United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. K V, INC., Respondent.	OSHRC DOCKET NO.: 22-0339

Appearances:

Joshua P. Falk and Afroz Baig, Department of Labor, Office of Solicitor, San Francisco, California
For Complainant

B. J. Driscoll and Ben Marsden, Smith, Driscoll & Associates, PLLC, Idaho Falls, Idaho and Martin K. Banks, Parr Brown Gee & Loveless, LP, Salt Lake City, Utah
For Respondent

Before: Judge Joshua R. Patrick – U. S. Administrative Law Judge

DECISION AND ORDER

I. Introduction

On August 23, 2021, a trench collapsed and injured two of Respondent's employees while they were fusing two pieces of gas main pipe. Respondent contacted OSHA and informed the Boise Area Office a trench collapsed and two of Respondent's employees suffered injuries resulting in hospitalization. Two days later, Complainant sent CSHO Juan Luna to conduct an inspection. As a result of his inspection, CSHO Luna recommended, and Complainant issued, a Citation and Notification of Penalty.

Respondent did not implement any protective measures for the trench because it was less than five feet deep. Five feet is the threshold under which protective systems or sloping are not

required so long as a competent person has determined there is no indication of a potential cave-in. *See* 29 C.F.R. § 1926.652(a)(1). Respondent designated Brandon Miller, the excavator operator, as its competent person and contends he performed a competent and thorough inspection of the trench prior to its collapse. Complainant contends Miller was not qualified as a competent person and that he performed an inadequate inspection of the trench, which rendered the exception inapplicable.

Based on the following findings of fact and conclusions of law, the Court finds Respondent should have implemented a protective system notwithstanding the depth of the trench. The Court also finds Respondent failed to provide adequate training to RL, one of the employees who was injured in the trench collapse. Accordingly, the Citation and Notification of Penalty is AFFIRMED.

II. Procedural History

Complainant initiated an inspection in response to a report of an injury requiring hospitalization that occurred as a result of a trench collapse in St. Anthony, Idaho. As a result of the inspection Complainant issued a four-item Citation and Notification of Penalty (Citation) with a grouped penalty of $8,702. Each of the individual Citation items relates to Respondent's alleged failure to protect its employees working in the trench or its failure to ensure those employees were properly trained. Respondent timely filed a notice of contest, bringing this matter before the Commission.

Prior to trial, Respondent filed a motion to dismiss Citation 1, Item 1(c), which indicated Complainant would stipulate to its dismissal. The Court held the matter in abeyance until trial, at which time it recognized Complainant's stipulation to the dismissal of Citation 1, Item 1(c). Accordingly, this decision only concerns Citation 1, Items 1(a), 1(b), and 1(d).

Trial in this matter was held on May 24-25, 2023, in Idaho Falls, Idaho, and completed on June 26, 2023, via Zoom. The following witnesses testified: (1) Compliance Safety and Health Officer (CSHO) Juan Luna; (2) Area Director David Kearns; (3) RL, an employee of Respondent; (4) Geoffrey Isbell, President—Energy Worldnet, Inc., provider of training modules; (5) Wade Gordon, part-owner and operator of Respondent; (6) Brandon Miller, excavator operator for Respondent; (7) James Mallea, inspector for Quality Control Inspections (QCI); and (8) John Hymel, Respondent's expert. Both parties timely submitted post-trial briefs for the Court's review.

III. Stipulations and Jurisdiction

Complainant and Respondent reached a number of stipulations prior to trial, both factual and legal, which the Court will incorporate by reference.[1] Those stipulations include: (1) the Commission has jurisdiction over this matter under section 10(c) of the Act; and (2) Respondent is an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act.

IV. Factual Background

1. Respondent's Business

Respondent is a construction company that performs trenching and pipe construction services in Idaho and is owned by Wade Gordon, Kenneth Elison, and Vicky Jo Elison. (Jt. Stip. Nos. 3, 7). Gordon, who testified, is the operations manager and is responsible for the day-to-day operation of Respondent. (Jt. Stip. No. 9). Respondent had approximately 17 employees working on the St. Anthony project. (Tr. Jt. Stip. No. 24).

Respondent was hired by Intermountain Gas Company (IGC), which is owned by Montana Dakota Utilities (MDU). MDU, in turn, hired QCI to supervise the work performed by Respondent

1. The parties reached 32 separate stipulations. *See Joint Stipulation Statement*, No. 22-0339 (May 15, 2023). Where applicable, the Court shall cite to those stipulations as follows: "Jt. Stip. No. ___".

to ensure it complies with MDU's safety and installation requirements. (Tr. 391, 581). According to Gordon, MDU requires QCI to have a representative on site every day to review the work Respondent performs. (Tr. 392). MDU also requires Respondent's employees to complete training courses known as Operator Qualifications, or OQs. (Tr. 402).

The OQs cover topics ranging from installation of steel pipe in ditches to backfilling. (Tr. 293-310; Ex. C-37). These training courses are provided online through a company called Energy Worldnet. (*Id.*). At the time of the inspection, most of Respondent's employees had received OQ training in some capacity, with the exception of RL. (Tr. 73, 150). According to Gordon, RL was a relatively new employee—he had approximately one month on the job at the time of the trench collapse. (Tr. 150, 442-43). Before providing access to the OQ training modules, Respondent's practice was to begin with an introduction to the employee manual (which the employee was expected to read), on-the-job training, and the topics that were discussed at various morning meetings and toolbox talks on the jobsite. (Tr. 439-440). Respondent also provided annual safety training to supplement the daily meetings and OQs. (Tr. 398-402, 407; Ex. R-31). OQs were typically provided at the end of a one-to-two-month period. (Tr. 439). Eventually RL received OQ training, but this did not occur until after the accident leading to the inspection in this case. (Tr. 100; Ex. C-4).

2. The St. Anthony Project

The worksite at issue in this case was located in the alley between South 9th West and South 10th West streets and was part of a larger, multi-year project to replace gas service and main lines throughout the town of St. Anthony, Idaho.[2] (Tr. 47; Ex. C-10, C-14, C-21). The St. Anthony project was overseen by Daurel Palmer, the project manager. (Tr. 59). Palmer supervised two work

2. Gas mains are pipes that provide gas throughout the town, whereas service lines are pipes that provide gas from the main lines to a home or business.

crews of approximately 17 employees—one crew to install gas mains and another to install service lines. (Tr. 343, 534; Jt. Stip. No. 24). At the time of the inspection, Brandon Miller was the excavator operator, supervisor of the main crew, and, in addition to Palmer, served as Respondent's designated competent person. (Tr. 537). Miller also supervised six employees, including the two employees injured at the worksite, RL and JB. (Tr. 537-38).

3. The Trench Collapse

On August 23, 2021, the main crew, supervised by Miller, was working in the alley identified above. According to Miller, he had dug the trench one to two hours earlier, inspected it, and had hand dug an area below a pre-existing sewer service line to allow the main line to run perpendicularly underneath it. (Tr. 431, 488, 495-96). JB, a pipe fuser and supervisor, and RL, a relatively new laborer, entered that area of the trench to fuse two sections of the main line. (Tr. 73, 223-224; Ex. C-15). JB was RL's supervisor that day and instructed RL to enter the trench. (Tr. 73, 224-225). As JB and RL were fusing the pipe, one side of the trench collapsed, pinning both of them to the other side. (Tr. 77; Ex. C-10, J-8). Respondent had not installed any protective systems or utilized sloping or benching to prevent a collapse. JB had minor injuries, but RL suffered multiple broken bones and had to be hospitalized for three to four days. (Tr. 227; Ex. J-10 at pp. 1-2). Neither Miller nor Palmer was in the area at the time of the collapse.

At the time of the collapse, Miller was working around the corner end of the alley, which was roughly 80-100 feet away and out of view. (Tr. 538). At some point after Miller had dug the area where the trench collapsed, but before the actual collapse, JB and RL experienced a couple instances of sloughing. (Tr. 228-229). One sloughing incident—which occurred one to two hours before the cave-in and roughly 10 to 15 feet from where it the wall collapsed—required JB, RL, and Raymond Mendoza, another laborer, to stop work and remove roughly 20 to 30 shovelfuls of

material that had fallen into the trench. (Tr. 228-232, 245-47, 267; Ex. J-8, J-11 at pp. 13, 18). Miller testified he was not aware of any sloughing.

4. OSHA Inspection

CSHO Luna arrived at the worksite on August 25, 2021, which was two days after the accident. CSHO Luna was not able to observe the trench in person, because Respondent had to refill the trench for safety reasons. (Tr. 133; Ex. C-10). Nevertheless, he conducted multiple interviews, observed Respondent's work practices, and inspected the area where the accident occurred.

Although the trench had already been filled in, CSHO Luna was able to learn specific details about how the trench was constructed. According to photographs taken by Respondent after the collapse, the trench measured approximately 4-feet deep and 24-inches wide. (Tr. 99-100, 225; Ex. J-2 to J-5, J-8, J-9, J-11, C-24, C-25). During his interviews with Miller and Palmer, CSHO Luna learned Respondent did not perform tests on the soil but, instead, assumed all soil in the St. Anthony project was Type C. (Tr. 93, 122-23; Ex. C-6 at 6). This assumption was confirmed by Complainant's Salt Lake Technical Center, which classified CSHO Luna's soil sample as Type C, with a 97.22% sand and gravel composition.[3] (Ex. C-2, C-3, C-20). CSHO Luna also learned the area of the trench had been previously excavated—there were utility lines that ran parallel and perpendicular to the new line they were installing. (Tr. 174-175). According to its own internal investigation, Respondent concluded the previously disturbed soil around the parallel line affected the stability of the trench's sidewall and caused the collapse. (Tr. 433; Ex. J-10).

3. Although CSHO Luna did not take the sample directly from the trench, he did collect a sample from the area where the collapse occurred, as identified by Respondent's representatives. (Ex. C-20). Other samples taken by CSHO Luna were not permitted into evidence, because they did not come from the same area as the collapse. (Tr. 329-332; Ex. C-2, C-3).

V. Analysis

Based on what CSHO Luna observed, Complainant issued a four-item Citation, of which three remain at issue. Complainant grouped the individual items under one penalty because they ultimately arise from the same set of facts, starting with the trench collapse. The Court will handle the Citation items similarly. To the extent a certain finding or conclusion is applicable to more than one citation, the Court shall incorporate such findings by reference.

A. Burden of Proof under Section 5(a)(2) of the Act

To establish a prima facie violation of a specific standard promulgated under section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: "(1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions." *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-0531, 1991).

The Secretary must establish his prima facie case by preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361, 1365 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the evidence, Black's Law Dictionary (10th ed. 2014).

B. Citation 1, Item 1(a)

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

> 29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(b) or (c):
>
> On August 23, 2021, and times prior thereto, employees were working to install and fuse 4-inch gas line in a a [sic] narrow trench with unstable soil, exposing them to cave-in hazards. There was established knowledge and had been indications the soil was unstable, including prior cave-ins.

See Citation and Notification of Penalty at 6.

As indicated by the language of the standard, the default requirement for any trench or excavation is to supply protection in the form of shoring, sloping, or benching. *See* 29 C.F.R. § 1926.652(a)(1), (b), (c). According to the preamble to the standard, this is because "there is a potential for a cave-in in virtually all excavations." Occupational Safety and Health Standards—Excavations, 54 Fed. Reg. 45,894, 45,927 (October 31, 1989) (to be codified at 29 C.F.R. Part 1926). In fact, even Gordon himself admitted "there is no such thing as a safe ditch." (Tr. 362).

Notwithstanding this presumption, there are two exceptions to the protection requirement. The first exception is for trenches dug entirely in stable rock. 29 C.F.R. § 1926.652(a)(1)(i). This exception does not apply because the entire St. Anthony project was presumed, and confirmed, to be Type C soil. The second exception permits work in an unprotected trench so long as: (1) the trench is under five feet deep; and (2) "examination of the ground by a competent person provides no indication of a potential cave-in." *Id.* § 1926.652(a)(1)(ii). Because the presumption is that every trench should be protected, it is incumbent upon Respondent to prove the exception applies. *Dover Elevator Co.*, 15 BNA OSHC 1378, 1381 (No. 88-2642, 1991) (holding that the party claiming the benefit of an exception bears the burden of proving that its case falls within that exception).

As in any case brought under section 5(a)(2) of the Act, Complainant must establish the four elements of its *prima facie* case, including whether the standard applies and was violated.

Ormet Corp., 14 BNA OSHC 2134. Here, the default requirement of the standard is to provide protection. So, the failure to provide protection constitutes a prima facie violation of the Act *unless* Respondent can prove the aforementioned exception.[4] The depth of the trench not being at issue, Respondent presented evidence that its designated competent person performed an inspection that revealed no indication of a potential cave-in. In response, Complainant contends Miller was not properly designated as a competent person, that he failed to perform the required inspection, and, alternatively, any inspection he performed failed to take proper account of many indications of a potential cave-in. Respondent contends Miller was qualified by training and experience to perform adequate inspections as a competent person, and that he did so in this case.

This applicability of the exception turns on three main issues: (1) Miller's status as a competent person; (2) the meaning of "no indication of a potential cave-in" as it relates to the inspections Miller claims to have performed; and (3) whether Miller should have been aware of the sloughing observed and abated by RL, JB, and Mendoza. Based on the following analysis, though the Court finds Miller was qualified as a competent person, the trench showed signs of a potential cave-in, and Miller should have been aware of those signs or disregarded them as immaterial. Thus, the Court concludes the exception advanced by Respondent does not apply.

1. Miller Was a Competent Person

Complainant contends Respondent's use of the Energy Worldnet training courses as its primary, classroom-style instructional tool was insufficient to qualify Miller as a competent person. Complainant requested records from Energy Worldnet to determine the content of Miller's training and determined the training modules he took did not provide specific training or knowledge about soils analysis, the use of protective systems, or the requirements of the excavation standard.

4. The Court will address each of the 5(a)(2) elements below; however, for the purposes of the discussion above, the Court is merely addressing the prima facie elements of whether the standard applies and was violated.

Compl't Br. 16-17 (citing *Westar Mech., Inc.*, Nos. 97-0226, 2000 WL 1182858 at *9 (OSHRC August 14, 2000) (consolidated). Because Miller's formal training through the OQ program purportedly did not touch on each of the foregoing subjects, Complainant contends Respondent failed to meet the requirements of the exception. The Court disagrees.

According to the Act, a competent person is "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. § 1926.650(b). The Commission has held that the ability to identify hazards cannot come from on-the-job training alone; rather, some measure of trench-specific instruction is required. *See, e.g.*, *A.P O'Horo* Co., 14 BNA OSHC 2004, 2010 (No. 85-369, 1991) (affirming training violation because employer relied too heavily on on-the-job training and experience instead of providing specific trenching instructions, which foreman had never received); *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1615 (No. 89-2018, 1992) (sole reliance on employee handbook held insufficient).

Notwithstanding the above, in *Ford Development Corp.*, No. 90-1505, 1992 WL 406378 at *8 (OSHRC, Dec. 29, 1992), the Commission made clear that "our decision should not be read as requiring employers always to demand that their employees undergo formalized training, nor as compelling employers in every instance to gather written verification of job skills from their employee's former employers." Rather, the Commission noted the plain language of the standard required "some positive action" on the part of the employer. *Id.* The employer in *Ford* did not provide *any* training to the competent person in question during his three-year tenure at the company and, instead, relied on his previous one-day trench safety seminar he had attended four years prior. *Id.* Illustrating the significance of the failure, the Commission noted the alleged

competent person had not learned how or when to perform soil tests, nor did he know the standard even had requirements for manual testing and soil sampling. *Id.*

In this case, the Court finds Miller was trained and qualified as a competent person. While the formal instruction he received from Energy Worldnet OQs was not, of itself, sufficient to qualify him as a competent person, the OQ modules did cover such topics as: soil typing, visual inspections, sloping and protective systems, spoil piles, water accumulation, unexpected soil movement, and the definition of a competent person. (Ex. C-37). Further, Miller also received training through on-the-job instruction from experienced competent persons, morning meetings and toolbox talks, and the company's annual training. (Tr. 482-85). Other than the apparent failure to conduct adequate (or more frequent) inspections, the Court cannot find anything in Miller's responses to CSHO Luna's questions or to Complainant's cross-examination to undermine the conclusion that Miller was capable of identifying hazards or that he had authority to act upon hazards he identified.[5] (Tr. 536-573; Ex. C-6). *See C.J. Hughes Constr., Inc.*, No. 93-3177, 1996 WL 514965 (OSHRC, Sept 6, 1996) (concluding foreman was qualified as competent person based on training and experience). Accordingly, the Court finds Miller was properly designated as a competent person.

2. The Trench Exhibited Indications of a Potential Cave-In

More so than the question of whether Miller was a competent person, this case hinges on whether the trench exhibited indications of a potential cave-in and whether Respondent could have been aware of it. To repeat, the exception to the default protection requirement requires an examination by a competent person that reveals *no indication* of a potential cave-in. 29 C.F.R. §

5. Complainant points out that, on cross, Miller could not distinguish between a designated competent person and a person competent to perform a job. (Tr. 554). The Court finds this "failure" to be the result of an inartful question, as opposed to an admission about his knowledge of competent persons. On direct, Miller capably described a competent person as "someone who can recognized hazards and take action on those hazards." (Tr. 473).

1926.652(a)(1)(ii). Complainant contends there were multiple indications of a potential cave-in, including the sloughing witnessed by three of Respondent's employees, and that Miller, the competent person, either ignored or failed to recognize those indications. Respondent argues Miller performed multiple inspections, each of which took into consideration many of the signs Complainant claims were indications of a potential cave-in. Further, Respondent contends Miller was not made aware of the sloughing and, alternatively, minimizes any impact that sloughing would have had on Miller's decision to rely on the exception. (Tr. 499, 507-509). The Court finds the trench exhibited signs of a potential cave-in, and that Respondent, via Miller, could have been aware of the sloughing.

The language of the exception is "clearly intended to afford the individual the freedom to exercise *appropriate* judgment in determining whether there were indications of a potential collapse." *See C.J. Hughes*, 1995 WL 514965 at *5 (emphasis added). Respondent must show Miller "acted in a competent manner" and reasonably concluded the trench in question did not exhibit any indication of a potential cave-in. *Id.* In other words, this is not a mere "judgment call", as Respondent would have it; rather, Miller's actions must be judged against what a reasonable person would have done under the circumstances presented in this case.

In *C.J. Hughes*, the Commission reversed the ALJ, who concluded the Secretary established the potential for a cave-in based on three indicators: fissures in the wall of the trench, vibrations from the adjacent roadway, and the presence of a spoil pile. *Id.* The Commission determined the conclusions of the CSHO, upon which the ALJ based its decision, were of "questionable weight." *Id.* With respect to the fissures, the CSHO later admitted they could have been scars left from the excavator. As to the vibrations, the Commission noted the CSHO was the only witness to experience them. Finally, with respect to the spoil pile, the Commission stated, "If

we accepted the theory that this spoil pile constituted an indication of possible collapse, the same would be true for almost every trench; and it would be practically impossible for an employer to qualify for the exception set out in section 1926.652(a)(1)(ii)." *Id.*

When reaching the above conclusion, the Commission noted, "the standard does not afford any guidance in determining what constitutes an 'indication of a potential cave-in.'" *Id.* at *5, n.8. Nevertheless, the manner in which the Commission analyzed the purported indications of a potential cave-in suggests that any one indication of a potential cave-in would be sufficient. *Id.* This method of analysis jibes with the standard's default requirement that all trenches be protected unless the employer can prove there is "*no* indication of a potential cave-in." *See* 29 C.F.R. § 1926.652(a)(1)(ii) (emphasis added). In this case, the Court will analyze whether any individual indication of a potential cave-in identified by Complainant would have been sufficient to undermine the exception, or whether the indicators should be considered collectively. In either case, whether individually or collectively, Complainant's case proves to be a much stronger one than in *C.J. Hughes*.

Complainant identified three indications of a potential cave-in. First, Complainant argues the trench was dug in previously disturbed soil: there were pipelines running perpendicular and parallel to the trench where a new gas main was being installed. Complainant notes the testimony of AD Kearns and Respondent's expert, John Hymel, both of whom testified previously disturbed soil is a factor to consider when performing an inspection because "the integrity of the soil may be compromised to some extent." (Tr. 178, 681). In fact, Gordon testified Respondent concluded the previously disturbed soil from the parallel pipeline weakened the trench wall and, ultimately, caused the collapse. While the Court agrees this is an important factor to consider, previously

disturbed soil is not, of itself, an indication of a potential cave-in. (Tr. 681). In fact, according to the regulations, previously disturbed soil can be rated as high as Type B (not the case here).

Second, albeit relatedly, is the fact that the soil was Type C. Not only was this established by testing the samples acquired by CSHO Luna, but Respondent stated it treated all the soil in St. Anthony as Type C. Complainant points out that Palmer and Miller had expressed "concern" about the soil type, but Palmer also noted they had not experienced any problems with the stability of the soil during the St. Anthony project. (Ex. C-8 at 10). Again, as with the discussion of previously disturbed soil, the mere fact of the soil being Type C is not, alone, an indication of a potential cave-in. To be sure, a looser, less compact soil is more likely to slough or collapse, especially when the depth of the trench increases, thereby increasing the downward pressure on the walls of the trench. (Tr. 681). However, there is a reason why there are two exceptions to the cited standard. The first, which permits the trench to be unprotected if it is dug in solid rock, implies that the second—which permits the trench to be unprotected if, upon proper inspection, it does not exhibit indications of a potential cave-in—could potentially be dug in Type B or C soil so long as the conditions were appropriate. *See* 29 C.F.R. § 1926.652(a)(1)(i), (ii).

This leads to the third, and more significant, indication: the sloughing experienced by JB and RL. JB and RL were charged with fusing the gas main line, which ran underneath a perpendicular sewer service line. Miller had previously dug the trench with the excavator and hand dug the area below the perpendicular line to allow for the installation and fusing of the new gas main. Approximately one to two hours prior to fusing the pipe, however, RL testified that he, JB, and Raymond Mendoza had to enter the trench to clean up approximately 20-30 shovelfuls of dirt

that had sloughed off the wall of the trench into the excavation.[6] (Tr. 168, 200, 231-32). On cross-examination, counsel for Respondent confronted RL with his statement to the CSHO where he stated the sloughing was approximately 10-15 shovelfuls. (Tr. 245-247). Regardless of the number of shovelfuls or their size, it took three people to remove the dirt from the excavation. Even Gordon testified 10-15 shovelfuls of material sloughing into the trench would be significant enough to warrant reporting it to him. (Tr. 390).

While Respondent used many euphemisms for sloughing, i.e., "little fall-offs", the fact of the matter is sloughing—especially in amounts requiring three employees to clean it up—is an indication of a potential cave-in. Although the standard does not specifically define "potential cave-in", the text, structure, history, and purpose of the standard belie any ambiguity Respondent seeks to impute through its use of terms designed to minimize what actually occurred. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (holding that before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction).

For starters, the exception uses the term "potential", which is commonly used to describe an event that is *possible*, as opposed to *imminent*. *Potential*, MERRIAM-WEBSTER.COM, (last visited Jan. 25, 2024); *see also Fla. Gas Contractors, Inc.*, No. 14-0948, 2019 WL 995716 at *3 (OSHRC, Feb. 21, 2019) (citing *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term "carries its ordinary meaning"); *Animal Legal Defense Fund v. U.S. Dep't. of Agric.*, 789 F.3d 1206, 1216 (11th Cir. 2015) (referring to contemporaneous dictionary for the common usage and meaning of an undefined statutory term)). This common understanding of the term is also supported by the standard's structure, history, and purpose. As noted above, the default

6. RL testified regarding another instance of sloughing, but there was no evidence to suggest how substantial the sloughing was, nor whether any other employee was witness to it. (Tr. 228). As such, it does not factor into the Court's decision.

requirement of the standard is to protect the trench, whether through equipment or sloping and/or benching. *See* 29 C.F.R. § 1926.651(a). The reason for this is indicated in the preamble to the regulation:

> OSHA believes that there is a potential for a cave-in in virtually all excavations. However, experience has shown that the *probability* of a cave-in depends on the combined effects of many factors. These factors include the depth of the excavation, the type of soil involved, the ability of the soil to resist stress imposed on the soil from the weight of the soil itself and from static and dynamic surcharge loads, and from changes in the ability of the soil to resist stress due to exposure to environmental conditions over a period of time. In recognition of the low probability of a cave-in occurring in certain circumstances, the proposal . . . sets forth two exceptions to the requirement to provide cave-in protection.

Occupational Safety and Health Standards—Excavations, 54 Fed. Reg. at 45927. The first exception—a trench dug entirely in stable rock—is self-explanatory in light of the preamble's discussion of factors impacting the probability of a cave-in. The second exception, at issue here, requires a more thoroughgoing inspection on behalf of the competent person to ensure the high burden of "no indication of a potential cave-in" is met. Because the purpose of the standard is to provide protection in almost all instances—given the belief that every trench has the potential to cave in—the exception to that rule must be cabined in scope and limited in application.

The Appendix to the standard provides further contour to the understanding of what an indication of a potential cave-in might be. The Court found the following definition instructive:

> *Distress* means that the soil is in a condition where a cave-in is imminent or is likely to occur. Distress is evidenced by such phenomena as the development of fissures in the face of or adjacent to an open excavation; the subsidence of the edge of an excavation; the slumping of material from the face or the bulging or heaving of material from the bottom of an excavation; the spalling of material from the face of an excavation; and ravelling, i.e., small amounts of material such as pebbles or little clumps of material suddenly separating from the face of an excavation and trickling or rolling down into the excavation.

29 C.F.R. § 1926, Subpart P, App. B. In such instances where "distress" is identified, the Appendix requires the employer to reduce the maximum allowable slope from 1:1 to ½:1, at a minimum. *Id.*

Regardless, however, the key is that an event such as sloughing, or even the separation of small amounts of material from the face of an excavation, is a hazard-increasing event requiring intervention in otherwise compliant trenches.

The Court finds the sloughing observed by RL, JB, and Mendoza is properly categorized as an indication of a potential cave-in. When considering the additional factors identified by Complainant, such as Type C soil and the presence of adjacent, previously excavated utilities, the Court finds this particular portion of the trench required intervention. While this may not have been the case initially, it is incumbent upon the competent person to respond to changing conditions. (Ex. C-34 at 17, J-12 at 36-37). That final point leads to the next issue regarding Miller's inspection of the trench.

3. Miller (and Respondent) Knew or Could Have Known of the Sloughing

The OSHA Technical Manual and the Compliance Directive for the excavation standard require an employer to inspect a trench after a sloughing event. (Ex. C-34 at 17, J-12 at 36-37). Complainant contends Miller was or, with the exercise of reasonable diligence, could have been aware of the sloughing experienced by RL, JB, and Mendoza. Respondent argues Miller was not directly aware of the sloughing, nor was he informed by anyone that sloughing had occurred. As such, Respondent contends that, even if the sloughing was sufficient to be characterized as an indication of a potential cave-in, Miller was not aware of it. Based on what follows, the Court finds Respondent and, by extension, Miller had at least constructive knowledge of the sloughing that preceded the cave-in.

The Court finds Miller knew or could have known of the sloughing for a couple of reasons. According to Gordon, JB was designated as RL's immediate supervisor. (Tr. 466). As noted above, JB directed and helped RL and Mendoza clean up the material that had sloughed into the trench.

Because it is undisputed JB was a supervisor, his knowledge of the sloughing is imputable to Respondent. *See Dover Elevator Co.*, No. 91-862, 1993 WL 275823 at *7 (OSHRC, July 16, 1993) ("An employee who has been delegated authority over other employees, even if temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." (citing *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-360, 1992))); *see also id.* ("[A]n employee who is empowered to direct that corrective measures be taken is a supervisory employee." (citing *Mercer Well Serv., Inc.*, 5 BNA OSHC 1893 (No. 76-2337, 1977))). By extension, because Respondent is charged with JB's knowledge of the hazard, the Court finds Miller should also have been aware of the sloughing, whether by JB reporting it to him or by virtue of a proper and timely inspection. Lending further support to this conclusion, the Court notes that, according to Miller, both Mendoza and JB were qualified as competent persons due to their training and experience. In other words, Respondent had, at a minimum, two individuals with training and experience akin to Miller, one of whom was a supervisor, that were directly aware of the hazard.

Separate and apart from what JB witnessed, however, the Court finds Miller had, at the very least, constructive knowledge of the sloughing. According to undisputed testimony and documentary evidence, the sloughing occurred approximately one to two hours before the cave-in occurred. (J-8 at 2). While Miller was stationed around the corner when the trench collapsed onto RL and JB, the Court is hard-pressed to conclude Miller was unaware, or could not have been aware, of the prior sloughing experienced by RL, JB, and Mendoza.

According to Respondent, Miller was performing inspections almost constantly. Miller testified he performed an inspection at the beginning of the day, every 30 minutes to an hour, during breaks, just before the cave-in while hand-digging the area under the service line, and continuously throughout the day as he excavated. (Tr. 487-493). This testimony was echoed by

Jim Mallea, the inspector for QCI, which performs inspections of new pipeline installations for MDU. (Tr. 581, 587). In fact, Mallea testified he observed Miller perform the above-mentioned inspections, as well as performed his own inspections of the site, and did not observe any indications of a potential cave-in.

Respondent's evidence on the topic of Miller's inspections is problematic for several reasons. First, a substantial amount of testimony regarding Miller's inspections on the day of the collapse was prompted by overwhelmingly leading questions, some of which could easily be confused for testimony.[7] Second, albeit related to the first point, the testimony provided by Miller and Mallea at trial was inconsistent with their deposition testimony. For example, Miller testified that he walked the trench every 30 minutes to an hour and conducted inspections on personal breaks and lunch breaks. (Tr. 487-489, 493). Miller also testified his inspection coincident with hand-digging out the perpendicular service line occurred "within the hour" of the cave-in. (Tr. 495-496). However, on cross examination Miller could not recall what time he dug out the trench, where the cave-in occurred, or what time the cave-in even happened. (Tr. 538).

Similarly, Mallea testified he observed Miller performing inspections throughout the day; however, on cross-examination when confronted with his deposition testimony, Mallea admitted merely to seeing Miller in the area and could not recall what Miller was doing. (Tr. 587, 605). Mallea also testified on direct that he performed an examination of the trench; however, when presented with his deposition testimony that he had not, Mallea admitted it was not his role to inspect the trench for hazards but that everyone shared that responsibility. (Tr. 606-608). Finally, Mallea testified he was not in the area when the cave-in occurred, and there is no indication he was

7. While the Court granted some leeway in the manner of questioning due to the parties agreeing to examine certain witnesses simultaneously, a substantial portion of Respondent's examination of Miller was composed of leading questions. *See, e.g.,* Tr. 502-506.

aware of the sloughing experienced by RL, JB, and Mendoza, which renders his conclusions about the state of the trench questionable, at best.

RL, who was in the area the entire time, has been consistent throughout. RL testified regarding Miller's inspections along the trench: "[H]e would normally not do it." (Tr. 233). On cross-examination, RL testified that, on the day in question, he did not recall seeing Miller performing inspections along the trench. (Tr. 274). RL's testimony regarding what Miller "normally" did, coupled with his inability to recall whether such inspections were done on the day of the collapse, suggests the inspections Miller purported to perform did not occur in the manner he suggested, if at all.

The Court does not doubt Miller performed an initial inspection of the trench; however, the Court finds his testimony regarding the number, frequency, and quality of his inspections to be of limited value. If he was performing inspections as he claims, then either he should have been aware of the sloughing, which occurred an hour or two prior to the collapse and required three employees to clear it, or he ignored it. The alternative is that Miller was not performing the inspections he claims to have been performing and were necessary in light of the conditions experienced by RL and known by JB, a supervisor. In either case, due to the problems discussed above, the Court accords Miller and Mallea's testimony little weight regarding the inspections performed or what conditions they observed. As such, the Court finds Miller could have known about the sloughing event, which should have indicated to him the potential for a cave-in. In short, although Miller qualifies as a competent person, the ground provided indication of a potential cave-in. Accordingly, the Court finds Respondent failed to establish the exception to the standard.

4. Complainant Established its *Prima Facie* Case

The primary issue in this case was whether Respondent established the exception to the cited standard. Nevertheless, Complainant is still required to establish its *prima facie* case. *See*

Ormet Corp., 14 BNA OSHC at 2135 (listing *prima facie* elements). Although many of these matters have been discussed extensively above, the Court shall recap the legal conclusions stemming from the foregoing analysis.

The standard applies to the conditions at Respondent's worksite, because it is an open excavation in the earth's surface, which the standard defines to include trenches. *See* 29 C.F.R. § 1926.650(a). As noted previously, Respondent violated the standard by failing to install an "adequate protective system designed in accordance with paragraph (b) or (c)" and failing to establish an exception to the standard. *See id.* § 1926.652(a). Respondent's employees were exposed to the hazard because they were not only in the trench without an adequate protective system but were, in fact, injured due to the hazard coming to fruition. *See, e.g., Wayne Farms, LLC*, No. 17-1174, 2020 WL 5815506 at *3 n.2 (stating, in dicta, that injury suffered by employee is relevant to determination of actual exposure and that such evidence would likely be sufficient to establish exposure if the Commission were to reach that issue) (citations omitted); *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) ("Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable."), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). The Court also finds Respondent knew, or could have known, of the violative condition. However, in addition to asserting the exception to the standard, Respondent has also alleged Miller's failure to perform an adequate inspection was the product of unpreventable employee misconduct. The Court shall address Respondent's arguments in Section V.B.5, below.

Finally, the Court finds the violation was serious. Under section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious where there is a "substantial probability that death or serious physical harm could result" from the cited condition. *See Manganas Painting Co., Inc.*, No.

94-0588, 2007 WL 6113032 at *14 n.20 (OSHRC, March 23, 2007). Not only was there a substantial probability of an injury, but Respondent's employees were, in fact, injured as a result of being exposed to an unstable, unprotected trench. Accordingly, the violation was properly characterized as serious.

5. Respondent Failed to Prove Unpreventable Employee Misconduct

Respondent asserts that any failure regarding Miller's examination of the cited trench was the result of unpreventable employee misconduct. To establish this defense, an employer must show that it had: (1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered. *E.g., GEM Indus., Inc.*, 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996), *aff'd per curiam*, 18 BNA OSHC 1358 (6th Cir. 1996) (unpublished). In this case, however, it is not a rank-and-file employee accused of misconduct but the supervisor, Miller. "[W]here a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *L.E. Meyers Co.*, No. 90-945, 1993 WL 99197 at *4 (OSHRC, March 31, 1993) (citation omitted). In such a case, "[T]he employer must establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory employee." *Id.* (citing *Daniel Constr.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982)).

First, the Court finds Respondent had work rules governing work in trenches, including one which parrots the OSHA standard requiring the competent person to verify there are no indications of a potential cave-in for trenches less than five feet deep. (Ex. R-36). The problem, however, is that Respondent did not adequately communicate the specifics of what would

constitute an indication of a potential cave-in. During his testimony, Gordon stated he would find sloughing in the amount observed by RL and JB to be significant enough to require reporting, and, yet, Respondent claims no one reported the sloughing observed by RL and JB. (Tr. 390). Rather, the managers who testified repeatedly referred to sloughing as a normal occurrence and did not appear to grant it much significance. (Tr. 507, 513).

Further, nothing in the record reflects that Respondent communicated to its employees when to report sloughing-related incidents to management. As for the annual and periodic training, the Court cannot discern the substance of any of the training provided to Respondent's employees, and specifically its supervisors, outside of general statements that training on certain topics took place.[8] The Court finds such general pronouncements and reliance on on-the-job training, which may vary depending on the trainer, to be insufficient to meet the substantial burden of establishing misconduct on behalf of a supervisor. *See Stark Excavating, Inc.*, No. 09-0004, 2014 WL 5825310 at *5 (OSHRC, November 3, 2014) (consolidated), *aff'd*, 811 F.3d 922 (7th Cir. 2016) (noting supervisory misconduct is "strong evidence that the employer's safety program is lax" (quoting *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001), *aff'd per curiam*, 53 F. App'x 122 (D.C. Cir. 2002) (unpublished))).

Similarly, with respect to the question of whether steps were taken to ensure work rules were followed, the Court is unconvinced by the scant evidence in the record about how and when Miller's work was supervised. Miller testified Palmer and Gordon would inspect his work "occasionally"; however, his testimony was largely in response to leading questions and failed to

8. The Court recognizes that this conclusion appears to be at odds with its determination that Miller was both a competent person and adequately trained. However, the fact that the Court finds Miller was properly categorized as a competent person based on training *and experience* does not undermine the conclusion that Respondent's efforts at training were lacking. Miller competently testified regarding his ability to identify hazards and his authority to correct them. The Court, by so finding, is merely concluding *the evidence* Respondent presented regarding its program for communicating work rules was insufficient as to this topic; not that Miller was insufficiently trained to be a competent person.

provide much detail beyond a simple "yes" or "sometimes, yeah." (Tr. 524-525). Again, the Court finds such evidence to be insufficient in the face of the substantial burden imposed by a claim of unpreventable supervisory misconduct.

Finally, Respondent produced virtually no evidence regarding whether it effectively enforced the rules when violations were discovered. *See Angel Enters., Ltd.*, No. 16-0940, 2020 WL 4514841 at *8 (OSHRC, July 28, 2020), *aff'd*, 18 F.4th 827 (5th Cir. 2021) (citing *Cooper/T. Smith Corp. D/B/A Blakely Boatworks, Inc.*, 2020 WL 1692541, at *3 (No. 16-1533, 2020) (employer failed to prove effective enforcement under UEM defense because there was "no documentary evidence that Blakely enforced any of its safety-related work rules before [the violation]"); *Precast Serv.*, 17 BNA OSHC 1454, 1455-56 (No. 93-2971, 1995) (employer failed to prove effective enforcement under UEM defense because it "introduced no evidence that prior to [the project OSHA inspected] it had subjected an employee to termination, suspension, docked pay, or even a written reprimand or a verbal warning for failure to comply with a work rule."); *see also Fla. Gas Contractors, Inc.*, 27 BNA OSHC 1799, 1801-02 (No. 14-0948, 2019) (employer's failure to provide documentation supporting claimed instances of discipline was a factor weighing against a UEM defense)). Gordon testified he has issued verbal and written warnings in the past; however, Respondent presented no documentation, beyond these general proclamations, that discipline had taken place in any context. (Tr. 420-21, 460). In fact, he specifically testified he has no recollection of enforcing the disciplinary policy with respect to the trenching safety rules during the entirety of the St. Anthony project. (*Id.*). In that respect, it is also worth noting that Respondent did not discipline any employee for the violations that occurred in this case. (Tr. 536-37).

Based on the foregoing, the Court finds Respondent failed to establish the affirmative defense of unpreventable supervisory misconduct. As such, Citation 1, Item 1 is AFFIRMED.

C. Citation 1, Item 1(b)

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

> 29 CFR 1926.651(k)(1): Daily inspections of excavations, adjacent areas, and protective systems were not made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications of failures of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection was not performed by a competent person prior to the start of work and as needed throughout the shift:
>
> On August 23, 2021, and times prior thereto, the employer did not ensure a competent person inspected the trench prior to entry and as needed throughout the shift. Employees were working to install and fuse a 4 inch gas pipeline in a trench with unstable type-C soil where there had been prior cave-ins.

See Citation and Notification of Penalty at 7.

To determine whether Respondent established the exception to the standard cited in Citation Item 1(a), the Court had to analyze whether Miller was a competent person and whether he conducted an examination of the trench that, in essence, conformed to the requirements of § 1926.651(k)(1). The Court has already found that: (1) the excavation standards apply to the work performed by Respondent; (2) although Miller was qualified by training and experience, he either failed to perform an adequate, and timely, inspection of the trench or failed to respond to an indication of a potential cave-in, i.e., sloughing,[9] which is a violation of *this* cited standard; (3) Respondent's employees were exposed to the hazard, as illustrated by their injuries and presence inside the trench; (4) Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition through the constructive knowledge of Miller or actual knowledge of JB; (5) the violation was serious; and (6) Respondent failed to establish the defense of unpreventable supervisory misconduct. *See* Section V.B, *supra*. Thus, the Court finds the proof required to establish a violation of this citation item is satisfied by the evidence presented by

9. To reiterate, the sloughing observed by RL, JB, and Mendoza was in an amount sufficient for Gordon to state he would want to be notified about it.

Complainant here and in opposition to Respondent's assertion of the exception to § 1926.652(a)(1). As such, the Court incorporates the findings in Section V.B, *supra*, by reference and finds Complainant established a violation of § 1926.651(k)(1). The citation item is AFFIRMED.

D. Citation 1, Item 1(d)

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

> 29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his/her environment to control or eliminate hazards or other exposure to illness or injury:
>
> On August 23, 2021, and times prior thereto, employees installed and fused 4" gas pipe in trenches. Each affected employee had not received sufficient training or instruction on how to identify and protect themselves from the hazards of cave-ins.

See Citation and Notification of Penalty at 9.

1. The Standard Applies and Was Violated

As noted by Complainant, the Commission has long-standing precedent "that an employer is required to provide excavation safety instructions under § 1926.21(b)(2) to employees engaged in excavation work, regardless of whether the potential hazards posed by excavations are actually present." *See Bardav, Inc.*, No. 10-1055, 2014 WL 5025977, at *8 (OSHRC Sep. 30, 2014). Respondent's employees were engaged in such work and were exposed to the hazard posed by excavations. Accordingly, the standard applies.

The Court finds the standard was violated. While Complainant focuses on both RL and JB, the Court finds the evidence with respect to JB is less convincing and, ultimately, unnecessary to establish a violation of the standard. The record is clear Respondent did not provide RL with the tools to recognize or avoid hazardous conditions, nor was he trained regarding the regulations applicable to working in trenches. Respondent contends there were multiple avenues through

which RL received training sufficient to meet the requirements of the standard. The Court shall address each of those avenues below.

When RL was hired, he went through orientation with Gordon. (Tr. 425). Gordon testified he provides new employees with a copy of its safety and health policy and encourages them to read it. (Tr. 425). Aside from discussing the course of his training however, Gordon did not follow up with RL or other new employees to ensure they had read or understood the materials they were provided. (Tr. 459). Instead, Gordon relied on on-the-job training, morning toolbox talks, OQ training through Energy Worldnet, annual training, and JSA meetings. However, RL did not receive the instruction required by the standard in any of these so-called trainings.

First, merely providing an employee with a manual and expecting them to read it is insufficient for the purposes of the standard. *See O'Brien Concrete Pumping, Inc.*, No. 98-0471, 2000 WL 235285 at *3 (OSHRC, Feb. 16, 2000) (finding that supplying manuals for employees to read and having them signing an acknowledgment form was insufficient). Second, aside from saying that Respondent provides on-the-job training, there is no evidence to indicate what, if anything, was taught during that time. No one testified as to the training they provided RL, so the Court is left with what RL can recall about his training. According to RL, he did not recall being given instruction on trenching hazards, how to identify them, or what regulations governed his behavior at the worksite. (Tr. 221-224, 257-260). *See also id.* At *3 (finding record failed to establish training sessions provided specific instructions related to hazards encountered by employees).

Third, Gordon admits he does not supply new employees with access to the Energy Worldnet OQs, which provides education on trenching hazards, soil classification, and other information relevant to identifying and addressing hazards or compliance with applicable

regulations. (Tr. 439). Because new employees like RL did not have access to the Energy Worldnet platform, they could not access other documents, such as the SF 418 document, which lays out the operating procedures that govern contractors working for MDU. (Tr. 444). Although training on the operating procedures was discussed at Respondent's annual meeting and safety training, RL was not hired until after the meeting took place. (Tr. 441-450).

Fourth, Respondent contends it provided training through periodic seminars, morning meetings, and JSAs to discuss discrete safety issues. However, as illustrated by Complainant, the only periodic training RL participated in prior to the cave-in covered overhead hazards and power hazards. (Tr. 442-443; Ex. R-22, R-31). As for the morning meetings and JSAs, the Court finds Gordon and Miller's testimony to be too general to satisfy the requirements of the standard. Both Miller and Gordon testified they had safety meetings in the morning prior to going to the worksite; however, it is unclear what, if any, topics regarding trench safety were discussed. When asked whether the morning meetings covered "safety issues", Miller replied, "Yeah, sometimes." (Tr. 523). He also testified that JSA meetings covered "work rules". Gordon testified in a similarly general manner. When asked about whether RL was encouraged to report any safety issues to him, Gordon testified, "We—we talk about those things every morning. If—I ask them if there's an issue that we need to discuss about safety, any kind of safety." (Tr. 426). Without some evidence to indicate the substance of the training provided to RL during the one-month period between his hire date and the date of the cave-in, the Court cannot conclude Respondent provided training sufficient to teach RL to recognize and avoid unsafe conditions or to understand the regulations applicable to his/her environment to control or eliminate hazards.

The foregoing is supported by RL's testimony. RL testified he did not receive training in the morning meetings or during the JSA meetings. (Tr. 222, 260, 265-69). According to RL, the

JSA was already filled out when he received the form, and he was expected to sign it. To his understanding, the form listed materials that were being used for the job that day. (*Id.*). Respondent seemed to imply RL's lack of recollection on certain topics merely meant he did not remember what he was trained. The Court finds RL's inability to remember what he learned is a product of not being trained on those subjects. This is confirmed by the inability of Respondent to provide any evidence whatsoever regarding the substance of what RL would have been taught during the one-month period of his employment prior to the cave-in.

Based on the foregoing, the Court finds Complainant established a violation of the standard.

2. RL was Exposed to a Hazard

As discussed extensively in Section V.B, *supra*, RL, as well as JB and Mendoza, were exposed to the hazard posed by the trench at issue, as well as every other trench they had to work on during the course of their employment with Respondent. As such, it was incumbent upon Respondent to ensure they were trained in accordance with the requirements of § 1926.21(b)(2). *See Bardav, supra* at *10 ("As for the remaining elements of the prima facie case, exposure is established because Bardav's employees were engaged in excavation work without first receiving required training.").

3. Respondent Knew of the Violation

It is the responsibility of the employer to ensure its employees are trained in accordance with § 1926.21(b)(2). In this case, that responsibility fell to Gordon. (Tr. 336-37). Because the evidence shows RL did not receive adequate training prior to his injury, the Court finds Respondent had actual knowledge of his lack of training.

4. The Violation was Serious and is Affirmed

For the same reasons expressed above with respect to Citation items 1(a) and 1(b), the Court finds the violation was serious. Accordingly, Item 1(d) is AFFIRMED.

VI. Penalty

The foregoing items were grouped as one citation with a single penalty of $8,702. During direct examination of AD Kearns, counsel for Respondent stated, "We're not contesting the amount of gravity or the basis on which it was calculated. That's not an issue in dispute." (Tr. 180). Upon questioning from the Court, Respondent confirmed that, if the citation were proven, the penalty was appropriate. (*Id.*). The Court sees no compelling reason to depart from the gravity or penalty assessments made by Complainant. Accordingly, the penalty assessment is AFFIRMED.

VII. Order

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Items 1(a), 1(b), and 1(d) are AFFIRMED as serious, and a grouped penalty of $8,702 is ASSESSED.
2. Citation 1, Item 1(c) has been withdrawn by Complainant.

SO ORDERED.

/s/ Joshua R. Patrick

Dated: February 12, 2024
Denver, Colorado

Joshua R. Patrick
Judge, OSHRC