



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.

PETRONGOLO CONTRACTORS, INC.,

Respondent.

OSHRC Docket No. 20-0786

DECISION AND ORDER

APPEARANCES:

For the Complainant:

Bertha M. Astorga, Esq.
Trial Attorney
U.S. Department of Labor
Philadelphia, Pennsylvania

For the Respondent:

Michael Metz-Topodas, Esq.
Cohen, Seglias, Pallas, Greenhall, and Furman, P.C.
Philadelphia, Pennsylvania

BEFORE: William S. Coleman
Administrative Law Judge

The Respondent, Petrongolo Contractors, Inc. (Petrongolo), is a corporation primarily engaged in the business of public utility contracting, much of which requires creating excavations. On January 27, 2020, Petrongolo excavated a trench in the street in the 4200 block of Adams Avenue in Philadelphia, Pennsylvania (Adams Site) to access a sewer owned by the Philadelphia Water Department (PWD). PWD had contracted with Petrongolo to reline the sewer for a length of about six city blocks in this vicinity. Petrongolo subcontracted with another company to do the actual relining work, but before the subcontractor did the relining, Petrongolo first had to remove

the existing manhole to the sewer and replace it with a larger precast manhole so that the subcontractor to access the sewer to do the relining. In preparing the site for the subcontractor, Petrongolo removed the existing manhole and dug a trench in the spot where the existing manhole had been located. The resulting trench was about 10-feet deep from street level to the top of the sewer pipe (where the pipe had a large opening where the original manhole had connected to the pipe). The footprint of the trench at street level was about 10x6 feet.

A cast iron gas main owned by Philadelphia Gas Works (PGW) ran parallel to the sewer, at a slightly higher elevation than the sewer and somewhat offset so that it was not directly above the sewer. PGW received a report on January 27, 2020, that caused it to be concerned that Petrongolo's excavation had compromised the structural integrity of its gas main. A PGW employee went to the Adams Site and caused Petrongolo to stop work at the site in the early evening of January 27, 2020.

PGW contacted the Occupational Safety and Health Administration (OSHA) and reported what it believed to be a hazardous excavation, and it sent to OSHA photographs that its employees had taken of the trench on both the evening of January 27 and on the morning of January 28. This information resulted in OSHA dispatching one of its Compliance Safety and Health Officers (CO) to the worksite on the morning on January 28, 2020, to investigate the report. The CO's inspection and investigation resulted in OSHA issuing to Petrongolo two one-item Citations.

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.652(c)(1) for "fail[ing] to obtain the soil type to determine the proper configuration when using timber shoring." Citation 1 proposed a penalty of \$3,393.

Citation 2, Item 1 alleges a repeat violation of 29 C.F.R. § 1926.652(a)(1) for "fail[ing] to ensure that each employee working inside an excavation of approximately twelve (12) feet deep

were protected by cave-in protection,” and stating further the alleged failure was “[n]oted on or about 28 JAN 2020.” Citation 2 proposed a penalty of \$29,687.

Petrongolo timely contested the Citations and proposed penalties and thereby brought the matter before the independent Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act (Act). 29 U.S.C. § 659(c). The Commission docketed the matter on May 19, 2020. The Secretary of Labor (Secretary) thereafter filed his formal complaint that re-alleged the allegations and proposed penalties set forth in the Citations. The Commission’s Chief Judge assigned the matter to the undersigned for hearing and decision. The hearing was conducted remotely via videoconferencing technology on March 10–12 & 24, 2021. Post-hearing briefing was completed on June 25, 2021.

The principal issues for decision are as follows:

- Did the Secretary prove by a preponderance of the evidence that Petrongolo failed to obtain the soil type in determining the proper configuration of timber shoring that Petrongolo installed on January 28, 2020? (Citation 1, Item 1; § 1926.652(c)(1)).

Decision: No.

- Did the Secretary prove by a preponderance of the evidence that Petrongolo employees were working in a trench that lacked an adequate protective system on January 28, 2020? (Citation 2, Item 1; § 1926.652(a)(1)).

Decision: Yes.

- Did the Secretary prove by a preponderance of the evidence that Petrongolo had knowledge that its employees were working in a trench that lacked an adequate protective system on January 28? (Citation 2, Item 1; § 1926.652(a)(1)).

Decision: Yes.

- Did Petrongolo rebut the Secretary’s prima facie showing that the violation of § 1926.652(a)(1) was substantially similar to Petrongolo’s

prior violations of the same standard for purposes of classifying the violation as a repeat violation? (Citation 2, Item 1; § 1926.652(a)(1)).

Decision: No.

- What is the appropriate penalty for the repeat violation of § 1926.652(a)(1)?

Decision: A penalty of \$22,000 is assessed.

For the reasons set forth below, Citation 2, Item 1 is AFFIRMED as a REPEAT violation and a penalty of \$22,000 is assessed. Citation 1, Item 1 is VACATED

FINDINGS OF FACT

Except where the following findings indicate that the evidence was insufficient to establish a certain fact or indicates the absence of evidence bearing on a matter of fact, the following facts were established by at least a preponderance of the evidence:

1. Petrongolo is a corporation that engages in public utility construction mainly in the metropolitan area of Philadelphia, Pennsylvania. (T. 259-60). Much of Petrongolo's construction activities involve sewer reconstruction and relining. (T. 259-60). Approximately 80% of Petrongolo's work involves excavations. (T. 260).

2. The president of Petrongolo is Mr. Ron Petrongolo. His son, Mr. Dan Petrongolo, is a vice president.¹ (T. 258-59, 493-94). Petrongolo employs other workers serving as foremen, operators, laborers, and truck drivers. (T. 517).

3. Petrongolo is an employer and is engaged in a business affecting interstate commerce. (Joint Pre-Hr'g Statement ¶ IV(B)(2)).

¹ References herein to "Petrongolo" are references to the Respondent only. Messrs. Ron and Dan Petrongolo are referred to by full name only.

The Adams Site and Associated Trench Excavation

4. The Philadelphia Water Department (PWD) contracted with Petrongolo for a water main and sewer project that included relining about six city blocks of PWD's brick sewer in the vicinity of Adams Avenue in Philadelphia. (T. 523-24). The relining would be accomplished by injecting the existing sewer pipe with resin that would line the inner walls of the pipe, essentially creating a new resin pipe inside the existing brick pipe. (T. 525). The entire length of the existing sewer is not excavated to do the relining. Rather, the relining is done by accessing the sewer from a manhole opening.

5. Petrongolo subcontracted with a company named North American Pipe (NA Pipe) to perform the actual task of relining. (T. 294-95, 299, 525-26, 562). But, because the existing manhole on the 4200 block of Adams Avenue was too narrow for NA Pipe to access the sewer to do its work, it was necessary for Petrongolo first to remove the existing manhole and the surrounding soil to create a trench excavation where Petrongolo would then install a wider precast reinforced concrete manhole, four feet in diameter, through which NA Pipe could then access the sewer. (Joint Pre-Hr'g Statement ¶ IV(A)(1); T. 153-54, 260-63, 284-85, 295-97, 524-27; Ex. C-2 at 3; Ex. J-8 at 20 & 22). Petrongolo was the only contractor performing excavation work on this trench excavation. (Joint Pre-Hr'g Statement ¶ IV(A)(4); T. 88-90, 649-50).

6. NA Pipe did not perform any excavation work at the Adams Site and would not begin the work of relining the sewer until after Petrongolo had completed preparations for it to begin work. (T. 564). Petrongolo had also subcontracted with a paving subcontractor and a plumber subcontractor, but neither of them performed excavation work. (T. 562, 564).

Events on January 27, 2020

7. On January 27, 2020, Petrongolo created a trench excavation at the location of the existing manhole down to the existing sewer by removing the existing manhole and the soil around

it. The upper portion of the sewer pipe had an opening where the original manhole had connected to the pipe and where the new manhole would connect. (T. 260, 524-25). The trench was about 10-feet deep from street level to the top of the sewer pipe. The trench's footprint at street level was about 10x6 feet. The walls of the trench were vertical or near vertical. (Joint Pre-Hr'g Statement ¶ IV(A)(1) & (2); T. 153-54, 182-83, 230-33, 260-63, 284-85, 523-24, Ex. J-8 at 29 & 30). (The trench and the area in its immediate vicinity in the 4200 block of Adams Avenue are accurately depicted in photographs in Exhibits C-1, C-2, and J-8.)

8. Ron Petrongolo was present at the Adams Site for the duration of Petrongolo's work activity on January 27, 2020, serving as foreman of the Petrongolo crew. (Joint Pre-Hr'g Statement ¶ IV(A)(3); T. 260-61, 273-74).

9. Petrongolo had its backhoe at the Adams Site, and Ron Petrongolo operated it to remove the existing manhole and create the trench excavation. (T. 44, 52-53, 262-64, 296-97, 328, 336-38; Ex. C-2 p.3).

10. The excavation exposed a segment of a cast iron gas main owned by PGW that ran parallel to the sewer at a depth slightly above and to the side of it. (T. 40-41, 44, 90-91, 121-22, 603-06; Ex. C-2 pp. 1 & 2). The exposed segment of the gas main had no soil underneath it to provide support. (T. 40-41, 91, 130-32, 604-05; Ex. C-2, pp. 1 & 2). This potentially could have led to the gas main fracturing and leaking gas. (T. 40-41, 603-06, 633-34).

11. Sometime after Petrongolo started digging the trench, PGW received a report that its gas main may have become exposed and its structural integrity compromised by the excavation activity. (T. 40-41, 90, 603-06). PGW dispatched Mr. Anthony Pereira, who was a Distribution Maintenance Supervisor for PGW, to investigate and inspect the condition of the gas main. He arrived at the Adams Site about 6:00 p.m. and remained on site until about 12:30 a.m. (T. 40-41,

43, 56). While there, he took photos of the trench and the Adams Site that are included in Exhibit C-2 and that accurately depict the condition of the trench at the time he took the photos. (T. 46-53; Ex. C-2).

12. Around 8:30 p.m. on January 27, another PGW employee, Mr. Brian Eckroade, who is an Area Supervisor in PGW's Maintenance Department, also arrived at the Adams Site, and he remained at the site until about 11:30 p.m. (T. 82, 90, 92). Messrs. Pereira and Eckroade discussed having PGW workers returning to the vicinity of the Adams Site the next day to oversee a "cut and cap" on the gas main because of continued concerns that the excavation activity could cause the gas main to fracture and leak gas. (T. 91-92). A cut and cap operation would have the effect of bypassing the exposed gas main in the trench. This would be done by cutting and then capping the gas main at two places on opposite sides of the excavation to divert the flow of gas around the segment of the gas main that was exposed in the trench. (T. 91-92).

13. Pereira asked either Ron Petrongolo directly or through an official of PWD for Petrongolo to stop work that evening. Petrongolo complied. Ron Petrongolo used Petrongolo's backhoe to cover the unprotected trench excavation with steel plates, and the Petrongolo crew departed the Adams Site sometime later that night. (T. 43, 45-46, 286, 329-31, 336-38; Ex. J-8, p. 20).

Events on January 28, 2020

14. On the morning of January 28, 2020, Ron Petrongolo led a crew of four other Petrongolo workers that returned to the Adams Site to continue work. (Joint Pre-Hr'g Statement ¶ IV(A)(2); T. 299-301). The other four workers were Luis Ortiz, Cesar Rosario, Luis Morales, and Dan Rosario. (Ex. C-3).

15. Mr. Eckroade of PGW returned to the Adams Site around 7:00 a.m., and another PGW official, Mr. Steve Westergon, who was a Distribution Maintenance Supervisor, arrived

about the same time, both to oversee PGW's cut and cap operation. (T. 96-98, 118-19, 121). There is no direct evidence of the precise locations along the gas main where PGW performed its cut and cap operation, but Petrongolo's Daily Report for January 28, which Ron Petrongolo prepared, suggests that it was done at both ends of the 4200 block of Adams Avenue, with one cut being done where Adams Avenue intersects Church Street, and the other cut being done where Adams Avenue intersects Ruan Avenue, with both cuts requiring that PGW create excavations. (Ex. R-25; Ex. J-8 at 1 and 9 [Bates 189]; T. 158). The linear distance between these two intersections is about 320 feet.²

16. Ron Petrongolo used Petrongolo's backhoe to remove the steel plates that he had put over the unprotected trench the night before. Around 7:30 a.m. or 8:00 a.m., as both Eckroade and Westergon moved between the two cut and cap locations and passed by Petrongolo's trench, they observed two workers in the unprotected trench standing on wood boards that had been arrayed side by side about six feet down inside the trench to create a work platform for them to stand on. (The number of wood boards constituting the work platform varies between four and six in the thirteen photos in Exhibit C-1, depending apparently on the progress of the work that was being done while the photos were being taken.) The workers were seen installing two 2x6 boards vertically against the walls of opposite sides of the trench and placing a metal jack-pipe in between the boards that appeared to serve as a cross-brace supporting the two vertical boards. The jack-

² No evidence of the length of this segment of Adams Avenue was presented at the hearing. This finding respecting the distance between the two intersections is based on judicial notice of a Google map and satellite image of the area, the accuracy of which cannot reasonably be questioned for purposes of this case. *See Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking *sua sponte* judicial notice of a Google map and satellite image as a “source[] whose accuracy cannot reasonably be questioned’ for purposes of this case” under Fed. R. Evid. 201(b)(2)); *accord U.S. v. Burroughs*, 810 F.3d 833, 835 n.1 (D.C. Cir. 2016) (taking judicial notice of the same on motion of party).

pipe spanned the width of the trench about one foot above the wood boards the workers were standing on. A ladder was inside the trench which appears to have provided the workers the means of ingress and egress. The ladder appears also to be the same type of ladder in color and material as the ladder that Petrongolo had put in the same trench the night before as reflected in the photos in Exhibit C-2. Eckroade took thirteen photographs of the workers doing this work inside the unprotected excavation at around 7:30 a.m. to 8:00 a.m. on January 28. Those photographs accurately depict the condition of the trench when taken and were received in evidence at Exhibit C-1. The faces of the two workers inside the trench are not captured in any of the photographs. Some of the photographs show the lower arms or the lower legs of at least one other worker (or possibly two different workers) who was (or were) outside the trench. The two workers inside the trench depicted in the photographs are accurately depicted working inside an excavation that was deeper than five feet and that lacked an adequate protective system to protect them from a cave-in. (Joint Pre-Hr'g Statement ¶¶ IV(A)(1)-(4); T. 97-106, 110, 112-13, 121-24, 143-44, 147-48, 161, 163-64, 219-20, 227-28, 270-74, 279-80, 299-301, 313-22, 338, 561-64, 577-78, 649-52, 699-701; Exs. C-1, C-3, R-25).

17. Westergon was present when Eckroade took the photographs in Exhibit C-1. (T. 125). Westergon observed and heard Ron Petrongolo give oral instructions to the workers while the workers were inside the trench and when the trench lacked an adequate protective system to protect the workers from cave-ins. (T. 123-24, 138-41, 143-44). These workers were Petrongolo employees. There is no evidence that employees of any employer other than Petrongolo would have reason to enter the unprotected trench to begin installing timber shoring in the trench.

18. The workers in the unprotected trench were not PGW employees. The two PGW supervisors (Eckroade and Westergon) who observed the workers in the trench were familiar with excavation safety and recognized the unprotected trench was a hazard. They would not allow PGW employees to enter the unprotected trench. (T. 84-85, 99-100, 124, 146-47). One of the PGW supervisors (Westergon) admonished Ron Petrongolo that workers ought not enter the unprotected trench. (T. 123, 137).

19. The workers in the unprotected trench were not employees of any of Petrongolo's subcontractors (NA Pipe, or the plumbing or paving subcontractors) in that none of Petrongolo's subcontractors did excavation work and none had reason to direct employees to enter the unprotected trench to begin to install timber shoring. (Joint Pre-Hr'g Statement ¶ IV(A)(4); T. 562-64).

20. Sometime after Eckroade took photos of the trench, Ron Petrongolo directed Petrongolo employees in completing the installation of timber shoring in the trench. The day before, Ron Petrongolo had assessed the trench's soil type by performing a visual examination of the soil. (T. 268-70). He also performed a manual test by picking up a sample of the soil and rolling it around between his fingers. (T. 266). He found the soil type "inconsistent" and concluded it was probably not composed of a single type of soil. (T. 306-308, 341-43, 702). This led Ron Petrongolo reasonably to classify the soil as Type C, which is the least stable soil type. (T. 306-308, 341-43, 682-83, 702).

21. Sometime after 8:00 a.m. (when Eckroade took the photographs at Exhibit C-1) and before noon, Petrongolo workers supervised by Ron Petrongolo completed installing timber shoring in the trench. (T. 265, 302, 697-700; Ex. J-8). There is no evidence that any workers were inside the unprotected trench while completing the installation of the timber shoring except for the

photographs received in evidence at Exhibit C-1. After the timber shoring was completely installed, it constituted an adequate protective system to protect workers from cave-ins. (T. 436-37, 445).

22. Petrongolo's "Daily Report" that Ron Petrongolo prepared to record Petrongolo's activity at the Adams Site on January 28, 2020, indicates that PGW completed its cut and cap operation at about 7:00 p.m. that day, after which PGW cleared Petrongolo to proceed with the sewer relining. (Ex. R. 25).

OSHA's Inspection and Citation

23. In response to PGW's report to OSHA of a hazardous excavation at the Adams Site, OSHA dispatched a Compliance Safety and Health Officer (CO) to the Adams Site to conduct an inspection. (Joint Pre-Hr'g Statement ¶ IV(A)(6); T. 154-57, 204-07; Ex. J-7).

24. The CO arrived at the Adams Site on the morning on January 28, 2020, and by the time he arrived the Petrongolo crew had completed installing the timber shoring in the trench and had departed the Adams Site.³ (T. 158, 179-82, 242-50, 445-46; Ex. J-8 pp. 3-14, 16, 19, 21, 24-25, 29-30). Sometime during his inspection, in late morning or early afternoon, Dan Petrongolo arrived at the Adams Site and met the CO. (T. 530). Ron Petrongolo returned to the site sometime after Dan arrived, and the CO spoke to both at the same time. (Joint Pre-Hr'g Statement ¶ IV(A)(8); T. 158-59, 184, 274-75, 528-30).

³ The CO testified that he arrived at the Adams Site in the morning, but there is no more precise evidence of the time he arrived. (T. 158). The CO took 30 photographs of the Adams Site, which were admitted in evidence as Exhibit J-8. (T. 178-79). Eight of the photographs have timestamps ranging from 12:19 p.m. to 12:25 p.m., but the other photographs have no timestamps. (Ex. J-8, pp. 1-8). In his testimony, the CO indicated that these timestamps may have been one hour off, but he did not indicate whether this discrepancy was one hour earlier or later. (T. 200).

DISCUSSION

The Commission obtained jurisdiction under section 10(c) of the Act upon Petrongolo's timely filing of a notice of contest. 29 U.S.C. § 659(c). Petrongolo has employees and is engaged in a business affecting commerce, and thus meets the Act's definition of "employer." 29 U.S.C. § 652(5); (Finding of Fact ¶ 3).

Both Citations allege violations of safety standards promulgated pursuant to section 6(b) of the Act. 29 U.S.C. § 655(b). To establish a violation of such a standard, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees had access to the violative condition; and (4) the cited employer had actual or constructive knowledge of the violative condition. *Donahue Indus. Inc.*, 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003).

Alleged Insufficiency of Petrongolo's Type C Soil Determination

Serious Citation 1, Item 1 – Section 1926.652(c)(1)

Citation 1, Item 1 alleges a violation of § 1926.652(c)(1), which provides in relevant part that "[d]esigns for timber shoring in trenches shall be determined in accordance with the conditions and requirements set forth in appendices A and C to this subpart."

Appendix A is titled "Soil Classification," and its "scope" provision states: "This appendix describes a method of classifying soil and rock deposits based on site and environmental conditions, and on the structure and composition of the earth deposits. The appendix contains definitions, sets forth requirements, and describes acceptable visual and manual tests for use in classifying soils."

Appendix C is titled "Timber Shoring for Trenches" and its "scope" provision states in part:

This appendix contains information that can be used [when] timber shoring is provided as a method of protection from cave-ins in trenches that do not exceed 20

feet ... in depth. This appendix must be used when design of timber shoring protective systems is to be performed in accordance with § 1926.652(c)(1).

Citation 1, Item 1 alleges that Petrongolo violated § 1926.652(c)(1) by “fail[ing] to obtain the soil type to determine the proper configuration when using timber shoring.”⁴

The cited standard applies to the Adams Site trench excavation, and Petrongolo does not contend otherwise. *See* § 1926.650(a) (“This subpart applies to all open excavations made in the earth’s surface. Excavations are defined to include trenches”); § 1926.650(b) (defining the terms “trench” and “trench excavation” as “a narrow excavation (in relation to its length)” that is generally deeper than it is wide but is not wider than 15 feet).

Appendix A establishes four soil classifications: Stable Rock, and Types A, B, and C soil. *See* 29 C.F.R. § 1926, Subpt. P, app. A ¶ (b). Type C is the least stable soil type. *See* App. A (b); *see also* (T. 306-07, 682-83). The use of design data in Appendix C is dependent on the soil classification that is determined according to the criteria set forth in Appendix A. *See* Appendix C, ¶ (b) (providing that “[i]n order to use the data presented in this appendix [C], the soil type or

⁴ The Secretary has argued that Petrongolo’s design of the timber shoring did not conform to the requirements of Appendix C. (Sec’y Br. 22-23). That issue will not be adjudicated because the scope of the alleged violation is limited to whether Petrongolo conformed with the requirements of Appendix A for classifying the soil type. The citation item does not allege a violation of Appendix C respecting the design of Petrongolo’s timber shoring system, and so the issue of whether Petrongolo’s design conformed with Appendix C is outside the scope of the pleadings. Moreover, that issue was not tried by consent of the parties such that a judge could *sua sponte* amend the pleadings post-hearing. *Fossett*, 7 BNA OSHC 1915 (No. 76–3944, 1979) (upholding Commission judge’s decision to amend a citation item *sua sponte* after the close of the hearing pursuant to the provisions set forth in current Fed. R. Civ. P. 15(b)(2)); *McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) (deciding that amendment under Fed. R. Civ. P. 15(b)(2) “is proper only if two findings can be made – that the parties *tried* an unpleaded issue and that they *consented* to do so”; and stating further that “[t]rial by consent may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue”). In any event, even if the issue were deemed to have been within the scope of the pleadings or tried by consent, the evidence that Petrongolo’s design failed to meet the requirements of Appendix C was not preponderant. (*See* T. 435-36, 664-67).

types in which the excavation is made must first be determined using the soil classification method set forth in appendix A”).

Appendix A requires a competent person to perform at least one visual and one manual test on the soil to determine the soil type. App. A ¶ (c)(2). The appendix sets forth a series of “[a]cceptable visual and manual tests” and provides also that a competent person may rely on other recognized methods of testing as well. *Id.* (“Such [visual and manual] analyses shall be conducted by a competent person using tests described in paragraph (d) below, or in other recognized methods of soil classification and testing such as those adopted by the America Society for Testing Materials, or the U.S. Department of Agriculture textural classification system.”).

The preponderant evidence established that Ron Petrongolo, who is a registered professional engineer with years of experience in testing soil and performing excavations in the Philadelphia area, is a “competent person” as defined in § 1926.650(b).⁵ (T. 289-93). The Secretary recognizes as much. (Sec’y Br. 6-7). Ron Petrongolo performed at least one manual and one visual test of the soil at the Adams Site in conformance with the requirements of Appendix A. (Findings of Fact ¶ 20). These tests and other relevant information available to him caused him reasonably to conclude that the timber shoring design for the trench’s timber shoring must be adequate for Type C soil. (T. 306-08, 341-43).

Even if Ron Petrongolo had failed to conduct the visual and manual tests required by Appendix A, it would not have mattered, because his determination that the soil was Type C rendered any soil testing superfluous and thus not required. *See* OSHA Interpretation Letter,

⁵ The definition is: “*Competent person* means 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.” § 1926.650(b).

“Testing of type C soil is not necessary if employees are adequately protected,” (June 5, 1991) (stating that “soil testing would be superfluous and not required” if soil is classified as Type C and the protective system is adequate to protect against cave-ins in Type C soil); (*see also* T. 306-308, 682-83). The Secretary makes no argument that this 1991 letter of interpretation, which is published on OSHA’s public website, does not accurately represent current OSHA policy respecting the need to test soil in the manners specified by Appendix A where that soil is regarded to be Type C soil.

The Secretary did not establish that Petrongolo failed to comply with § 1926.652(c)(1) in the manner alleged in Citation 1, Item 1, and accordingly that citation item must be vacated.

Alleged Failure to Provide Adequate Protective System

Repeat Citation 2, Item 1 – Section 1926.652(a)(1)

Citation 2, Item 1 alleges a violation of § 1926.652(a)(1), which provides in relevant part that “[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section” Citation 2, Item 1 alleges that Petrongolo violated this section because it “failed to ensure that each employee working inside an excavation of approximately twelve (12) feet deep were protected by cave-in protection.”

The cited standard applies to the trench excavation for the same reasons the excavations standard applied to Citation 1, Item 1. Petrongolo does not contend otherwise.

Alleged Violation on January 27, 2020

This decision adjudicates only whether Petrongolo employees were exposed to the violative condition on January 28, 2020, when the PGW officials observed and took photographs of workers in the unprotected excavation who appear to have begun installing timber shoring as depicted in the photographs in Exhibit C-1.

The Secretary argues that the evidence established employee exposure to an unprotected trench on the evening of January 27, 2020, as Mr. Pereira of PGW testified he had observed. This argument is not considered because the Citation identifies the next day, January 28, as the “on or about” date of the violation (not on or about January 27 *and* January 28). Moreover, the assistant area director of the OSHA area office that issued the citation testified that the citation item was not grounded upon any claimed worker exposure on January 27, 2020, but rather was based on the near conclusive photographs of worker exposure that were taken on the morning of January 28. (T. 418-24; Ex. C-1). The issue of whether the Petrongolo violated the cited standard on January 27 will not be adjudicated because the scope of the alleged violation is limited to whether Petrongolo violated the cited standard on January 28, not January 27, and the unpleaded issue of whether a separate violation occurred on January 27 was not tried by consent. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC at 2129.

The imprecise and somewhat unfocused evidence as to employee exposure on the evening of January 27 is further indicative that the parties did not try that issue by consent. While Mr. Pereira testified that he observed workers in the unprotected trench, he took no photographs of that violative conduct, although he did take photographs of the empty trench and PGW’s exposed gas main therein. (Ex. C-2; T. 44-45, 80). Mr. Pereira’s testimony did not squarely controvert Ron Petrongolo’s testimony that Petrongolo employees entered the trench on January 27 only when they were inside the precast concrete manhole that Ron Petrongolo had temporarily placed in the excavation on January 27. Rather, Pereira at least partially corroborated Ron Petrongolo’s account—Pereira testified that employees were in the trench at the same time the manhole was in the trench. (T. 44-45 & 79-80). With respect to the adequacy of the manhole to protect the workers from cave-ins, the Secretary presented no testimony respecting how or why that asserted method

was non-compliant. In his closing briefs, the Secretary makes no argument that the use of the manhole for providing cave-in protection in the manner that Ron Petrongolo claimed was non-compliant with the cited standard. (*See* Sec’y Reply Br. 2-3). The adequacy of the cave-in protection that the concrete manhole provided the workers in the trench on January 27 is similarly not adjudicated.

Alleged Violation on January 28, 2020

On January 28, 2020, the trench was well over five feet deep and thus constituted a hazard for so long as it was open and lacked an adequate protective system. *See Flint Eng’g & Constr. Co.*, 15 BNA OSHC 2052, 2055 n.8 (No. 90-2873, 1992) (rejecting cited employer’s argument that an unprotected trench was not a hazard so long as employees were not in the trench, concluding instead that “[t]he open trench was the hazard”). Accordingly, the open trench was non-compliant with the cited standard on January 28, 2020, from the time that Ron Petrongolo removed the steel plates covering it to the time that the Petrongolo crew completed installation of the timber shoring that was in place by the time the CO arrived at the Adams Site later that morning.

The photographs in Exhibit C-1 show two workers in the unprotected trench at the Adams Site that was at least ten feet deep. Those two workers were exposed to a cave-in hazard. *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2011 (No. 90-1505, 1992) (“The standard speaks of the depth of the trench, not of the position of employees in the trench”), *aff’d*, 16 F.3d 1219 (6th Cir. 1994); *see also P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997) (“The safety standard is implicated by the depth of a particular trench, without regard to an individual worker’s precise position in it”).

Petrongolo defends on the grounds (1) the Secretary did not prove that the workers in the unprotected trench were Petrongolo employees, and (2) that the Secretary did not prove that Petrongolo had knowledge that *any* workers (whether Petrongolo employees or the employees of

some other employer) had entered the unprotected trench. (Resp't Br. 3, 21-25). As discussed below, the Secretary proved both (1) that the workers in the unprotected trench were Petrongolo employees, and (2) that Petrongolo had both actual and constructive knowledge that its employees were in the unprotected trench. It is therefore unnecessary to adjudicate the Secretary's alternative theory of liability under the multi-employer worksite doctrine or Petrongolo's counterargument that the Secretary did not prove it had knowledge that employees of other employers were in the unprotected trench. (Sec'y Br. 24-25; Sec'y Reply Br. 5).

The parties have stipulated that Petrongolo was the only contractor performing excavation work on the inspected trench. (Joint Pre-Hr'g Statement ¶¶ IV(A)(4); T. 270, 561-64, 649-52). There is likewise no dispute that on the morning of January 28, Petrongolo employees installed *all* the timber shoring that had been completely installed sometime by the time the CO arrived that morning. (Joint Pre-Hr'g Statement ¶ IV(A)(2); T. 163-64; Exs. C-3, R-25). Ron Petrongolo was present at the Adams Site on the morning of January 28. He used Petrongolo's backhoe to remove the steel plates that had covered the trench overnight. He supervised the Petrongolo crew in installing all the timber shoring that had been completely installed by the time the CO arrived later that morning. (Joint Pre-Hr'g Statement ¶ IV(A)(3); T. 158-59, 271-72, 299-301, 699-700). In their hearing testimony, neither Ron nor Dan Petrongolo could rule out the possibility that the workers depicted in the photographs in the unprotected trench may have been Petrongolo employees. (T. 313-23, 577-78; Ex. C-1). No other employers other than Petrongolo had cause to have their employees enter the unprotected trench on January 28 and begin to install timber shoring in the unprotected trench, as the workers depicted in the photographs in Exhibit C-1 appear to be doing. (Findings of Fact ¶¶ 17-19).

This circumstantial evidence is sufficient to prove to a reasonable certainty that the workers inside the unprotected trench were Petrongolo employees. This circumstantial case is bolstered by Westergon's reliable and credible testimony that he observed and heard Ron Petrongolo giving oral instructions to workers who were inside the unprotected trench. (Findings of Fact ¶ 17).

Westergon testified that he recognized Ron Petrongolo from having had prior contacts with him on other projects and that on the morning of January 28 he spoke to him face to face. (T. 123). Ron Petrongolo acknowledges that he spoke to PGW representatives while at the Adams Site. (T. 282). And while Westergon did not expressly testify that he observed Ron Petrongolo directing the workers in the trench *at a time when the trench was unprotected*, that detail is reasonably implied from the context of his direct and cross examination, including his tone and demeanor in responding to those questions. (T. 123-24, 143-44).

Petrongolo argues that during cross-examination Westergon equivocated away from the certainty he had expressed in his direct examination that the person he saw and heard directing workers in the unprotected trench was Ron Petrongolo. (Resp't Br. 22). The undersigned finds Westergon's testimony reasonably reliable and not significantly undermined by the somewhat unrelenting, albeit respectful, cross-examination regarding the reliability of his recognition of Ron Petrongolo. (T. 138-41). Moreover, it bears noting that the hearing witnesses were sequestered and that Westergon and Ron Petrongolo were never present in the videoconference hearing at the same time. Thus, neither Westergon nor Ron Petrongolo was afforded the opportunity to view the other's video image for the purpose of confirming or denying whether they had a face-to-face encounter on January 28 as Westergon described them having. (T. 123, 137). (Petrongolo could have conceivably tested the reliability of Westergon's testimony that on January 28 he recognized Ron Petrongolo based on prior contacts by requesting that Ron Petrongolo join the

videoconference hearing briefly during Westergon's testimony for purpose identification only, but Petrongolo made no such request.)

Other than Ron Petrongolo's testimony that he never saw any workers inside the unprotected trench, Petrongolo has presented no probative evidence that the workers depicted in the photographs in Exhibit C-1 were not Petrongolo employees. Although Petrongolo identified the four other employees that were working at the Adams Site on January 28 (Ex. C-3), none were called to testify respecting whether they had entered the unprotected trench that day or to testify that they were *not* one of the two workers inside the trench depicted in Exhibit C-1. *Cf. Well Sols., Inc.*, 17 BNA OSHC 1211, 1215 (No. 91-340, 1995) (determining that the Secretary's prima facie case was sufficient to prove a violation where evidence that would have been in possession of the employer was not presented to rebut that prima facie case); *Thomas Indus. Coatings*, 21 BNA OSHC 2283, 2288 (No. 97-1073, 2007) (finding a violation where the employer failed to present evidence to rebut the most reasonable inference to be drawn from the evidence).

While the whole of the evidence may be susceptible of other inferences, those inferences are considerably less plausible than the reasonable inference that the workers depicted inside the trench in the photographs of Exhibit C-1 were Petrongolo employees, and on this record the undersigned finds no other inference to be reasonable. *See R.D. Anderson Constr.*, 12 BNA OSHC 1665, 1666 (No. 81-1469, 1986) (a fact is established by a preponderance of the evidence where "the evidence taken as a whole shows that the fact sought to be proved is more probable than not").

As to the fourth element of the Secretary's burden of proof, a preponderance of the evidence establishes that Petrongolo knew or with the exercise of reasonable diligence could have known of a violative condition or conduct. *Calpine Corp.*, No. 11-1734, 2018 WL 1778958, at *5

(OSHC Apr. 6, 2018), *aff'd* 774 F. App'x 879 (5th Cir. 2019) (unpublished); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). A supervisor's knowledge of the violative condition or conduct is imputable to the employer. *Calpine Corp.*, 2018 WL 1778958, at *5; *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (No. 86-360, 1992) (consolidated).

There is no dispute that Ron Petrongolo, as the foreman of the Petrongolo crew at the Adams Site, was a supervisor whose knowledge is imputable to Petrongolo. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003) (supervisory status of an employee is based on a consideration of the “indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf”). As previously found, the greater weight of the evidence is that Ron Petrongolo supervised and gave oral directions to the Petrongolo employees who were installing shoring in the unprotected trench. (Findings of Fact ¶ 17). Ron Petrongolo thus had actual knowledge of the employees' violative conduct, and his knowledge is imputed to Petrongolo. *Calpine Corp.*, 2018 WL 1778958, at *5; *Tampa Shipyards, Inc.*, 15 BNA OSHC at 1539.

Even if the Secretary had failed to prove Ron Petrongolo's actual knowledge, the greater weight of the evidence also establishes that Ron Petrongolo could have discovered or prevented the employees' violative conduct with the exercise of reasonable diligence, and thus he had constructive knowledge of the violative condition. *See Mastec N. Am., Inc.*, No. 15-1574, 2021 WL 2311875, at *6 n. 7 (OSHC, Mar. 2, 2021) (commenting that in determining whether a supervisor had constructive knowledge of an employee's violative conduct, “the question is whether [the] supervisor exercised reasonable diligence in monitoring” the employee's work). Reasonable diligence can implicate “several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate

hazards, and take measures to prevent violations from occurring.” *S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016).

Ron Petrongolo was the foreman and supervised the work Petrongolo was performing at the Adams Site on January 28, 2020. (Joint Pre-Hr’g Statement ¶ IV(A)(3)). He was in charge of running the worksite, he remained there the entire shift “for the most part,” and he directed the work during the excavation. (T. 261). He operated Petrongolo’s backhoe and removed the steel plates covering the trench on the morning of January 28, and he thus had actual knowledge that the unprotected trench was open and accessible to the Petrongolo employees who were present to begin to install the timber shoring. (Findings of Fact ¶ 16). And, while the evidence does not establish precisely establishes how long the workers were in the unprotected trench, the progress they had made in installing the timber shoring as depicted in the photographs of Exhibit C-1 permits the reasonable inference that they were in the trench for more than a “brief or indeterminate duration.” *See David Weekley Homes*, 19 BNA 1116, 1119 (No. 96-0898, 2000).

Even assuming Ron Petrongolo temporarily left the Adams Site after he had removed the steel plates that had been covering the trench, he had a heightened responsibility to keep the Petrongolo crew from entering the unprotected trench in his absence. There is no evidence that he took any affirmative steps to do so, such as admonishing the employees not to enter the unprotected trench or by re-covering the trench with the steel plates. His lack of reasonable diligence is even more apparent considering that before Messrs. Westergon and Eckroade of PGW observed the Petrongolo employees in the unprotected trench, Westergon made a point of warning Ron Petrongolo directly that the Petrongolo workers should not enter the unprotected trench. (T. 123, 137).

A preponderance of the evidence establishes that in the exercise of reasonable diligence Ron Petrongolo could have prevented the violation from occurring. *S.J. Louis Constr. of Tex.*, 25 BNA OSHC at 1894; *cf. KS Energy Servs. Inc.*, 22 BNA OSHC at 1267-68 (foreman’s presence at the worksite where hazardous conditions was in plain view was relevant to determining constructive knowledge). Ron Petrongolo’s constructive knowledge is imputed to Petrongolo. *Calpine Corp.*, 2018 WL 1778958, at *5; *Tampa Shipyards, Inc.*, 15 BNA OSHC at 1539.

Repeat Classification for Citation 2, Item 1

Section 17(a) of the Act, 29 U.S.C. § 666(a), allows for heightened penalties for “[a]ny employer who ... repeatedly violates the requirements of ... any standard ... promulgated pursuant to section 6 of this Act” “A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167 (No. 90-1307, 1993), citing *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979) (*Potlatch*).⁶ The Secretary can make a prima facie showing of substantial similarity “by showing that both violations are of the same standard.” *Id.* This prima facie showing of substantial similarity may be rebutted “by evidence of the disparate conditions and hazards associated with these violations of the same standard.” *Id.*

The Citation alleged Petrongolo’s violation of § 1926.652(a)(1) was a repeat violation based on the following:

⁶ The employer or the Secretary may appeal a Commission final order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Pennsylvania, in the Third Circuit, where Petrongolo’s office is also located. *See* Citation at 1 (listing Petrongolo’s business address in Philadelphia, Pennsylvania). The Third Circuit has adopted the Commission’s *Potlatch* test. *Reich v. D.M. Sabia Co.*, 90 F.3d 854 (3d Cir. 1996).

Petrongolo Contractors, Inc. was previously cited for a violation of [§ 1926.652(a)(1)] which was contained in OSHA inspection number 1347967, citation number 2, item number 1 and was affirmed as a final order on April 26th, 2019, with respect to a workplace located at Broad Street and Wharton Street, Philadelphia, Pennsylvania.

Petrongolo Contractors, Inc. was previously cited for a violation of [§ 1926.652(a)(1)] which was contained in OSHA inspection number 1347967, ⁷ citation number 2, item number 1 and was affirmed as a final order on November 1st, 2018, with respect to a workplace located at Broad Street and Ell[s]worth Street, Philadelphia, Pennsylvania.

Petrongolo Contractors, Inc. was previously cited for a violation of [§ 1926.652(a)(1)] which was contained in OSHA inspection number 1323007, citation number 1 item number 2 and was affirmed as a final order on November 1st, 2018, with respect to a workplace located at 20th and Poplar, Philadelphia, Pennsylvania.

At the hearing, the Secretary submitted the following evidence regarding the prior violations:

- Regarding the previous violation arising out of inspection 1347967, occurring on September 21, 2018, at Broad Street and Wharton Street (Broad-Wharton Citation): the Citation alleging a violation of § 1926.652(a)(1) and the Violation Worksheet for the Broad-Wharton Citation. (Exs. J-5, J-6).
- Regarding the previous violation arising out of inspection 1326082, occurring on June 28, 2018, at Broad Street and Ellsworth Street (Broad-Ellsworth Citation): the Citation alleging a violation of § 1926.652(a)(1), the Photo Mounting Worksheet for the Broad-Ellsworth Citation, the Violation Worksheet for the Broad-Ellsworth Citation, and an Informal Settlement Agreement for the Broad-Ellsworth Citation signed by Ron Petrongolo on October 25, 2018. (Exs. C-7, C-8, J-1, J-3).

⁷ The documentation received in evidence reflects the actual inspection number being 1326082. (Ex. J-3).

- Regarding the previous violation arising out of inspection 1323007, occurring on June 15, 2018, at 20th and Poplar Street (Poplar Citation): the Citation alleging a violation of § 1926.652(a)(1), the Photo Mounting Worksheet for the Poplar Citation, the Violation Worksheet for the Poplar Citation, photos of employees in an unprotected excavation taken in connection with the Poplar Citation, and an Informal Settlement Agreement for the Poplar Citation signed by Ron Petrongolo on October 25, 2018. (Exs. C-4, C-5, C-6, J-2, J-4).

Based on the evidence submitted for the Broad-Ellsworth and Poplar Citations,⁸ the Secretary has established a prima facie case of substantial similarity for purposes of classifying Petrongolo's violation of § 1926.652(a)(1) as a repeat violation. *Jersey Steel Erectors*, 16 BNA OSHC at 1167; *Triumph Constr. Corp.*, 26 BNA OSHC 1331, 1346-47 (No. 15-0634, 2016) (ALJ) (determining that an informal settlement agreement constitutes a "Commission final order" for purposes of repeat classification), *aff'd*, 885 F.3d 95 (2d Cir. 2018). The burden therefore shifts to Petrongolo to rebut the Secretary's showing. *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005). In so doing, Petrongolo must show that the previous violations resulted in different *hazards*, not just distinguish the factual circumstances surrounding the instant violation and the previous ones. *Amerisig Se., Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996) ("[T]he principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards"), *aff'd without published opinion*, 117 F.3d 1433 (11th

⁸ No evidence of a final order respecting the Broad-Wharton Citation was presented. In arguing that this Citation was disposed of by informal settlement, the Secretary cites only to vague, general testimony from OSHA's assistant area director and Dan Petrongolo concerning settlement negotiations. (Sec'y Br. 29, citing T. 362, 574). This is insufficient to establish the existence of a "Commission final order" for the Broad-Wharton Citation, and so that Citation is not regarded to constitute a prior violation for purposes of classifying the current violation as repeated or for assessing the penalty.

Cir. 1997). Petrongolo has not rebutted the Secretary's prima facie case for either the Poplar or the Broad-Ellsworth Citations.

Poplar Citation

For the Poplar Citation, Petrongolo points out that, as indicated in the Violation Worksheet for that Citation, there was *no* shoring installed for workers in a trench that was over five feet deep. (Resp't Br. 27, citing Ex. J-2). Petrongolo asserts that this was because "Petrongolo did not anticipate needing to excavate further than five feet, so it did not bring shoring materials to the job site." (Resp't Br. 27). By contrast, Petrongolo goes on to argue, the shoring for the instant Citation was alleged to have been inadequate rather than non-existent. (*Id.* 28).

This argument is rejected. The violation at the Adams Site involves the exposure of two Petrongolo employees who were inside an unprotected trench and beginning to install timber shoring. The Petrongolo employees at the Adams Site were exposed to a substantially similar, if not identical, hazard as the employee who was inside an unprotected excavation in connection with the Poplar Citation, as that employee is depicted in the photographs at Exhibits C-4 and C-5. *Amerisig Se., Inc.*, 17 BNA OSHC at 1661; *Lake Erie Constr. Co., Inc.*, 21 BNA OSHC at 1289 ("We find that the record supports the judge's finding that these violations were substantially similar because both involved the same standard and the same hazard, a fall of more than 20 feet to a road below"); *see also* T. 186-89 (describing the cave-in hazards associated with an unprotected trench five feet or more in depth). Indeed, Dan Petrongolo acknowledged that the possibility of severe injury or death is a hazard associated with any trench that lacks an adequate protective system in place. (Tr. 590-91). *Cf. Par Elec. Contractors, Inc.*, 20 BNA OSHC 1624, 1628 (No. 99-1520, 2004) (finding substantially similar hazards where foreman acknowledged the hazards were similar in nature).

Broad-Ellsworth Citation

For many of the same reasons discussed in connection with the Poplar Citation, Petrongolo's attempts to distinguish the Broad-Ellsworth Citation from the instant Citation also fail. Petrongolo again points to the fact that the Broad-Ellsworth Citation allegedly involved a trench with *no* cave-in protection, whereas this case involves the use of two types of cave-in protection at one time or another. (Resp't Br. 29). This argument again fails for the reasons set forth above.

Petrongolo also points to a photograph in the Violation Worksheet for the Broad-Ellsworth Citation which Petrongolo characterizes to be an employee working on a water main. (Resp't Br. 29, citing Ex. J-1; *see also* Ex. C-7). Petrongolo argues that, because "such utility work falls within the scope of work for much of Petrongolo's business," it is more likely that this photograph depicts an employee doing "authorized work in an excavation over 5-feet deep." (Resp't Br. 29). This argument is contrary to the facts found herein that Petrongolo employees were inside the unprotected trench on January 28, 2020, while receiving oral instructions from Ron Petrongolo, and thus performing work that Ron Petrongolo was explicitly authorizing that they do. In any event, this argument does not alter the incontrovertible fact that the employees at the Adams Site and the employee at the Broad-Ellsworth site were exposed to substantially similar cave-in hazards, which is the crux of the inquiry for purposes of repeat characterization. *Lake Erie Constr. Co.*, 21 BNA OSHC at 1289.

Finally, Petrongolo argues generally that "substantially similar" must "be construed sufficiently narrowly [so] that the citation for the first violation placed the employer on notice of

the need to take steps to prevent the second violation.” Resp’t Br. 26,⁹ quoting *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 403 (7th Cir. 1998) (“*Caterpillar*”); Resp’t Br. 30-31. Further citing to *Caterpillar*, Petrongolo argues that a repeat characterization is “only warranted where an employer fails to learn from experience.” *Id.*, quoting *Caterpillar*, 154 F.3d at 402. The Seventh Circuit’s decision in *Caterpillar* is not controlling precedent in this matter, but even if it were, it would not alter the result here. In *Caterpillar*, the Commission found that the employer had failed to rebut the Secretary’s prima facie showing of similarity for violations under the same standard, and the court affirmed that finding. *Caterpillar*, 154 F.3d at 404. The language Petrongolo quotes merely recognizes, as the Commission has since *Potlatch*, that an employer can rebut a prima facie showing of substantial similarity for violations under the same standard by proffering sufficient “evidence of the disparate conditions and hazards associated with these violations of the same

⁹ In support of this argument Petrongolo also cites to the Commission’s decision in *Angelica Textile Servs., Inc.*, 27 BNA OSHC 1246 (No. 08-1774, 2018), *vacated as moot*, 803 F. App’x 542 (2d Cir. 2020) (unpublished). A vacated decision of the Commission has no precedential effect. *Reich v. Contractors Welding*, 996 F.2d 1409, 1413-14 (2d Cir. 1993) (analysis in a vacated Commission decision may not “retain any precedential effect” because the Commission lacks rulemaking authority and adjudicating cases based on a decision that could not be reviewed due to intervening mootness is unfair).

Petrongolo also cites to the Fourth Circuit’s decision in *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834 (4th Cir. 1978). This decision predates the Commission’s *Potlatch* decision. However, the court did note that it had “deliberately avoided setting forth an all-inclusive and rigid definition of ‘repeatedly’ under the Act” and was “allowing the Commission flexibility in working out reasonable guidelines in enforcing the Act.” *George Hyman Constr. Co.*, 582 F.2d at 841. In the more than forty years after the Commission decided *Potlatch*, the Fourth Circuit has not revisited the issue of what standard to apply to determine repeat classification, and there is no reason to conclude that the Fourth Circuit would now regard *Potlatch* not to provide “reasonable guidelines” for classifying a violation as repeated.

standard.” *Potlach*, 7 BNA OSHC at 1063. Petrongolo has simply failed to make that showing here.¹⁰

The Secretary’s evidence established a prima facie case that Citation 2, Item 1 was substantially similar to the violations in the Poplar and Broad-Ellsworth Citations. Petrongolo has not rebutted the Secretary’s showing, and accordingly Petrongolo’s violation of § 1926.652(a)(1) is properly classified as a repeat violation.

Penalty

Section 17(a) of the Act, 29 U.S.C. § 666(a), provides, in relevant part, that “[a]ny employer who ... repeatedly violates ... any standard ... promulgated pursuant to section 6 of this Act ... may be assessed a civil penalty” that is up to ten times the maximum penalty for a serious or other-than-serious violation. The maximum penalty for the repeat violation proven here is \$134,937. 29 C.F.R. § 1903.15(d)(2) (2020).

The Commission and its judges conduct *de novo* penalty determinations and have discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) *aff’d*, 73 F.3d 1466 (8th Cir. 1996); *Allied Structural Steel*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give “due consideration” to four criteria: the size of the employer’s business, the gravity of the violation, the employer’s good

¹⁰ Petrongolo also argues that defining the hazard addressed by § 1926.652(a)(1) simply as a “cave-in hazard,” as the Secretary does, “could describe virtually any violation of 29 C.F.R. § 1926.652(a)(1), [which] would broaden the concept as to render ethereal any supposed ‘advance warning’ from prior citations.” (Resp’t Br. 31, quoting *Mondo Constr. Co.*, 25 BNA OSHC 1285 (No. 13-1332, 2014) (ALJ) (addressing how a predicate violation may provide a basis for a repeat classification for the violation of a different standard)). Unlike *Mondo Construction*, the two prior violations here were for violations of the same standard as the instant violation, which is specifically focused on protecting employees in excavations from cave-ins. § 1926.652(a)(1).

faith, and its prior history of violations. *Specialists of the S., Inc.*, 14 BNA OSHC 1910, 1910 (No. 89-2241, 1990). Gravity is the primary consideration among these four statutory criteria and is determined by “such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary proposes a penalty of \$29,687 for the repeat violation. At the hearing, the OSHA assistant area director indicated that this proposed penalty was based on a determination that the gravity of the violation was high because the severity of any injury that could result from the violation was “higher” and the probability of an injury occurring was “greater.” (T. 393-94). The photographs at Exhibit C-1 indicate that soil on at least one wall of the trench was visibly unstable. (T. 104-05, 146-47). The undersigned concurs in that assessment of the statutory gravity factor, so that if the penalty were based solely on its gravity, the maximum penalty of \$13,494 for a serious violation would be appropriate. 29 C.F.R. § 1903.15(d)(3) (2020); *cf. Mossier Constr., Inc.*, 23 BNA OSHC 1044, 1047 (No. 08-0631, 2010) (“[R]egardless of the probability of a cave-in, we find that the gravity of the violation remains moderate to high considering the serious consequences in the event a cave-in occurred”).

The undersigned further concurs with the Secretary’s penalty calculation in reducing that figure by 60% to account for Petrongolo’s small size. (T. 394). The undersigned concurs further with the Secretary in providing no reduction for good faith in view of the violation being repeated based on two prior violations of the same standard occurring within 20 months of the violation proven here. The undersigned does *not* concur in increasing that figure by 10% to account for history of violations as the Secretary has proposed, because the substantial enhancement of the penalty for to account for its repeated nature sufficiently addresses that statutory factor.

The undersigned concurs in multiplying the resulting figure for a repeated violation based upon the two prior violations of the same standard occurring within 20 months of the instant violation. The Secretary's proposed penalty was based on the assertion that there were three prior violations of the same standard, rather than two prior violations that the Secretary proved. Although there was no testimony on the point, the Secretary's proposed penalty would presumably have been lower had the Secretary formulated it based on two, rather than three, prior violations of the same standard. For this reason, a penalty of \$22,000 will be assessed for the repeat violation based upon Petrongolo's two prior violations of the same standard, both occurring less than two years before the violation proven here. *Cf. M.V.P. Piping Co.*, 24 BNA OSHC 1350, 1352 (No. 12-1233, 2014) ("a high gravity violation of the cave-in protection standard typically warrants a substantial penalty").

ORDER

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.652(c)(1), having not been proven, is VACATED.

2. Citation 2, Item 1, alleging a repeat violation of 29 C.F.R. § 1926.652(a)(1) is AFFIRMED as a REPEAT violation and a penalty of \$22,000 is ASSESSED.

/s/ William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: September 28, 2021