United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ARROW PLUMBING, LLC, Respondent.	OSHRC Docket No. 21-0244

Appearances:

Megan McGinnis, Laura O'Reilly, Jeffrey Mendoza, Department of Labor, Office of Solicitor, Kansas City, Missouri,
For Complainant

Anthony L. Gosserand, Van Osdol PC, Kansas City, Missouri,
For Respondent

Before: Judge Christopher D. Helms – U. S. Administrative Law Judge

DECISION AND ORDER

This matter is before the United States Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*.) (the Act). On August 20 and 21, 2020, a Compliance Safety and Health Officer (CSHO) inspected a worksite after receiving a complaint that an excavation appeared unsafe. As a result, the Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty to Respondent Arrow Plumbing, LLC (Arrow Plumbing). The Citation alleges two serious violations and two repeat-serious violations, with total proposed penalties of $299,590.00. Arrow Plumbing timely contested the Citation.

The Chief Administrative Law Judge designated this matter for conventional proceedings, and a trial was held on July 19-21, 2022, in Kansas City, Missouri. The following individuals testified: (1) Compliance Safety and Health Officer (CSHO) Christina Gibbs; (2) Michael Hayslip, an expert witness for the Secretary; (3) Karena Lorek, Area Director of the Kansas City Area OSHA office; (4) Rick Smith, Owner of Arrow Plumbing; and (5) Joshua Brackenbury, Project Supervisor.

After the trial concluded, both parties timely filed post-trial briefs, which were considered by the Court in reaching its decision. Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law.

For the reasons discussed, Citation 2, Item 1 is vacated. The remaining citation items are affirmed.

II. Stipulations & Jurisdiction

The parties stipulated to several matters, including the jurisdiction of this Court over this proceeding and the parties before it. *See* Joint Stipulation Statement (J. Stip.) 1. The parties submitted the Joint Stipulation Statement to the Court prior to trial and entered the stipulations into the record. (Tr. 11). The Court incorporates by reference the Joint Stipulations and refers to them as necessary in this decision.

III. Background

a. The Inspection

This case arises out of a project to replace a sewer line that had been installed incorrectly. (Tr. 75). In 2020, the City of Grain Valley, Missouri, hired Arrow Plumbing, which is owned by Rick Smith, to complete the job. (J. Stip. 10; Tr. 509). Work on the project began on August 19,

2020, at which time an excavation was dug in the front yard of a residential property located at 643 Gateway Court, Grain Valley, Missouri ("site" or "worksite"). (Tr. 34-35, 621)

On August 20, 2020, OSHA received a complaint about the worksite because the excavation allegedly looked unsafe. (Tr. 34-35). CSHO Gibbs drove to the site and arrived at 4:45 P.M. to conduct an investigation. (Tr. 34-35, 48). As she approached the site from the south, she did not see anyone in the excavation, but she did observe an individual—later identified as Jaron Brown—standing on the edge of the excavation looking down. (Tr. 35-37). She also observed a trailer with a trench box at the south end of the neighborhood. (Tr. 36).

As CSHO Gibbs approached the worksite, she observed Mr. Smith and Mr. Brackenbury working inside the excavation. (Tr. 43-44). Neither was wearing head protection such as a hard hat, and there was no trench box in the excavation. (Tr. 49; J. Stip. 17, 20-21). Mr. Brackenbury was the supervisor and competent person on site, and Mr. Brown was in training. (Tr. 528, 596).

The CSHO discussed the project with Mr. Smith and Mr. Brackenbury, and proceeded to take measurements and photographs. (Tr. 68-69, 532, 535). Mr. Smith was in the excavation and assisted with measuring. (Tr. 74). The excavation ran in an east-west direction and was located on the south side of a driveway. (Tr. 48). The residential home was on the east end of the excavation, and a sidewalk was on the west end. (Tr. 48). The CHSO recorded the width of the excavation at its opening to be 12'10", the depth to be 9'3", and the length to be more than 22'2". (Tr. 71-72). Mr. Smith testified that after the CSHO left, he measured the width of the excavation's opening to be 14'6". (Tr. 554). He did not take any other measurements. (Tr. 554). The CSHO did not measure the width of the excavation's floor, but Mr. Smith testified it was 2 ½ or 3 feet wide. (Tr. 531).

During her inspection, the CSHO observed spoil piles along the south wall and to the east of the worksite. (Tr. 49). She took samples from the spoil piles, but she did not measure them or

their distance from the edge of the excavation. (Tr. 187, 224, 226). The CSHO also observed a mini-excavator and some tools on the ground on the northeast part of the excavation near the edge. (Tr. 49, 54). She observed spoil piles along the south wall and to the east of the worksite. (Tr. 49). A white pipe had been placed in the trench, and one end was fitted with a coupling with purple glue. (Tr. 52, 553). On the east end of the excavation, a white electrical line and a yellow gas line ran across the excavation from the south wall to the north wall. (Tr. 49).

Mr. Brackenbury was the site supervisor assigned to the worksite. (Tr. 520; J. Stip. 14, 15). At trial, Mr. Smith described Mr. Brackenbury as Arrow Plumbing's most competent employee. (Tr. 520). Before work began on the project, Mr. Smith and Mr. Brackenbury had a safety meeting to discuss dangerous situations that might be encountered at the worksite. (Tr. 519, 522, 620). They also discussed challenges presented by the fact that the excavation would be dug in the front yard of a home close to the neighbor's property line. (Tr. 514-15, 623).

On August 19, Mr. Brackenbury arrived at the worksite, dug the excavation with a mini-excavator, and bore a hole under the road so that a 4-inch pipe could run underground and tie into the home. (Tr. 622). He also located the marked electric and gas lines and excavated the lines with a shovel. (Tr. 625). He noticed that the coupling had separated from the conduit on the electrical line. (Tr. 626). The next day, August 20, Mr. Brackenbury continued the excavation with the mini-excavator. (Tr. 633). Mr. Brackenbury piled the excavated soil outside the excavation while another Arrow Plumbing employee (Coy Smith) moved it to the road for removal by the City of Grain Valley. (Tr. 634-35). On August 20, Mr. Brackenbury did not use a trench box during the installation because he believed he had properly sloped the walls of the excavation to prevent a cave-in. (Tr. 641).

Mr. Smith arrived at the worksite around 3:00 P.M. to resolve an issue with the sewer's fall line.[1] (Tr. 526-27). He noticed that the southern wall of the excavation was nearly vertical, but he did not have any safety concerns and proceeded to enter the excavation with Mr. Brackenbury. (Tr. 530). Mr. Smith was also aware of the exposed utility lines and noted that the rubber casing of the electrical line was damaged. (Tr. 537). He believed the utility lines were safely secured by the walls of the excavation and not at risk of rupturing due to lack of support. (Tr. 538-39). Moreover, he explained that some slack in the lines allowed them to be moved out of the way while work was completed around them. (Tr. 539).

When Mr. Smith and Mr. Brackenbury were working in the excavation, they focused their efforts on the portion of the sewer pipe that was fitted with the coupling. (Tr. 657). Mr. Brackenbury was standing along the vertical south wall assisting Mr. Smith, who was positioned alongside the coupling. (Tr. 577-78). The two men had installed 10 to 12 feet of pipe by the time the CSHO arrived. (Tr. 648). Notably, the testimony regarding the distance between where the men were working and the utility lines varies: the CSHO testified they were 3 to 4 feet away, while Mr. Brackenbury recalls working 10 feet away, and Mr. Smith believed they were 15 to 20 feet away. (Tr. 141, 540, 654-55).

Work continued the next day, and the CSHO returned to conduct another inspection of the site. (Tr.141). OSHA cited Arrow Plumbing for violations observed on August 21, but the Secretary later amended the citation to exclude them. (Tr. 262-64).

[1] The fall line refers to the degree of decline to ensure the sewer line drains properly. (Tr. 527). The sewer line in this case relied on gravity to flush the contents of the sewer to the main line. (Tr. 629).

b. Prior OSHA Violations

OSHA has previously cited Arrow Plumbing for violations similar to those present in this case. In December 2016, Arrow Plumbing was completing a job in Belton, Missouri, which involved digging a trench and connecting a sewer line stub for a residential property. (Tr. 598; Ex. C-23 at 2). The trench was 9 feet deep, approximately 2 feet wide, and 20 feet long. (Ex. C-23 at 2). The walls of the trench were not benched or sloped, and there was no trench box in use. (*Id.* at 5). Spoil piles were located adjacent to the edge of the trench and were not held back by any retaining device. (*Id*. at 2). While digging, the excavator hit a sewer main and caused a break. (*Id*.). The operator entered the trench and, while he was in the trench, the wall collapsed under the weight of the spoil piles, resulting in the death of the operator. (*Id*. at 5; Tr. 441). OSHA cited Arrow Plumbing with four serious violations and three willful violations. (Ex. C-22 at 5-12). Relevant to this case, Arrow Plumbing was cited with a serious violation of 29 C.F.R. § 1926.651(j)(2) (failure to keep excavated materials at least 2 feet from the edge of the excavation) and a willful violation of 29 C.F.R. § 1926.652(a)(1) (failure to protect employees from cave-ins). (Ex. C-22 at 6, 12). The proposed penalties totaled $294,059. (Ex. C-22 at 13).

A month after the fatality at the Belton worksite, OSHA conducted an inspection of a worksite in Kansas City. (Ex. C-26 at 2; Tr. 446). Arrow Plumbing was hired to connect a sanitary sewer line from a residence to a main line. (Ex. C-26 at 2). OSHA noted that there was an excavation ranging in depth from 8 to 13 feet, and spoil piles were adjacent to the edge of the excavation. (*Id.*). No form of cave-in protection was in place, and utilities were unsupported. (*Id*.). OSHA cited Arrow Plumbing with four serious violations and three willful violations. (Ex. C-25 at 6-12). Relevant to this case, OSHA cited Arrow Plumbing with a willful violation of 29 C.F.R. § 1926.651(j)(2) (failure to keep excavated materials at least 2 feet from the edge of the excavation)

and a willful violation of 29 C.F.R. § 1926.652(a)(1) (failure to protect employees from cave-ins). (Ex. C-25 at 10, 12).

The Belton and Kansas City citations were resolved by a single formal settlement agreement, which became a final order on September 28, 2018. (Tr. 454; Ex. C-28). Arrow Plumbing agreed to a number of abatement measures, including enhanced safety abatement, hiring a third-party safety and health consultant who would make unannounced visits to worksites and develop a trenching and excavation program, and sending employees and supervisors to trainings. (Tr. 464-68; Ex. C-28 at 4-7). As of August 20, 2020, Arrow Plumbing had not complied with those provisions or paid the penalty in full. (Tr. 464-68). In addition, Arrow Plumbing remained on the Severe Violator Enforcement Program (SVEP)[2] at the time of OSHA's August 20, 2020, inspection. (Tr. 469).

c. The Instant OSHA Citation and Penalty

The CSHO ultimately concluded that Arrow Plumbing committed two serious violations and two repeat-serious violations. Ms. Lorek reviewed the file and approved the issuance of these citations. (Tr. 435). Citation 1, Item 1 alleges a violation of 29 C.F.R. § 1926.100(a) (failure to wear protective helmets while working in the excavation). (Ex. C-17 at 6). Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1926.651(b)(4) (failure to support, protect, or remove underground utilities). (Ex. C-17 at 7). Citation 2, Item 1 alleges a repeat-serious violation of 29 C.F.R. § 1926.651(j)(2) (failure to keep excavated materials at least 2 feet from the edge of the excavation). (*Id.* at 8) Citation 2, Item 2 alleges a repeat-serious violation of 29 C.F.R. § 1926.652(a)(1) (failure to protect employees from cave-ins). (Ex. C-17. at 9).

[2] SVEP is OSHA's publicly available list of employers that were issued a willful violation directly related to a fatality. (Tr. 469).

OSHA assessed the maximum penalty for the two repeat violations and one of the serious violations. (Tr. 458). OSHA considered mitigating factors when deciding the appropriate penalty, but ultimately concluded that none applied. (Tr. 471). For instance, Arrow Plumbing's overall safety and health program—which consisted solely of a printed copy of the OSHA excavation standard that was not provided to new employees and never enforced—was not an adequate mitigating factor. (Tr. 470).

OSHA also concluded the penalties for the serious citation items should not be reduced on the basis of gravity of the violation, good faith, history, or size. (Tr. 471-73). It determined that gravity did not reduce the penalties because although only one employee was exposed, and that exposure was seemingly of short duration, the risk and probability of injury or serious harm for several of the violations was high. (Tr. 112, 118, 125, 493). It also determined good faith and history did not reduce the penalty amount because Arrow Plumbing had a history of OSHA violations. (Tr. 460-61). Further, OSHA did not give Arrow Plumbing a reduction for size because it wanted the penalty amount to create a deterrent effect, which it claimed is permissible under the Field Operations Manual. (Tr. 471-72). In short, OSHA did not give Arrow Plumbing any reductions for mitigating factors because it wanted to create a deterrent effect. (Tr. 488).

IV. Discussion

To establish the violation of a safety standard under the Act, the Secretary must prove: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at * 6 (OSHRC, Dec. 5, 1994). The Secretary

has the burden of establishing each element by a preponderance of the evidence. *The Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498, at *3 (OSHRC, Sept. 15, 1995).

A. Citation 1, Item 1

1. Violation of the Cited Standard

The CSHO cited Arrow Plumbing because its employees failed to wear protective headgear while working in the excavation. Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1926.100(a), which provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The Secretary described the serious violation[3] as follows:

> The employer is failing to protect employees from overhead struck-by hazards associated with trench[4] work. Instance of exposure include and not limited to:
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> a) This was most recently documented on August 20, 2020, at the residential construction site located at 643 Gateway Court, Grain Valley, Missouri. Employees were not wearing protective helmets while working in a trench measured at 9'3" deep. Employees were exposed to struck-by hazards from tools, materials, and spoil piles.
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> * * *

Citation at 6. Arrow Plumbing argues that the standard did not apply, there was no exposure to a hazard, and it had no knowledge of the violation.

After careful consideration, the Court concludes that the standard applied. Mr. Brackenbury was working alongside excavation walls that exceeded his height while working on

[3] The Citation originally cited Arrow Plumbing for events occurring on August 20 and 21, 2020. At trial, the Secretary amended the Citation to include only events occurring on August 20, 2020. (Tr. 262-63). Thus, the Court has only included those portions of the Citation relating to August 20, 2020.

[4] During trial, the Secretary requested—and the Court granted—leave to amend the Citation to replace the word "trench" with "excavation." (Tr. 678-81).

connecting the pipe. Tools and spoil piles were located overhead near the edge of the excavation, so they posed a potential threat of head injury from falling or kicked objects.

Next, there is no dispute that the standard was violated. The record establishes—and Arrow Plumbing concedes—that neither Mr. Smith nor Mr. Brackenbury were wearing hard hats at the worksite on the day of the inspection. The fact that hard hats were seen as a nuisance and limited the wearer's field of vision does not negate a finding by this Court that the standard was violated. (Tr. 100, 543); *see Houran USA, Constr.*, No. 18-1261, 2020 WL 1316905, at *3 (OSHRC, Feb. 7, 2020) (employees disliking hard hats because they made them sweat was no defense).

The Secretary also established exposure. Mr. Brackenbury was working next to a near-vertical wall below spoil piles and tools left along the edge. The record demonstrates that Mr. Brown was walking along and standing at the edge of the excavation above Mr. Brackenbury. It is reasonably foreseeable that an object from the surface would fall or get kicked into the excavation and strike Mr. Brackenbury. *See, e.g.*, *Rawlings Constr., Inc.*, No. 9980, 1975 WL 4845, at *3 (OSHRCALJ, May 5, 1975) (finding that two workers without hard hats in a trench were exposed to the hazard of falling objects where excavated soil was stored on the banks of the excavation and activity was taking place at the surface level). Although Arrow Plumbing argues the possibility of being struck is remote, exposure can nevertheless be established. *See Altor, Inc*., No. 99-0958, 2011 WL 1682629, at *7 (OSHRC, Apr. 26, 2011) ("[e]xposure can be shown even where 'the hazard of being struck . . . was remote and [where] hardhats may not have offered much protection.'") (citation omitted).

Lastly, the Court concludes employer knowledge is established. Mr. Brackenbury admitted he did not wear a hard hat, and Mr. Smith observed Mr. Brackenbury in the excavation without a hard hat on, despite both men having access to hard hats in their vehicles. *See CMC Elec., Inc.*,

No. 96-169, 1999 WL 261189, at *5 (OSHRC, Apr. 26, 1999) (affirmed in pertinent part) (finding employer knowledge established where all three employees, who were also supervisors, failed to wear their hard hats on site). Accordingly, the Secretary met her burden on Citation 1, Item 1.

2. Classification as Serious

A violation of this section is "serious" when "there is a possibility of an accident and a substantial probability that death or serious physical injury would result." *Brennan v. OSHRC* (*Interstate Glass*), 487 F.2d 438, 439 (8th Cir. 1973) (citing 29 U.S.C. § 666(j)). The CSHO testified that based on her experience, tools or chunks of dirt could have caused a brain injury if they fell on Mr. Brackenbury's head. (Tr. 103). Mr. Hayslip testified that wearing hard hats was a common practice at excavation sites given the risk of dirt or tools falling into them. (Tr. 339). The testimony regarding the serious nature of this violation is unrebutted. Accordingly, the Secretary has met her burden of proving that the violation alleged in Citation 1, Item 1 is properly classified as serious.

B. Citation 1, Item 2

The CSHO also cited Arrow Plumbing for a serious violation of 29 C.F.R. § 1926.651(b)(4), which provides: "While the excavation is open, underground installations shall be protected, supported or removed as necessary to safeguard employees." The Secretary described the violation as follows:

> The employer is failing to protect employees from electrical and asphyxiation hazards associated with trench work. This was most recently documented on August 20, 2020, at the residential construction site located at 643 Gateway Court, Grain Valley, Missouri. Employees working in a trench with active unsupported and unprotected utilities lines running across the trench. The employer did not support the gas line nor the electrical power lines located in the trench.

Citation at 7.

Arrow Plumbing does not dispute the excavation had exposed utility lines running through it, so the standard applies. Instead, Arrow Plumbing contends it did not violate the standard.

As noted by the Secretary, the OSHA technical manual provides guidance for means of compliance, such as underpinning, shoring, or bracing, to support underground installations. (Sec'y. Br. 14; Tr. 110-11). Mr. Smith testified that the utility lines were light and sufficiently supported by the walls of the excavation. (Tr. 540). Mr. Brackenbury also testified the lines were supported by the walls of the excavation, and the middle of the gas line was "sitting on dirt." (Tr. 684). However, the CSHO testified that she did not observe anything supporting or protecting the lines. Mr. Hayslip's expert report noted that accepted industry practice is to "support the utilities with lumber or other structural supports and post warnings." (Ex. C-21 at 15). Photographs of the excavation do not assist the Court's analysis because they do not conclusively show whether the utility lines were or were not supported by a pile of dirt.

Based on the testimony of the CSHO and Mr. Smith, as well as the expert report that the industry standard requires structural supports, the Court concludes the utility lines were either unsupported or insufficiently supported, resulting in a violation of the cited standard.

Next, the Court considers whether the Secretary established exposure. Arrow Plumbing argues there was no exposure because Mr. Brackenbury was working far away from the lines. Testimony at trial places the men between 5 and 20 feet away from the utility lines at the time of the inspection. This distance, by itself, does not negate exposure. *See Phoenix Roofing, Inc*., No. 90-1995, 1995 WL 82313, at *3 (OSHRC, Feb. 24, 1995) (holding it was reasonably predictable that a worker would go into an unprotected area when retrieving materials located 12 feet away) *aff'd*, 79 F.3d 1146 (5th Cir. 1996). Although Mr. Smith testified Mr. Brackenbury did not go near the lines, Mr. Brackenbury himself admitted he exposed the lines by digging around them with a

shovel and he anticipated digging around the lines again as work progressed. (Tr. 683). It is undisputed that the utility lines were live, and the CSHO testified that if one of the lines were nicked or cut, it would create an electrocution or asphyxiation hazard. (Tr. 108-09). Thus, the Court concludes that it is reasonably foreseeable that a pipe, shovel, or other equipment would snag or nick the lines and, because those lines were live, could result in a serious injuries or death. Thus, based on this record, the Court concludes exposure was established. *See D.R.B. Boring & Drilling Co.*, No. 05-0693, 2006 WL 305303, at *5 (OSHRC, Jan. 30, 2006) (operating a boring machine close to the gas line and a foot from the water line supports a finding the lines could have been ruptured or broken, resulting in serious injuries).

Lastly, the Court considers whether the Secretary established knowledge. *See Phoenix Roofing, Inc.*, 1995 WL 82313, at *3 ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation."). To prove this element, the Secretary must show Arrow Plumbing knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co*., No. 82-928, 1986 WL 53522, at *4 (OSHRC, July 30, 1986). It is undisputed that Mr. Smith and Mr. Brackenbury were aware of the exposed lines, knew the lines were "live," and knew or could have known that the lines were unsupported or insufficiently supported. Mr. Brackenbury testified that he did not take additional steps to support the lines but instead left them on the dirt from which they had been excavated. (Tr. 675). There was no attempt to ensure a support structure was in place, although Mr. Brackenbury could have known dirt provided insufficient support. Accordingly, the Secretary established knowledge. Moreover, as noted previously, it is apparent that if either line had been hit, serious injuries or death could have resulted. *Interstate Glass*, 487 F.2d at 439. This item is affirmed as a serious citation.

C. Citation 2, Item 1

The CSHO next cited Arrow Plumbing for a repeat-serious violation of 29 C.F.R. § 1926.651(j)(2), which provides:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

Citation at 8. The Secretary described the violation as follows:

> The employer is failing to protect employees from struck-by and collapse hazards associated with trench work. This was most recently documented on August 20, 2020, at the residential construction site located at 643 Gateway Court, Grain Valley, Missouri: Where the employer has employees working in a 9'3" deep trench with the spoil pile placed within two feet of the edge of the excavation.

Id. The Secretary then set forth the basis for the repeat citation, identifying two other instances in which Arrow Plumbing was cited for the same violation:

> Arrow Plumbing was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.651(j)(2), which was contained in OSHA inspection number 1197640, citation number 1, item number 1, and was affirmed as a final order on September 28, 2018, with respect to a workplace located at 507 Coleman Road Belton, Missouri.
>
> Arrow Plumbing was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.651(j)(2), which was contained in OSHA inspection number 1204399, citation number 2, item number 1, and was affirmed as a final order on September 28, 2018, with respect to a workplace located at Lot 27 N Baltimore Ave, Kansas City, Missouri.

Id. Arrow Plumbing argues the spoil piles were at least 2 feet away from the edge of the excavation, so the Secretary failed to prove a violation of the cited standard or exposure to a hazard.

The Court concludes the Secretary has established three of four elements. First, it is undisputed that spoil piles were present at the worksite, so the standard applied. And, it is well-established that spoil piles located fewer than 2 feet away from the edge of an excavation expose

workers in the excavation to a serious hazard. *See Fla. Gas Contractors, Inc*., No. 14-0948, 2019 WL 995716, at *5 (OSHRC, Feb. 21, 2019) (quoting Occupational Safety and Health Standards-Excavations, 54 Fed. Reg. 45,894, 45,925 (Oct. 31, 1989) (to be codified at 29 C.F.R. Part 1926) ("[M]aterials such as excavated soil . . . also place a superimposed load on the edge of the excavation. Such loads can be the cause of cave-ins and must be considered when determining what protection is necessary to safeguard employees."). In addition, there is evidence in the record that one cubic foot of soil may weigh up to 100 pounds which, if a cave-in were to occur, would move at a speed of 30 to 35 miles per hour and cause serious injury. (Tr. 407-08). Lastly, the Court concludes Arrow Plumbing had knowledge of the condition, which is established by the testimony of Mr. Brackenbury and Mr. Smith. *See Phoenix Roofing, Inc*., 1995 WL 82313, at *3. ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation.").

However, the Secretary has failed to establish noncompliance with the standard. Arrow Plumbing argues the largest spoil piles were set back at least 2 feet from the edge of the excavation and, in any event, the CSHO failed to measure the distance. Mr. Smith testified there were "some small spoil piles" around the excavation. (Tr. 542). He could not recall exactly how far back those spoil piles were located, but he could not see the spoil piles from his location in the excavation. (Tr. 553). Mr. Brackenbury was adamant that he placed the spoil piles at least 2 feet away from the excavation, i.e., the width of the mini-excavator's bucket. (Tr. 676). In contrast, the CSHO recalled that the spoil piles were located right at the edge of the excavation, and she pointed the Court to photographs purporting to show those spoil piles at the edge. However, she admitted she did not measure the dimensions of the spoil piles or their distance from the edge of the excavation. And, there is nothing in the record that provides a precise measurement of the spoil piles.

After review, the Court concludes that there is insufficient evidence of a violation of the citation. Although photographs depict this condition at the worksite, they are unable to resolve the conflicting credible testimony given at trial. Ultimately, the CSHO never measured the distance between the edge of the excavation and the spoil piles, and photographs only show some amount of distance between the piles and the edge. The Court is hesitant to substitute concrete measurements with its own estimation of distance. In addition, although Mr. Smith admitted in his statement to OSHA that there were spoil piles on the edge of the excavation, he noted it was a "pretty small pile." (Ex. C-1b at 6). This raises a serious question of whether that small pile actually posed a hazard. Without a measurement, the Court cannot resolve the inconsistencies. Thus, after careful consideration, the Court concludes the Secretary has not met her burden to establish a violation of the standard. *See Caterpillar Tractor Co*., No. 80-4061, 1986 WL 53446, at *3 (OSHRC, Apr. 16, 1986) ("Normally, where the record in a case lacks sufficient evidence on a disputed issue, we would resolve that issue against the party having the burden of proof."). The Court vacates Citation 2, Item 1.

Assuming for purposes of this section that the Secretary had established a violation, the Court concludes the Secretary's classification as repeat-serious was proper. The CSHO testified that a spoil pile at the edge of an excavation adds weight to the walls of the excavation and can push the walls in, creating an engulfment or cave-in hazard. (Tr. 116, 161). The severity of potential injury ranged from bruising to death. (Tr. 117). The Commission has recognized that a cave-in is a serious hazard. *See Mosser Constr., Inc.*, No. 08-0631, 2010 WL 711322, at *3 (OSHRC, Feb. 23, 2010) (finding cave-in includes "potentially serious or deadly consequences"). Thus, the serious characterization is supported.

Similarly, the CSHO properly identified the violation as repeated. "A violation is 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." *Potlatch Corp*., No. 16183, 1979 WL 61360, at *3 (OSHRC, Jan. 22, 1979). Arrow Plumbing was previously cited for violating 29 C.F.R. § 1926.651(j)(2) at the Belton and Kansas City worksites because it failed to remove spoil piles from the edge of those excavations. The spoil piles presented the same engulfment and cave-in hazards that were present in this case, and the Belton and Kansas City citations became a final order of the Commission. *See Potlach*, 1979 WL 61360, at *4 (holding a prior violation must present a similar hazard and be a final order of the Commission). Accordingly, assuming for purposes of this section that the Secretary established a violation of the standard, that violation was properly characterized as repeat-serious. However, as the Secretary has not met her burden of establishing noncompliance with the cited standard, Citation 2, Item 1 is vacated.

D. Citation 2, Item 2

In the final citation item, OSHA alleged Arrow Plumbing committed a repeat-serious violation of 29 CFR § 1926.652(a)(1), which requires—as relevant to this case—that employees in an excavation be protected from cave-ins by an adequate protective system. These systems include sloping or benching designs or a support system or shield, like a trench box. § 1926.652(b) and (c). The Secretary described the violation as follows:

> The employer failing to protect employees from struck-by and collapse hazards associated with trench work. This was most recently documented on August 20, 2020, at the residential construction site located at 643 Gateway Court, Grain Valley, Missouri: The employer has employees working in a 9'3" deep trench without providing adequate shoring, sloping or benching as means of protection against the trench collapse.

Citation at 9. The Secretary then set forth the basis for the repeat citation, identifying two other instances in which Arrow Plumbing was cited for the same violation:

> Arrow Plumbing was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.652(a)(1), which was contained in OSHA inspection number 1197640, citation number 2, item number 3, and was affirmed as a final order on September 28, 2018, with respect to a workplace located at 507 Coleman Road Belton, Missouri.
>
> Arrow Plumbing was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.652(a)(1), which was contained in OSHA inspection number 1204399, citation number 2, item number 3, and was affirmed as a final order on September 28, 2018, with respect to a workplace located at Lot 27 N Baltimore Ave, Kansas City, Missouri.

Id.

Arrow Plumbing argues there was no exposure because Mr. Brackenbury was not working near the southern sheer wall. Arrow Plumbing also asserts the affirmative defense of infeasibility for this citation item. The Secretary maintains that Mr. Brackenbury was exposed to a hazard while working within the zone of danger of the sheer wall. The Secretary further argues that Arrow Plumbing failed to show infeasibility.

1. Violation of the Cited Standard

The Court first concludes the standard applies. Section 1926.650 defines "excavation" to mean "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." Despite some testimony presented at trial that this was a "hole" and not an excavation, Arrow Plumbing has used the term "excavation" in its post-trial briefs when discussing the project at issue and has not raised arguments that this was not an excavation. (*See generally* Resp. Br.).

Next, the record establishes that Arrow Plumbing violated the standard. Arrow Plumbing argued that "Smith and Brackenbury informed [the CSHO] that because the excavation was wider than it was deep," workers in the excavation were protected from a potential cave-in. (Resp. Br.

37). However, Arrow Plumbing does not present any evidence or cite to any authority that an excavation wider than it is deep protects workers, nor does the cited standard contain such an exception. And, the evidence establishes the excavation was not properly sloped. Mr. Hayslip testified that even using Arrow Plumbing's measurements of the excavation, i.e., measurements more favorable to it, the slope was well outside of the requirements of the standard. *See Lakeland Enters. of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 747 (7th Cir. 2005) (holding the trench "fell short" of the standards requirements using either party's purported measurements). Further, the testimony at trial demonstrates that the southern wall appeared to be almost vertical. *See Garney Constr., Inc*., No. 02-2134, 2003 WL 21693001, at *5 (OSHRC ALJ, July 18, 2003) (observing that "all faces of an excavation" must be properly sloped or benched). Moreover, it is undisputed that no trench box or other support was used at the time when the CSHO arrived on site to conduct her inspection. In short, no cave-in protection system was in place. Accordingly, the Secretary established noncompliance with the standard.

The Secretary also established exposure. The Secretary can establish employee exposure to a violative condition by showing either "actual exposure or that access to the hazard was reasonably predictable." *Gate Precast Co.*, No. 15-1347, 2020 WL 2141954, at *2 (OSHRC, Apr. 28, 2020) (citations omitted). "In determining whether the Secretary has proven access to the hazard, the 'inquiry is not simply into whether exposure is theoretically possible,' but whether it is reasonably predictable 'either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.'" *Nuprecon Lp Dba Nuprecon Acquisition Lp*, No. 08-1037, 2012 WL 525154, at *2 (OSHRC, Feb. 7, 2012) (quoting *Fabricated Metal Prods., Inc*., No.93-1853, 1997 WL 694096, at *2 (OSHRC, Nov. 7, 1997)).

Here, Mr. Brackenbury and Mr. Smith were working on the pipe near the sheer south wall, and the men were "running some more pipe." (Tr. 529). Mr. Smith had arrived at the worksite around 3 P.M., and the CSHO arrived at 4:45 P.M., which means the men were working in the excavation for a significant portion of that time. And, both men had unfettered access to all portions of the excavation. Thus, the Court concludes Mr. Brackenbury was exposed to a serious cave-in hazard while he was working in the excavation.

Lastly, the Secretary established knowledge. To prove knowledge, the Secretary must show that the employer either actually knew of the noncomplying condition, or constructively knew of it—that is, the employer could have known with the exercise of reasonable diligence." *Par Elec. Contractors, Inc*., No. 99-1520, 2004 WL 334488, at *3 (OSHRC, Feb. 19, 2004). Here, both Mr. Smith and Mr. Brackenbury were working in the excavation and were aware of its physical condition. They both testified that one of the walls of the excavation was almost vertical, and they admitted that they believed that no cave-in protection system was necessary due to the dimensions of the excavation (wider than it was deep). There was no attempt to shore the excavation's walls, and Mr. Smith and Mr. Brackenbury testified they were unable to slope or bench the excavation because of a nearby property line. They also admitted they did not use a trench box, even though a trench box was on site. In short, the Court agrees with the Secretary's expert witness: a reasonably prudent contractor would have shored this excavation or used the trench box given the limitations of space. (Tr. 417). Thus, the record establishes knowledge. Citation 2, Item 2 is affirmed.

2. Characterization as Repeat-Serious

The Court affirms this citation item's characterization as repeat-serious. Cave-ins pose a substantial probability of death or physical harm, and Arrow Plumbing's failure to comply with

the standard posed this risk to Mr. Brackenbury. *See* 29 C.F.R. § 1926.650(b) (defining cave-in to mean "separation of a mass of rock or soil material . . . either by falling or sliding, in sufficient quantity so that it could entrap, bury, or otherwise injure and immobilize a person"). And, the violation is repeated. Arrow Plumbing failed to use cave-in protection at the Belton and Kansas City worksites, substantially similar violations to the instant violation, which resulted in a fatality at the Belton worksite. This item is affirmed as a repeat-serious violation.

3. Infeasibility Defense[5]

"When a standard states a specific method of complying, an employer seeking to be excused from liability for its failure to comply with the standard has the burden of demonstrating that the action required by the standard is infeasible under the circumstances cited." *State Sheet Metal Co.*, No. 90-1620, 1993 WL 132972, at *7 (OSHRC, Apr. 27, 1993) (consolidated). "In order to carry this burden, an employer who raises the affirmative defense of infeasibility must prove that (1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) either an alternative method of protection was used or no alternative means of protection was feasible." *Id.*; *see also Dun-Par*, 843 F.2d at 1136 (same).

Here, Arrow Plumbing seems to argue that a combination of factors at the worksite made compliance with the standard infeasible. Arrow Plumbing explains that the old sewer line was in disturbed soil near the house, and the location of that disturbed soil made placement of a trench box by the excavator impossible. (Tr. 604). Arrow Plumbing also argues that sloping and benching were not options because the neighboring property line was too close to the excavation. (Tr. 603).

[5] Arrow Plumbing did not raise the greater hazard defense in its Answer or argue it in its post-trial brief. Accordingly, it has been waived.

The Court finds Arrow Plumbing's arguments to be without merit. First, Arrow Plumbing's position that the excavation did not require protection because it was wider than it was deep directly contradicts its affirmative defense of infeasibility. And, in any event, Mr. Hayslip testified that the width of an excavation does not negate the need for proper sloping or benching of the walls, (Tr. 311), and the Court agrees.

Mr. Smith and Mr. Brackenbury testified they did not slope or bench the excavation because they were restricted by the neighboring property line. However, Arrow Plumbing does not identify any case law or other authority allowing an employer to assert the infeasibility defense under these circumstances. Lastly, Arrow Plumbing has not satisfied its burden to show that an alternative means of protection was used or there was no feasible alternative means of protection. It did not explain why it did not excavate in such a way that the excavation could be shored, and it did not present sufficient evidence to support its argument that an excavator was physically unable to place the trench box due to disturbed soil. Accordingly, Arrow Plumbing's infeasibility defense fails because it did not satisfy its evidentiary burden. *See Pitt-Des Moines, Inc.*, No. 90-1349, 1993 WL 393505, at *5 (OSHRC, Sept. 30, 2009) (employer's burden to show infeasibility as an affirmative defense, not the Secretary's burden to show feasibility).

E. Penalty

"Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties for violations, the Commission must give "due consideration" to four criteria: "the size of the employer's business, gravity of the violation, good faith, and prior history of violations." *J. A. Jones Constr. Co*., No. 87-2059, 1993 WL 61950, at *15 (OSHRC, Feb. 19, 1993). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *Id.* (citations omitted). "The gravity of a particular

violation, moreover, depends upon 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." *Id*. (citation omitted). Although the Commission takes gravity, good faith, and prior history into consideration for repeated violations, under OHSA's policy, the penalty for repeated violations may only be reduced for the employer's size. Field Operations Manual (FOM) Ch. 6-V-B-1-b. Moreover, the penalty for a repeated violation may be multiplied by 10 if necessary to achieve a deterrent effect. FOM Ch. 6-V-B-1. Here, the Court vacated Citation 2, Item 1, so it will only consider the assessment of penalties for the two serious citation items (Citation 1, Item 1 and Citation 1, Item 2) and the remaining repeat-serious citation item (Citation 2, Item 2).

The Court agrees with OSHA's assessment of gravity. Mr. Brackenbury had been working in the excavation throughout the day on August 20. He had lowered the pipe into the excavation and was working on connecting the line. No safety precautions, like a hard hat, trench box, or proper sloping, were used or implemented, and the likelihood of injury was high. (Tr. 124-25). Thus, a reduction for gravity is not appropriate.

Similarly, OSHA properly concluded Arrow Plumbing did not demonstrate good faith and was not eligible for a reduction based on prior history. Arrow Plumbing is a repeat offender that continues to put its employees' lives at risk. *See Quality Stamping Prods Co.*, No. 91-414, 1994 WL 382494, at *3 (OSHRC, July 21, 1994) (prior history may include violations of a different degree or nature that could not support a repeat characterization). It has not implemented the enhanced abatement measures set forth in the Belton and Kansas City settlement. (Tr. 464-65). It remains on the severe violator enforcement program, and it has failed to pay the penalties for prior citations. (Tr. 470). Thus, Arrow Plumbing is not eligible for reduction in the penalty for the serious citation items for good faith or prior history.

Lastly, the Court turns to whether Arrow Plumbing should receive a reduction of up to 70% for size for all three citation items, which total $163,058. The Commission has viewed the size factor as "an attempt to avoid destructive penalties" that would unjustly ruin a small business. *A-1 Sewer and Water Contractors, Inc*., No. 21-0562, 2022 WL 2102909, at *12 (OSHRC, June 1, 2022). However, this concern for small businesses must be tempered with the need to achieve compliance with applicable safety standards. *Atlas Roofing Co. v. OSHRC*, 518 F. 2d 990, 1001 (5th Cir. 1975) (OSHA penalties are meant to "inflict pocket-book deterrence").

In 2020, Arrow Plumbing had 11 employees (J. Stip. 4), which could weigh in favor of reducing the penalty amount. However, Arrow Plumbing has offered no evidence to support a reduction of penalty for size based on something like financial hardship. *See*, *e.g.*, *J.C. Stucco and Stone, Inc.*, No. 14-1558, 2016 WL 7363932, at *8 (OSHRC ALJ, Nov. 7, 2016) (consolidated) (holding that "before the Court can decide whether an employer's poor financial condition can properly weigh towards a penalty reduction, [the employer] must actually prove its precarious financial condition and establish that it deserves to have its poor finances affect the penalty."). Likewise, Arrow Plumbing has not demonstrated that the penalty would somehow be destructive. *C.f. Secretary of Labor v. Colonial Craft Reproductions, Inc*., No. 881, 1972 WL 4135, at *2 (OSHRC, Oct. 27, 1972) (holding "[a]djustment of the penalty for the employer's size is primarily an attempt to avoid destructive penalties" and finding non-assessment of penalties appropriate for employer presenting evidence that it was operating on a deficit with only 10 part-time employees).

Moreover, size cannot be considered by this Court in a vacuum. Arrow Plumbing's lack of safety procedures, history of related OSHA violations, and failure to comply with OSHA settlements suggests that no reduction in the penalty amount is appropriate. *See Dakota Underground, Inc. v. Secretary of Labor*, 200 F.3d 564, 569 (8th Cir. 2000) (reduction in amount

for employer's size (25 employees) was not warranted in light of the company's history with OSHA citations and failure to pay prior penalties); *see also J.C. Stucco and Stone, Inc*., 2016 WL 7363932, at *8 (holding the employer had not acted in good faith, has a detrimental history, and does not deserve to have its financial condition used to justify a penalty reduction). Accordingly, the Court will impose the recommended penalty amounts for each of the remaining citation items, totaling $163,058.

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, Item 1, alleging a serious violation of 29 C.F.R. § 1926.100(a) is AFFIRMED, and a penalty of $12,873.00 is ASSESSED.
2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.651(b)(4), is AFFIRMED, and a penalty of $13,653.00 is ASSESSED.
3. Citation 2, Item 1, alleging a repeat-serious violation of 29 C.F.R. § 1926.651(j)(2) is VACATED.
4. Citation 2, Item 2, alleging a repeat-serious violation of 29 CFR § 1926.652(a)(1) is AFFIRMED, and a penalty of $136,532.00 is ASSESSED.

SO ORDERED.

/s/ Christopher D. Helms

Dated: August 21, 2023
Denver, Colorado

Christopher D. Helms
Judge, OSHRC