where employee actually fell off bridge), *aff'd* 19 BNA OSHC 2143 (2002); *J-Lenco Inc*., 2002 WL 1546566, at *7 (No. 01-0712, 2002) ("The accident plainly demonstrates that the terms of the standard were violated and that an employee was exposed to the cited hazard."); *Active Oil Serv., Inc*., 2002 WL 538932, at *4 (No. 00-0482, 2002)("As to exposure, the accident clearly demonstrates that four of Respondent's employees were exposed to the cited condition."). Here,

[39]There is no evidence that Mr. LaRoche deliberately drove the CAT 725 into the water.

Respondent failed to protect its employees and violated the standard by exposing its employees to the hazard.

Knowledge

The final element in the Secretary's burden of proof is that the employer had knowledge of the hazard. To establish the knowledge element it is not necessary for the Secretary to show that the employer was aware of being in violation of the cited standard. Rather, knowledge is established where the Secretary demonstrates that the employer had either actual or constructive knowledge of the violative conditions. *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1823 (No. 88-2572, 1992). This means that the employer either knew of the violative conditions or could have known of them with the exercise of reasonable diligence. *Id.* The Secretary does not have to prove that the employer knew that the conditions constituted a violation. *Id.*

Respondent knew or could have known of the cited condition at its workplace on July 22, 2008. *See Pride Oil Well Serv*., 15 BNA OSHC 1809, 1814 (No. 87-692, 1992)(To meet her burden of establishing employer knowledge, the Secretary must show that the cited "employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition."); *Gary Concrete Products Inc*., 15 BNA OSHC 1051, 1052 (No. 86-1087, 1991). Reasonable diligence requires an employer to inspect the work area, anticipate hazards to which employees may be exposed or accidents that could occur, and take measures to prevent the occurrence of violations or accidents. *Pride*, *supra* at 1814; *Nat'l Engr*., *supra* at 1454 (when surveying ramp for safety, employer should have taken into account mechanical equipment occasionally malfunctions and an accident could always happen). CFER failed to exercise reasonable diligence. Although Respondent put together a berm safety check list, reasonable diligence requires more than walking along the berm checking for any holes in the soil and its composition. Mr. Villa's visual inspection did not provide any meaningful information about the soil composition and whether the berm could withstand a vehicle with the size and weight distribution of the CAT 725 operating close to the edge of the berm. Respondent ignored the drowning hazard and failed to take adequate measures to prevent the CAT from falling into the pond. Respondent did not ask the County about the weight-bearing capacity of the berm or if

it was safe to operate the CAT 725 on the berms. Nothing prevented Respondent from so doing. (Tr. 198-99, 321-22). Mr. Villa also could have looked at the CAT Manual for the CAT 725 before directing Mr. LaRoche to operate the equipment in the conditions present on the worksite. The CAT Manual included warnings of the dangers associated with the use of that equipment in certain conditions, and it warns against using the equipment in the conditions present on Respondent's worksite on the berms around the retention ponds. (*See* R-14, pp. 22-23, 72).

The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer. *Tampa Shipyards Inc*., 15 BNA OSHC 1533,1537 (Nos. 86-360 and 86-469, 1992)(citing *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, (No. 85-369, 1991)). Respondent had actual knowledge of the cited workplace conditions on July 22, 2008.[40] Mr. Villa walked on top of the berms. The evidence shows that Respondent knew that its workers were working on the berm, and were specifically directed by the foreman, with the Superintendent's knowledge and approval, to operate the CAT 725 on top of the berm in order to complete the job. (Tr. 179-82, 318). Mr. Villa directed Mr. LaRoche to drive the CAT 725, a piece of equipment capable of weighing 101,000 lbs., with a concentrated load under each wheel, within inches of the edge of a steep eight to nine-foot drop into a body of water. It is foreseeable, given these circumstances, that the berm might collapse beneath the weight of the CAT 725, or that the CAT 725 could veer off the side of the berm because the operator did not have sufficient clearance. The drowning hazard was in plain view and was open and obvious given the width of the dump truck and the width of the berm, the fact the dump truck is a wheel-mounted vehicle with a concentrated load, the steepness of the berm, the proximity to water and the berm consisting of rocky soil. Courts have found that an employer has knowledge of a safety violation where the condition is in plain view and is "open and obvious." *See, e.g., Native Textiles Co*., 20 BNA 0SHC 1110, 1116-17 (holding that Secretary showed employer's knowledge of violation where condition of defective stop buttons on machines (they were either broken or black capped, instead of red mushroom-type caps) was "open and obvious and should have been discovered by supervisory personnel."). Respondent had knowledge of the drowning hazard because it was in

[40]Even if Respondent did not have actual knowledge of the hazardous condition, CFER certainly had constructive knowledge.

plain view and Respondent's foreman directed Mr. LaRoche to operate the CAT 725 in these unsafe conditions.

John Chorlog testified that he "couldn't believe" that Respondent would put such a large truck on top of the berm. (Tr. 96). He explained that he did not consider running the CAT on the berm to be reasonable given the size of the CAT's wheels, the pressure it imposed on the berm, and the closeness of the wheels to the edge of the berm. (Tr. 96). Mr. Chorlog's opinion is supported by the CAT Manual. The CAT Manual warns that (1) the operator of the CAT should not get too close to edges of cliffs and embankments; (2) the operator should have adequate clearance around the machine; (3) newly filled earth may collapse from the weight of the machine; (4) rocks and moisture of the surface drastically affect the machine's traction and stability; and (5) rocky surfaces may promote side slipping of the machine. (R-14, pp. 22-23, 72). The CAT Manual further states that before operating the CAT 725, the operator needs to know the "maximum dimensions of [the] machine." (R-14, p. 22).

The width of the CAT, measured from outside of the wheels, was 9.5 feet.[41] (Tr. 122). Detective Nichols testified that, according to police measurements, the width of the berm where the accident occurred ranged from ten feet, four inches to fourteen feet, two inches wide. At its narrowest point, the CAT had less than one-half of a foot clearance on each side of the berm.[42] (Tr. 37, 76, 122, 125). Although Respondent admitted that the width of the dump truck and the amount of clearance on either side are important considerations in determining whether it is safe to use an off-road truck on the berm, Respondent did not know the exact width of the CAT 725 or the berm and directed its employees to use the CAT 725 on the berm where there was very little clearance. (Tr. at 202-04, 324-26). Both the Miami-Dade County Police Department and

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[41]Foreman Villa testified that he would be surprised if the CAT 725 was 9.5 feet wide. He gave an estimated width of eight and a half to nine feet. (Tr. 191-92). Given this range, it is clear that Mr. Villa had no actual knowledge of the precise width and was only providing a rough estimate. In contrast, the CO's testimony was based on actual measurements. More importantly, the parties stipulated as fact that the CAT 725 is 9.5 feet from wheel to wheel. (SJHS No. 12).

[42]This amount is based upon subtracting nine feet, six inches from ten feet, four inches, equaling ten inches, and then dividing the result by two equaling five inches on each side of the CAT on the north berm.

OSHA measured the CAT 725 to be approximately nine feet, five inches from wheel to wheel. (Tr. at 76, 122, 125). The operator's manual specifications provide that the truck's overall width, including the side mirrors, is ten feet, nine inches. (R-14, p. 28).

Mr. Villa testified that he believed that there was approximately 1.5 feet clearance in some areas on each side of the CAT.[43] (Tr. 219). Mr. Villa believed 1.5 feet to be adequate clearance for the CAT on the north berm. At best, this assumes that the CAT operator would be able to consistently drive the vehicle straight down the middle of the berm, made of a gravelly fill material and of an inconsistent width.

Given the warnings contained in the CAT Manual, and the testimony of Messrs. Chorlog, Lopez and Leorza, as well as Detective Nichols, I find that a reasonable person familiar with the circumstances of the industry would have recognized that driving the CAT along the berm constituted a hazard. The CAT Manual warns that newly filled earth may collapse from the weight of the machine and that rocky surfaces, such as the material used to construct the berm, may promote side slipping. Having decided to use a machine as large as the CAT 725, it was incumbent upon Respondent to take measures to ensure that the berm was constructed or maintained in a manner sufficient to support the off-road truck.

The record also demonstrates that there were steps that CFER could have taken to determine the safety of the berm. For example, Foreman Villa admitted that the size and weight of the truck and its load are important factors in determining whether the berm is strong enough to hold the load. (Tr. 201). Yet, Respondent made no meaningful effort to ascertain if it was safe to drive the CAT atop the north berm. CFER did not ascertain the weight of the CAT or the load. (Tr. 202). It never contacted the County or the general contractor to determine the load capacity of the berm. (Tr. 191, 199). It never sought to determine whether there was any erosion on the side of the berm adjacent to the water. (Tr. 202). Although Respondent was responsible

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43Mr. Villa's testimony was not precise. His estimated clearance may have represented only an average clearance on top of the berm. Where the berm was over fourteen feet wide, the clearance (assuming the operator was driving down the middle of the berm) could have been as much as just under 2.5'. On the other hand, where the berm was only ten feet, four inches wide, the clearance would have been about ten inches. Mr. Villa's lack of knowledge of the clearance reflects his lack of diligence in deciding to dispatch the CAT 725 to drive along the top of the berms.

for performing testing associated with the work, it did not conduct any soil testing of the berms. (G-23, ¶ 2.8; Tr. 172, 191, 321, 323). Respondent failed to gather the adequate information necessary to make an informed assessment about the safety of using the CAT 725 on the berms.

Despite all the red flags, including the warnings contained in the CAT Manual, Respondent chose to use a large and heavy truck, even though the job could have been completed using smaller, lighter trucks. (Tr. 97). Where the employer has made efforts to comply with a performance standard and the Secretary argues that those efforts were deficient, it is incumbent on the Secretary to demonstrate where the employer's efforts fell short and what it should have done to comply. *See Trinity Industries Inc.*, 15 BNA OSHC 1579, 1590 (Nos. 88-1545 & 88-1547, 1992), *rev'd on other grounds*, 16 F.3d 1149 (11th Cir. 1994). The Secretary has shown where CFER fell short and what it could have done to comply with the standard.

The undisputed evidence establishes that Respondent assigned a large and heavy CAT 725 to travel on a berm constructed adjacent to a retention pond, and that the CAT would have little clearance on either side of the berm. Indeed, the foreman walked the berm before the start of work that day to check for holes and to ensure that the berm was fairly level. Respondent took no meaningful steps and made no inquiries to determine whether the berm was constructed or maintained to accommodate its choice of vehicles. Accordingly, I find that the Secretary established that Respondent knew, or with the exercise of reasonable diligence, should have known that the berm was not constructed or maintained to accommodate the CAT 725.

The Court also finds that all of the defenses raised by Respondent are without merit.[44] Respondent contends that the standard is vague because it is a performance standard that fails to

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[44]Respondent's defenses that the accident did not occur on an "access road" and the use of the CAT 725 was proper have been previously discussed herein and found to be without merit for the reasons stated. (Ans., at pp. 3-4; SJHS, at pp. 9-10). Respondent also initially pled the affirmative defense of employee misconduct in its answer. (Ans., at p. 3). It did not include such affirmative defense in the SJHS. Respondent did not introduce evidence of employee misconduct at the hearing and Mr. Villa testified that no employee violated any work rule or instruction. (Tr. 195; G-20 at p. 1). *See also* Respondent's Response to Complainant Interrogatory No. 3, where Respondent stated "No employee is known to have violated any work rule or work practice." (G-26, at p. 3). The Court finds that Respondent has abandoned or waived any employee misconduct affirmative defense. *See Dole Packaged Food Co. et al.*, 1989 WL 223471, at *4 (Nos. 88-0665 and 88-2672, 1989).

set forth precisely what an employer is expected to do to comply. It contends the Secretary was obligated to demonstrate that a reasonable person, familiar with the circumstances of the industry, would recognize a hazardous condition requiring the use of protective measures. *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794 (No. 90-998, 1992). The Court finds the evidence demonstrates that a reasonable person, familiar with the circumstances of the industry, would have recognized that operating a vehicle as large as the CAT 725 on the berm posed a hazard.

The standard is not vague. A standard is not vague merely because it requires the exercise of judgment. *Dravo Corp*., 7 BNA OSHC 2095, 2098 (No. 16317, 1980)(relevant inquiry is whether reasonable persons agree as to the application of the standard to the circumstances of the case). Rather, a standard must be read in light of the conduct to which it applies and the employer must guide its actions accordingly. *Id.* Moreover, when faced with a broadly worded standard, the courts and the Commission have considered whether a reasonably prudent employer, familiar with the circumstances, would recognize a hazard warranting protection. *Pride Oil Well Service*, *supra* at 1813. The Fifth Circuit has determined that "industry custom and practice will generally establish the conduct of a reasonably prudent employer for the purpose of interpolating specific duties from general OSHA regulations." *Cotter & Co. v. OSHRC*, 598 F.2d 911, 913 (5th Cir. 1979).

Commission case law has previously addressed 29 C.F.R. § 1926.602(a)(3)(i). In her post-hearing briefs, Complainant cited *Nat'l Engr*., *supra* at 1454 (violation of 29 C.F.R. § 1926.602(a)(3)(i) upheld where a front-end loader and concrete trucks were driven on a ramp); *Guy F. Atkinson Co., d/b/a Guy F. Atkinson Constr. Co*., 11 BNA OSHC 1566, 1983 WL 23747, at *7 (No. 82-0835, 1983)(holding that the "haul road" used by Dart heavy duty belly dump dirt hauling vehicle to move clay to cover bottom portion of excavation on site qualified as "an access road or grade" within meaning of 29 C.F.R. § 1926.602(a)(3)(i)); *Anjo Constr. Co.*, *7* BNA OSHC 1998 (No. 78-2177, 1979) (violation of 29 C.F.R. § 602(a)(3)(i)) affirmed against an employer for permitting a crawler-type front-end loader to be moved on a grade which had not been accommodated for the safe movement of vehicles); *Leon Boulton and Sons, Inc*., 1976 WL 21971, at *3 (No. 15617, 1976)(ALJ)(finding no violation of 29 C.F.R. § 1926.602(a)(3)(i) where roadway used by earthmoving equipment for excavation was maintained in a safe

manner), *aff'd* 1977 WL 7633 (1977); and *Welltech Mid-Continent*, 1999 WL 15429 (No. 97-873, 1999)("*Welltech*"), (29 C.F.R. § 1926.602(a)(3)(i) found inapplicable to semi-tractor rigs, identified as 8687 Peterbuilt rigs, with attached belly dump trailers, because the Peterbuilt trucks were not used exclusively for off-highway work and Secretary did not prove that Welltech had failed to construct and maintain the access road "to accommodate safely the movement of" the Peterbuilt trucks when the access road became muddy and slick as rainfall increased).[45]

Respondent asserts in its First Affirmative Defense that other entities controlled the worksite and therefore Respondent is not responsible for any violations. (Ans. at p. 2; SJHS at p. 8). Respondent controlled the worksite and Respondent's work on the berms. (Tr. 196-97, 318-19). Respondent was responsible for creating the hazardous situation by operating a large piece of equipment so close to the edge of the north berm without taking any measurements or reasonable steps to determine the full weight of the vehicle or the weight-bearing capacity of the berm. Respondent, alone, made the decision to use the particular equipment on the berm. Respondent also directed its employees to operate the CAT 725 on the berm and is thus the exposing employer. It is well settled that each employer is responsible for the safety of its own employees. *RMS Consulting, LLC*, 20 BNA OSHC 1994, 1997 (No. 03-0479, 2004). On a multi-employer work site, OSHA may appropriately cite a subcontractor where employees are exposed to a hazard. *Id*.

Respondent failed to prove its affirmative defenses of infeasibility and greater hazard. (Ans. at pp. 2-4; SJHS at pp. 9, 11). Respondent has failed to meet its burden of proof as to its affirmative defenses that compliance with the requirement in 29 C.F.R. § 1926.602(a)(3)(i) to ensure that the berm was constructed and maintained to safely operate heavy earthmoving

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[45] *Welltech* is distinguishable from the instant case. In *Welltech*, the employer was constructing an extension from an existing access road, composed of dirt and shale. *Welltech, supra* at *1-2. An employee died when the Peterbuilt rig that he was operating travelled off the road and overturned into the pond at the bottom of the slope. *Id.* at *2. The Secretary alleged a violation of 29 C.F.R. § 1926.602(a)(3)(i) based on the roadway being slick and muddy due to rainfall. The evidence showed that the roadway was slick, but not hazardous. *Id.* at *5-6. Unlike *Welltech,* the evidence in the instant case shows that the CAT 725 was too large for the road and that it was operating too close to the edge of the berm. The hazard here was not conditioned upon the external affects of weather on the roadway.

equipment on it would be infeasible or create a greater hazard. The "infeasibility defense" requires Respondent to prove that it was impossible to perform the construction work without the use of the CAT 725, or that not using that piece of equipment would result in a greater hazard. *See Havens Steel Company*, 6 BNA OSHC 1564, 1566 (No. 13463, 1978)(infeasibility of using fall protection requires employer to show it was "impossible to erect safety nets, that safety nets would make performance of the work impossible or result in a greater hazard"), *Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1165 (5th Cir. 1981). The "greater hazard" defense requires an employer to establish that "(1) the hazards created by complying with the standard are greater than those of noncompliance; (2) other methods of protecting its employees from the hazards are not available; and (3) a variance is not available or that application for a variance is inappropriate." *Spancrete Northeast Inc*., 15 BNA OSHC 1020, 1022 (No. 86-521, 1991)(citing *Walker Towing Corp*., 14 BNA OSHC 2072, 2078 (No. 87-1359, 1991)).

Respondent's foreman admitted that it was feasible to do the job using different equipment. (Tr. 205). It was actually possible to complete the job without driving the CAT 725 on top of the berm. Mr. Chorlog testified that the work was, in fact, completed by another subcontractor using different means and methods. Mr. Chorlog testified that the work was completed by delivering and dumping the fill at the ends of the berms and using a bulldozer to push the fill out onto the berm. (Tr. 97). Respondent has failed to present evidence sufficient to establish the affirmative defenses of infeasibility or greater hazard.

Respondent also asserts that it reasonably relied on the expertise of the County and other entities. (Ans. at p. 4; SJHS at p. 10). The evidence in the record shows the contrary. Respondent's management officials affirmatively testified that they did not rely on any representations from any other entities regarding how to perform the work and regarding the safety and conditions of the berm. (Tr. 94, 197, 322-23; G-23; ¶ 1.6). The Court finds any such defense lacks factual support and merit.

Respondent further asserts that it has not engaged in any act or omission which was the cause in fact or proximate cause of the accident. (Ans. at pp. 4-5; SJHS at p. 11). The Secretary does not need to prove the cause of an accident; "the Act's specific mandate is to prevent the first injury from occurring." *Secretary v. Spinello Constr. Co.*, 1981 WL 19340, at *13, (citing *Brennan v. OSHRC and Underhill Construction Corp*., 513 F.2d 1032 (2d Cir. 1975)). Accord-

ingly, "the statute is violated when a recognized hazard is maintained, whether or not an injury occurs." *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, 874 (3d Cir. 1979) (citing cases). *See also Secretary v. Mordue and d/b/a Peoria Patio*, 1981 WL 19474, *6, (No. 80-6246, 1981) (noting that it is unnecessary for "an accident or injuries [to] result from a violation in order to prove noncompliance[,]" and that the explosion and fire demonstrated the lethal nature of the hazard. The OSHA violations existed prior to the accident and would have supported a citation if the Gilsonite had never ignited.). The courts need only evaluate "whether there is substantial evidence in the record supporting the charge that the employer maintained, at the time and place alleged, a recognized hazard to the safety of its employees." *Bethlehem Steel Corp. v. OSHRC, supra* at 874. In this instance, CFER maintained a recognized hazard at the north berm on July 22, 2008 and Mr. LaRoche's death resulted directly from a violation of the standard.

Characterization

The Secretary characterized the violation as serious. Under section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious if there is a substantial probability that death or serious physical harm could result. This does not mean that the occurrence of an accident must be a probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur. *ConAgra Flour Milling Co.*, *supra* at 824. Here the evidence establishes that failing to construct and maintain the berm to accommodate safely the movement of the CAT 725 could, and in fact did, result in death. Mr. LaRoche died when the CAT 725 fell into the water, trapping and drowning him. There is no question that an accident is possible, that the CAT 725 did fall in the water, and that the operator drowned. The citation is properly classified as a serious violation given the nature of the work, operating heavy equipment on a berm with minimal clearance, within inches and, at most, a foot or two from the edge of a nine-foot drop into a body of water. Therefore, the violation was properly characterized as serious.

Penalty

The Secretary proposed a penalty of $4,900 for the violation. In assessing penalties, the Commission gives "due consideration to the employer's prior history and good faith, the size of

the employer's business, and the gravity of the cited violations." 29 U.S.C. § 666(j); *S&G Packaging Co.*, 19 BNA OSHC 1503, 1509 (No. 98-1107, 2001).

CO Leorza testified that, when determining the appropriate penalty, OSHA considered the gravity of the violation to be "greater" based on the working conditions. (Tr. 146). CO Lopez testified that the severity of the citation was "high" because CFER employees were exposed to a drowning hazard that could cause death. (Tr. 357). For that reason, the citation was classified as serious. (Tr. 359). CO Lopez also testified that the case involved a greater probability based on the number of factors, including weight and load of the CAT, wheelbase width and clearance, CAT closeness to berm wall, soil mechanics and water. (Tr. 357-58). Based on the gravity of the violation, the Secretary arrived at an unadjusted penalty of $7,000. (Tr. 146-47, 359). The Secretary then deducted 20% based on Respondent's small size and 10% because Respondent had no prior history of violations. No deductions were given for good faith due to the high gravity of the violation. Therefore, the Secretary deducted a total 30% or $2,100 from the $7,000 base penalty for a total proposed penalty of $4,900. (Tr. 147, 359). Considering the factors set forth at 29 U.S.C. § 666(j), I find the proposed penalty to be appropriate.

Findings of Facts and Conclusions of Law

All findings of facts and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that the Citation for a serious violation of Section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R.§ 1926.602(a)(3)(i) is **AFFIRMED** and a penalty of $4,900 is **ASSESSED.**

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: August 8, 2010
Washington, D.C.