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. A-1 SEWER AND WATER CONTRACTORS, INC., Respondent.	OSHRC Docket No. 21-0562

REMAND ORDER

Before: ATTWOOD, Chairman; and LAIHOW, Commissioner.

BY THE COMMISSION:

On April 11, 2022, Administrative Law Judge Patrick B. Augustine issued a decision and order granting the Secretary's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(a).[1] For the following reasons, we vacate the judge's decision and remand this case for a hearing.

BACKGROUND

On May 10, 2021, OSHA issued Respondent a serious citation alleging a violation of 29 C.F.R. § 1926.652(a)(1) with a proposed penalty of $1,990. Respondent, appearing pro se, filed a timely notice of contest. On June 29, 2021, the case was assigned to Simplified Proceedings.[2]

[1] Federal Rule of Civil Procedure 56(a) provides, in relevant part, that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See* 29 C.F.R. § 2200.40(j) (applying FRCP 56 to motions for summary judgment in Commission proceedings).

[2] The purpose of Simplified Proceedings is "to provide simplified procedures . . . so that parties . . . may reduce the time and expense of litigation while being assured due process and a

After Respondent filed a declaration of affirmative defenses, the judge issued an order scheduling a merits hearing on February 28, 2022. *See* 29 C.F.R. § 2200.207(b) (allowing for affirmative defenses to be raised in Simplified Proceedings pre-hearing conference).

On December 27, 2021, the Secretary filed a single motion with three requests: (1) to postpone the hearing date by one month; (2) to hold the hearing remotely; and (3) to permit the filing of a motion for summary judgment. The next day, on December 28, 2021, the judge issued an order: (1) granting the request to postpone the hearing date; (2) denying the request to conduct the hearing remotely; and (3) granting the request to file a summary judgment motion. On February 3, 2022, the Secretary filed a motion for summary judgment.

When Respondent did not file a response to the Secretary's summary judgment motion, the judge issued an order on February 24, 2022, directing Respondent to file its response by March 4, 2022.[3] On February 28 and March 3, 2022, Respondent filed, respectively, a response, and an amended response, opposing the Secretary's motion for summary judgment and stating at the outset of both filings that it was "requesting a Hearing." On April 11, 2022, the judge issued a decision and order granting the Secretary's motion for summary judgment, affirming the citation as alleged, and assessing the $1,990 proposed penalty.

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hearing . . . ." 29 C.F.R. § 2200.200(a). Commission Rule 202(a) governs the eligibility of a case for Simplified Proceedings and provides that:

> [C]ases selected for Simplified Proceedings will . . . not involve complex issues of law or fact . . . [and] [c]ases appropriate for Simplified Proceedings will generally include . . . one or more of the following characteristics: (1) [r]elatively few citation items, (2) [a]n aggregate proposed penalty of not more than $20,000, (3) [n]o allegation of willfulness or a repeat violation, (4) [n]ot involving a fatality, (5) [a] hearing that is expected to take less than 2 days, or (6) [a] small employer whether self-represented or represented by counsel.

29 C.F.R. § 2200.202(a). This case, which the judge set for a one-day hearing, appears to meet all of these criteria—a pro se respondent, small enough to warrant a 70% reduction in calculating the proposed penalty amount of $1,990, cited for one serious violation, which did not involve a fatality.

[3] The judge explained that "the filing of a motion by one side requires a response from the other side unless the other side has no objection to the motion" and "extend[ed] the date for Respondent to file its response [to the summary judgment motion] should it desire to do so" under Commission Rule 5, which provides, in relevant part, that "the Judge on their own initiative . . . may enlarge . . . any time prescribed by the[] rules . . . ." *See* 29 C.F.R. § 2200.5.

DISCUSSION

We find that multiple procedural errors in this case warrant vacating the judge's decision. First, the December 27, 2021 motion filed by the Secretary was deficient in two ways. Commission Rule 40(d), 29 C.F.R. § 2200.40(d), which applies to a Simplified Proceedings case pursuant to Commission Rule 205(b), 29 C.F.R. § 2200.205(b), requires a moving party to confer with the other party and state in its motion not only what efforts were undertaken to confer, but also whether the other party opposes or does not oppose the motion. Here, the Secretary stated that he had conferred with Respondent regarding the two hearing-related requests in his motion and that Respondent objected to both. However, the Secretary's motion was silent as to whether he had conferred with Respondent regarding the more substantive request for permission to file a motion for summary judgment and as such, the motion was also silent on whether Respondent opposed that request.[4] *See AA Plumbing, Inc.,* 20 BNA OSHC 2203, 2204 (No. 04-1299, 2005) (noting Secretary's failure to confer with a pro se respondent when setting aside the judge's default order); *Action Concrete Constr., Inc.,* 22 BNA OSHC 1898, 1899 (No. 09-0923, 2009) (explaining that Secretary's failure to confer deprived respondent of opportunity to have its position included).

The Secretary's motion also failed to provide sufficient grounds to support his request for leave to file a motion of summary judgment in this case. Commission Rule 205(b) states that "[l]imited, if any, motion practice is contemplated in Simplified Proceedings . . . ."[5] 29 C.F.R. § 2200.205(b). The Secretary, without referencing this rule, acknowledged that he was making his request "even though this matter is currently set for Simplified Proceedings." But the Secretary offered no explanation for why such a motion would be appropriate given that context, making only general statements that the matter would be best resolved through summary judgment.

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[4] We note that this stands in contrast with the Secretary's motion for summary judgment itself, which does state that he informed Respondent of the motion the same day it was filed, and that Respondent opposed the motion.

[5] "Procedures . . . are simplified in a number of ways" and thus, formal pleadings are "generally are not required[,] . . . [d]iscovery is not permitted except as ordered by the judge[,] . . . [and] [h]earings are less formal" for cases assigned to Simplified Proceedings. 29 C.F.R. § 2200.200(b)(2), (4), and (6).

Second, the judge erred by ruling on the Secretary's three-in-one motion without providing Respondent an opportunity to respond. Commission Rule 40(h) states that a "party . . . upon whom a motion has been served shall file a response within 14 days from service of the motion." 29 C.F.R. § 2200.40(h). Yet the judge ruled on the Secretary's motion the very next day after it was filed even though the motion made clear that two of the three requests were opposed by Respondent.[6] *See Daniel Koury Constr. Inc*., 20 BNA OSHC 2089, 2091 (No. 04-1300, 2004) (vacating default judgment as "procedurally . . . flawed" and finding it "patently inadequate and unreasonable" to give pro se respondent only two days to respond to a show cause order in a Simplified Proceedings case); *Stone & Webster Constr. Inc.,* 23 BNA OSHC 1939, 1944 n.4 (No. 10-0130, 2012) (consolidated) (explaining that judge "improperly shortened the time periods set by the Commission's rules" for filing a response to pending motion). Moreover, despite the fact that, as discussed above, "limited, if any" motion practice is "contemplated" for cases assigned to Simplified Proceedings, the judge provided no explanation for his decision to grant the Secretary's request to file a motion for summary judgment. *See* 29 C.F.R. § 2200.205(b); *Daniel Koury*, 20 BNA OSHC at 2091 (shortened time period for response to show cause order "inconsistent with the intent of the . . . procedures" for Simplified Proceedings, known then as "E-Z Trials").

Given these procedural errors, we conclude that this pro se Respondent was deprived of the opportunity permitted by the Commission's procedural rules to be "fully heard" before the motion for summary judgment was ever filed. *See Action Concrete Constr., Inc.,* 22 BNA OSHC at 1900; *Structural Grouting Sys. Excavating, Inc*., 21 BNA OSHC 1067, 1069 (No. 03-1913, 2005) (vacating default judgment as judge "effectively provided [pro se respondent] no opportunity to respond at all" by mandating two-day response time to show cause order). In addition to depriving Respondent of this opportunity, neither the Secretary nor the judge has

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[6] We note that Commission Rule 40(e), which requires a party filing a "procedural motion" to include a proposed order granting the requested relief, states that such a motion "may be ruled upon prior to the expiration of the time for a response." 29 C.F.R. § 2200.40(e). Here, the judge made no mention of this rule in his order. In any event, we find nothing to suggest that the Secretary's motion could be considered purely procedural, particularly where two of the requests were opposed by Respondent and the third sought leave to file a dispositive motion. *See IAM v. J.L. Clark Co.*, 471 F.2d 694, 697 (7th Cir. 1972) (stating that "summary judgment is a form of relief which should be applied with caution to the end that litigants be allowed a trial on bona fide factual issues").

explained why permitting a motion for summary judgment was appropriate in this Simplified Proceedings case. Accordingly, we vacate the judge's decision granting summary judgment and direct him to hold a hearing on the merits of the case. *See* 29 C.F.R. § 2200.209 (governing hearings held in Simplified Proceedings case).

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: June 1, 2022

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. A-1 SEWER AND WATER CONTRACTORS, INC., Respondent.	OSHRC Docket No.: 21-0562

DECISION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The Court has reviewed and considered Complainant's Motion for Summary Judgment (Motion) filed on February 4, 2022. Complainant seeks a determination the Citation should be affirmed as a matter of law on the basis of the arguments which are summarized below. On February 28, 2022, Respondent filed its Response opposing the Motion. On March 3, 2022, Respondent filed an Amended Response to the Motion.

The Court's resolution of the present dispute is limited to the sole issue of whether genuine issues of material fact remain such that summary judgment is inappropriate. The Court has reviewed the Motion, the Amended Response, accompanying arguments and exhibits and finds

there are no disputed issues of material fact. Therefore, the Motion is GRANTED, and judgment is entered against Respondent as set forth below.

I. PROCEDURAL BACKGROUND.

Respondent was engaged in trenching and excavation work at the time of the inspection commenced on April 30, 2021, at Respondent's worksite located at 1105 W. Busse Ave., Mount Prospect, Illinois[7]. As a result of the inspection, the Occupational Safety Health Administration (OSHA) issued Respondent a Citation and Notification of Penalty containing one item classified as a serious citation[8] and proposed a penalty of $1985.00 (Citation). *See* Citation and Notification of Penalty. Respondent timely contested the Citation. This case was designated as a simplified case. The Commission has adopted Rules for Simplified Proceedings, which apply in this case. *See* Subpart M of 29 C.F.R. Part 2200 (29 C.F.R. §§ 2200.200 - 2200.211).

II. STANDARDS ON MOTION FOR SUMMARY JUDGMENT.

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact as to the issue(s) raised. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to prevail on a motion for summary judgment, there must be no genuine dispute as to any material fact, and the moving party must be entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). *See also*

[7] When Citation 1, Item was issued it stated the inspection occurred at 1105 W. Busse Avenue, Arlington Heights, Illinois. On February 3, 2022, the Court granted an unopposed Motion to Amend the Citation to reflect the location was in Mount Prospect, Illinois.

[8] The Citation alleges Respondent violated 29 C.F.R. § 1926.652(a)(1) by failing to protect an employee in an excavation from cave-in hazards by a protective system.

29 C.F.R. 2200.40(g)(j) (motions for summary judgment governed by Fed. R. Civ. P. 56)[9]; *Ford Motor Co. – Buffalo Stamping Plant*, 23 BNA OSHC 1593 (No. 10-1483, 2011). In resolving a motion for summary judgment, a judge does not decide factual disputes; rather, the role of the judge is to determine whether any material factual disputes exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (2005). In making such a determination, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 83 (2d Cir. 2006). If there is any evidence in the record from which a reasonable inference in favor of the nonmoving party can be drawn, summary judgment is improper. *Celotex*, 477 U.S. at 324. Conversely, if a review of the entire record could not lead a rational trier of fact to find for the nonmoving party, then there is no genuine issue for trial, and summary judgment is appropriate. *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

As to whether a fact is "material," the Supreme Court has stated:

> [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *See generally* 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93–95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual

[9] Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56.

> disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

Anderson, 477 U.S. at 248.

Under Federal Rule of Civil Procedure 56(c), a party to a summary judgment motion "asserting that a fact cannot be or is genuinely disputed must support the assertion," and if a party "fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion . . . ." Fed. R. Civ. P. 56(e). A nonmovant cannot, in other words, overcome summary judgment merely based on the possibility that material facts it has not yet identified exist; instead, it must "present facts essential to justify its opposition" (unless it shows "by affidavit or declaration" that such facts are not yet available to it "for specified reasons"). Fed. R. Civ. P. 56(d); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (the nonmovant must "designate specific facts showing that there is a genuine issue for trial").

III. UNDISPUTED MATERIAL FACTS.

On the date of the inspection, Respondent was in the process of installing a water line system for a residential building under construction. Szotko Decl. ¶ 4. There were two workers present at the worksite, Company owner and competent person Anthony Ciccone (Ciccone)[10] and an employee by the name of Pablo Ramirez (Ramirez). Szotko Decl. ¶¶ 5, 9, 10, 14 and Resp' t Am. Resp. at 3.

[10] Ciccone acknowledges he designated himself as the competent person and he was the owner of Respondent. *See Resp't* Am. Resp. at 3. The Court finds there is no material dispute as to the status of Ciccone.

During the inspection Compliance and Safety Officer Emil Szotko (CSHO) observed two trenches at the worksite. One trench (Trench 1) ran from the sidewalk to the front wall of the house and a second trench (Trench 2) went from the street to the sidewalk. Szotko Decl.¶ 6. The CSHO inspected both trenches and took measurements and photographs. Szotko Decl. ¶¶ 6, 17.

The Citation involves Trench 1 because the CSHO witnessed Ramirez working inside of it. Szotko Decl.¶¶ 4, 7; Comp 't. Exh. A-2. Ramirez was operating a vertical mounted drill against the building's foundation inside Trench 1. Szotko Decl. ¶ 7, 8; Comp 't Exh. A-2, A-5. The travel area in the excavation where Ramirez was working was between the ladder and the vertical mounted drill and had vertical walls with no slopes or benches.[11] Szotko Decl. ¶ 20. Ciccone was standing at the edge of Trench 1 and had verbal and visual contact with Ramirez which Ciccone stated he was supervising. Szotko Decl. ¶¶ 9. 14; Comp 't. Exh. A-2.

Using an engineering rod and measuring tape, the CSHO measured Trench 1 as being 4-feet wide, 20-feet long with a depth of five feet and six inches[12]. Szotko Decl. ¶ 17, Comp 't. Exh. A-3.[13] The soil was previously disturbed during the construction of the building. Due to this disturbance, the CSHO classified the soil as Type B[14]. Szotko Decl. ¶ 18. The CSHO observed:

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[11] Respondent argues the "travel area" was not greater than five feet in depth Resp't Am. Resp. 4. The Court finds it is not the depth of the "travel area" that triggers the applicability of the regulation. The regulation is clear if any part of the excavation is greater than five feet the regulation applies. The regulation does not use the phrase "travel area." The Court rejects Respondent's interpretation the measurement must be taken within the "travel area." Respondent's argument does not raise a material disputed fact.

[12] Respondent argues the use of the word "approximately 5.6 feet in depth" in the ADV of the Citation undermines Complainant's position the excavation was greater than five feet. Resp't Am. Br. at 5. The Court rejects this argument as exhibits provided by Complainant supporting its Motion indicate the measurement taken by the CSHO showed the trench was greater than five feet. The use of the word "approximate" does not detract from the objective evidence.

[13] Respondent alleges the dimensions are falsified. Respondent provides no evidence as to how they were falsified. Mere allegations do not create a material disputed fact. Respondent was present during the inspection and could have raised any concern or requested re-measurement. Respondent offers no information which indicated that he did either. Resp't Am. Br. at 6.

[14] While there is a dispute between Complainant and Respondent as to the type of soil in the excavation the Court finds that dispute is not material. Respondent contends the soil was clay with a black dirt top and thus Type A soil. Comp 't Exh. C at 8. Complainant classified the soil as Type B because it was clay and sand. Szotko Decl. ¶ 18.

(i) the walls of Trench 1 were vertical with no sloping or bench systems; and (ii) there was no shoring or shielding protective systems installed inside Trench 1. *See* Szotko Decl. ¶¶ 19, 20; Comp 't. Exh. A-2-A-5. In light of the above undisputed material facts, the Court finds no genuine issue of material facts exist which prevent summary judgment from being entered against Respondent.

IV. ANALYSIS OF COMPLAINANT'S PRIMA FACIE CASE

A. Jurisdiction.

The record supports Respondent is engaged in a business affecting interstate commerce and is an "employer" within the meaning of section 3 of the Act. The use of the term "affecting commerce" indicates a congressional intent to "exercise fully its constitutional authority under the commerce clause." *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976); *U.S. v. Dye Construction Co*., 510 F.2d 78 (10th Cir. 1975); *Brennan v. OSHRC*, 492 F.2d 1027 (2nd Cir. 1974); see also *Piping of Ohio, Inc*., 16 BNA OSHC 1236 (No. 91-3481, 1993). Commerce, according to § 3(3) of the Act, "means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof...." Following the Ninth Circuit in *Usery v. Franklin R. Lacy,* 628 F.2d 1226 commerce where it "is in a class of activity that as a whole affects commerce." *Clarence M. Jones d/b/a Jones Co*., 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983). In that case, the Commission went on to find "[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce." *Id*., citing

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Respondent produced documentation which indicated that the soil had been disturbed during the construction of the building. Comp 't Exh. C at 8. While there may be a dispute as to what the soil was made up of, there is no dispute that the soil was previously disturbed. If soil has been previously disturbed, it is automatically not Type A soil. *See* 29 C.F.R. p. 1926, sub-pt. P, app. A(b), definition of Type A soil. The Court finds the trench soil was Type B.

NLRB v. Int'l Union of Operating Engineers, Local 571, 317 F.2d 638, 643 n. 5 (8th Cir. 1963) (judicial notice taken that construction industry affects interstate commerce). Because Respondent is engaged in construction work, the undersigned finds it is engaged in a business affecting interstate commerce.

Excavation work qualifies as "construction work" which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1926.32(g). The construction industry of which excavation work is part of affects commerce, and even small employers within that industry are engaged in commerce. *Slingluff v. OSHRC*, 425 F.3d 861, 866-67 (10th Cir. 2005);, *d/b/a C. Jones Clarence M. Jones Co*., 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). The Court finds Respondent was engaged in interstate commerce.

As to whether Respondent was an "employer" under the Act, Ciccone stated Ramirez was his employee and he was supervising Ramirez. Szotko Decl. ¶ 13. Respondent does not dispute this fact. The Court finds Respondent was an "employer" under the Act.

Finally, the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act by Respondent filing its Notice of Contest. *Joel Yandell*, 18 BNA OSHC 1623, 1628 n.8 (No. 94-3080, 1999). *See also* 29 U.S.C. § 659(c).

B. Case Law Applicable to Analysis of the Prima Facie Case.

Although the Commission recognizes the difficulties a self-represented litigant may face when participating in the Commission's proceedings, the Commission still requires the self-represented litigant to follow the rules and exercise reasonable diligence in the legal proceedings in which it is taking part. *Sealtite Corp*., 15 BNA OSHC 1130 (No. 88-1431, 1991). An unrepresented employer must "exercise reasonable diligence in the legal proceedings" and "must

follow the rules and file responses to a judge's orders, or suffer the consequences, which can include dismissal of the notice of contest." *Wentzel d/b/a N.E.E.T. Builders*, 16 BNA OSHC 1475, 1476 (No. 92-2696, 1993) (citations omitted).

For most standards, including the one at issue here, Complainant is not required to prove the existence of a hazard each time a standard is enforced.[15] *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981); *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978) (Complainant not required to prove violation related to walking and working surfaces constituted a hazard). Instead, the hazard is presumed, and the Complainant's burden is limited to showing: (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Grp., Inc*., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009); *Sanderson Farms, Inc. v. Perez,* 811 F.3d 730, 735 (5th Cir. 2016); *Atl. Battery Co.,* 16 BNA OSHC 2131 (No. 90-1747, 1994).[16]

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

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[15] The Commission has held that, when a standard prescribes specific means of enhancing employee safety, [a] hazard is presumed to exist if the terms of the standard are violated."). *Joseph J. Stolar Constr. Co*., 9 BNA OSHC 2020, 2024 n.9 (No. 78-2528, 1981). *See also Kaspar Electroplating Corp*., 16 BNA OSHC 1517 (No. 90-2866, 1993). *See also Sanderson Farms, Inc. v. Perez*, 811 F.3d. 730 (5th Cir. 2016). In this case the regulation cited does not require the Secretary to prove the existence of a hazard since it is a specification standard. It is not necessary to show Respondent understands or acknowledges the physical conditions were actually hazardous. *Phoenix Roofing, Inc*., 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

[16] The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court applies the precedent of the Seventh Circuit where it differs from the Commission in deciding this case.

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

Preponderance of the Evidence, BLACK'S LAW DICTIONARY (10th ed. 2014).

The cited regulation requires:

> Each 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 except when: (i) Excavations are made in entirely stable rock; or (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

29 C.F.R. § 1926.652(a)(1).

C. The Regulation Applies.

Under Commission precedent, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *KS Energy Servs., Inc.,* 22 BNA OSHC 1261, 1267 (No. 06-1416, 2008) (finding "the cited ... provision was applicable to the conditions in KS Energy's traffic control zone"), *aff'd*, 701 F.3d 367 (7th Cir. 2012); *Active Oil Serv., Inc.,* 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005) (finding "that the confined space standard applies to the cited conditions" because "the vault was

a confined space"); *Arcon, Inc.,* 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004) ("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.").

Respondent was engaged in the installation of a water line five feet six inches beneath the ground in an excavated trench. The cited regulation requires a protective system be used in the excavation of any trench deeper than five feet unless it is excavated in stable rock. The Court has previously found the soil was not stable rock and the soil was classified as Type B soil. Since the soil was Type B, protective systems identified in the regulation must be utilized. Complainant has established the cited regulation applies.

D. The Cited Regulation was Violated.

The walls in Trench 1 were vertical without a sloping or benching protective system.[17] While Respondent stated to the CHSO that protective systems were used the day before, on the date of the inspection the evidence indicates there was no sloping or benching protective system being utilized.

[17] Under § 1926.652(b)(1), Option 1 requires the sloping of the sides of a trench at an angle not steeper than 1 ½ horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses another option described in the standard. Section 1915.652(b)(2) permits sloping or benching in accordance with Appendices A and B in Subpart P, 29 C.F.R. pt. 1926, sub-pt. P, app. A. When the employer elects to use sloping Option 2, soil classification per the requirements of Appendix A is mandatory. Appendix B contains the specifications for sloping and benching where an employee designs a protective system under § 1926.652(b) (sloping angles for Type A soil, 53 degrees; Type B soil 45 degrees). 29 C.F.R. pt. 1926,sub-pt. P app. B, Table B-1.

Respondent contends it had flared the top of Trench 1 when excavating and a shoring system was not necessary. Comp 't Exh. C at 7; Resp 't Am. Br. at 4. The referenced exhibit does show that one wall that ran parallel with the building was partially flared. Comp 't. Exh. C at 7.

The cited regulation is a specific regulation which sets forth the requirements Respondent must meet when the regulation cited applies to the work being performed. Trench 1 did not have a slopping or benching system as set forth in the regulation. *See* 29 C.F.R. § 1926.652(b) and 20 C.F.R. pt. 1926, sub-pt. P, app. (B)(c)(4)m Table B-1. Both sides of a trench must be sloped in accordance with the standards.[18] The "flaring" does not meet the requirements of the regulation as it is not a method defined in the regulation. Finally, even if the "flaring" was considered a protective system it was not in compliance with the regulation as there was no sloping system in accordance with 29 C.F.R. § 1926.653(b). *RJCL Corp. d/b/a RNV Construction*, No. 20-0456, ___W.L. ___ (O.S.H.R.C.A.L.J., Dec. 10, 2021).

Respondent has argued the following language of the regulation applies to relieve him of violating the cited regulation: (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in. *See* 29 C.F.R. § 1926.652(a). Resp't Am. Br. at 1-2. It is not disputed Ciccone was the competent person at the worksite. However, this exception would not apply since the depth of the excavation was greater than five feet. Even if it had applied, Respondent, in his Amended Response. did not provide any documentation that he made a determination the trench had no cave-in potential, and

[18] Comp' t. Ex. A-2 – A-5 and C show that Trench 1 did not have two sloping walls.

if he did, what did he do and what factors did he evaluate to make that determination.[19] Complainant has established a violation of cited standard.

E. Employee Exposure to the Hazard.

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission's longstanding "reasonably predictable" test for hazard exposure requires the Secretary to "show that 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." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing id.*). *See also Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).[20]

The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr*. Co., LLC, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013)(*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). The zone of danger is determined by the hazard presented by the violative condition and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction*, Co., 17 BNA OSHC at 1234; *Gilles & Cotting, Inc*., 3 BNA OSHC at 2003.

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[19] Respondent argues as the competent person he did make this examination. However, as noted, this exception to the regulation does not apply since the excavation was greater than five feet. Resp 't Am. Br. at 2.

[20] In *Gilles & Cotting, Inc*., the Commission rejected the "actual exposure" test, which required evidence that someone observed the violative conduct, in favor of the concept of "access," which focuses on the possibility of exposure under the conditions. *See Gilles & Cotting, Inc*., 3 BNA OSHC at 2002 (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure").

Here, the zone of danger presented was the presence of Ramirez in the excavation greater than five feet which exposed him to a cave-in hazard. Szotko Decl. ¶¶ 4, 7-10; Comp 't. Ex. A-2. Complainant has established exposure.

F. Employer Knowledge.

"The knowledge element of the *prima facie* case can be shown in one of two ways." *Eller-Ito Stevedoring*, 567 F. App'x at 803 (*citing ComTran,* 722 F.3d at 1307). "First, where the Secretary shows that a supervisor[21] had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *Id.* (*citing ComTran,* 722 F.3d at 1307–08). It is not necessary to show the employer knew or understood the condition was hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079-1080 (citations omitted); *Peterson Bros. Steel Erection Co.,* 16 BNA OSHC 1196, 1199 (No. 90-2304, 1999), *aff'd* 26 F.3d 573 (5th Cir. 1994)..

Actual knowledge is established when a supervisor directly engages in or sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.,* 5 BNA OSHC 1202, at *3 (No. 11015, 1977)(holding because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). In this case, Ciccone, Respondent's owner, and competent person, was working with and directing the work of Ramirez on the day of the

[21] It is well settled an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Access Equipment Systems. Inc*., 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999)(employee who was "in charge of" or "the lead person for" one or two employees who erected scaffolds "can be considered a supervisor). The Commission has long held it is the substance of the delegation of authority not the formal title of the employee having the authority. *Dover Elevator Co*., 16 BNA OSHC 1281 (No. 91-862, 1993). *See Diamond Installations*, 21 BNA OSHC 1688 (No. 02-2080, 2066 (permitting imputation of knowledge based on temporary delegation). A person not having the authority to fire or fire, such power is not "sine qua non "of supervisory status. *Rawson Contractors, Inc*., 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003).

inspection. *See* Comp 't Ex. A-2; Szotko Decl. ¶¶ 4, 5, 9-16. Ciccone was also supervising Ramirez and was standing at the top of the trench looking down into it.

Ciccone's actual knowledge may be imputed to Respondent since Ciccone was its supervisory employee. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) quoting *Access Equip. Sys.*, 21 BNA OSHC 1400, 1401 (No. 03-1351, 2006). Complainant has established Respondent had actual knowledge through its owner and competent person Ciccone and his knowledge is imputed to Respondent.

G. The Characterization of the Violation.

The Court finds the violation was serious within the meaning of section 17(k) of the Act. Under the Act, "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists … unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA 1044, 1047 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA 2072, 2077 (No. 88-523, 1993). The Secretary need not show there was a substantial probability an accident *would* occur; he need only show if an accident occurred, serious physical harm *could* result. *See Sec'y of Labor v. Phelps Dodge Corp. v. Occupational Safety & Health Review Comm'n*, 725 F.2d 1237, 1240 (9th Cir. 1984).

Here, there was a substantial probability that death or serious physical harm could result from a cave-in of the trench. Szotko Decl. ¶ 24. Comp 't Exh. D. Complainant has established that Citation 1, Item 1 was a serious violation.

H. Penalty.

When a citation is issued, it may include a penalty amount. *See* 29 U.S.C. § 659(a). OSHA has published a Field Operations Manual ("FOM") to, among other things, guide its employees in determining what penalty, if any, to propose for violations. FOM at 1-1, 6-1. FOM, Directive No. CPL-02-00-150, effective April 22, 2011, available at 4 Employment Safety and Health Guide, (CCH), ¶7965, at 12,133, 12,139 (2015). The penalty amounts proposed in a citation become advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441-42 (8th Cir. 1973); *Revoli Constr. Co*., 19 BNA OSHC 1682, 1686 n. 5 (No. 00- 0315, 2001). It is the Complainant's burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed.[22] *Valdak Corp.*, 17 BNA OSHC at 1138; *Orion Constr. Co., Inc.,* 18 BNA OSHC 1867, 1868 (No. 98-2014, 1999).

"Regarding penalty, the Act requires that "due consideration" be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.,* 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (citing 29 U.S.C. § 666(j); Jim Boyd, 26 BNA OSHC at 1117; *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished)). These factors are not necessarily accorded equal weight. *J.A. Jones Constr*., 15 BNA OSHC 2201, 2216 (No. 87-2059, 18 1993) (citation omitted). When applying the penalty assessment factors, the Commission need not accord each one equal weight. *See, e.g., Astra Pharm. Prods., Inc.*, 10 BNA OSHC 2070, 2071 (No. 78-6247, 1982); *Orion*, 18 BNA OSHC at 1867 (giving less weight to the size and history

[22] Complainant's proposed penalties are not accorded the same deference the Commission gives to reasonable interpretations of an ambiguous standard. *See Hern Iron Works*, 16 BNA OSHC 1619, 1621 (No. 88-1962, 1994) (rejecting Secretary's contention that his penalty proposals are entitled to "substantial weight"); *Nacirema Operating Co*., 1 BNA OSHC 1001, 1003 (No. 4, 1972) (declining to agree with the result or methodology the Secretary used to calculate the penalty).

factors). Rather, the Commission assigns the weight that is reasonable under the circumstances. *Eric K. Ho*, 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (Consol.), *aff'd sub nom*., *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005).

i. Gravity. The gravity of the violation is the principal factor in a penalty determination. Assessing gravity involves considering: (1) the number of employees exposed to the hazard; (2) the duration of exposure; (3) whether any precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury. *See, e.g., Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished). *See also Ernest F. Donley's Son, Inc*., 1 BNA OSHC 1186 (No. 43, 1973) (viewing gravity as the probability of an accident's occurrence and the extent of exposure). "A lack of injuries is not a measure for determining gravity or any other penalty factor." *Altor Inc.*, 23 BNA OSHC 1458, 1468 (No. 99-0958, 2011), aff'd 498 F. Appx. 145 (3d Cir. 2012) (unpublished). According to the CSHO, he considered the severity of the injury that was likely to occur from an accident, as well as the probability of an accident occurring. The likely severity of an injury resulting from trench wall cave-ins could cause injuries or temporary, reversible illness resulting in hospitalization and a limited period of disability. Szotko Decl. ¶ 24. Comp 't Exh. D. OSHA determined the likelihood of the violation was lesser, based on the CSHO's determination the employees were exposed to cave-in hazards for a limited time. Szotko Decl. ¶ 25. Complainant assessed a gravity-based penalty of $7,802. *Id*.

ii. Size. The gravity factor focuses on treating violations of similar quality and severity alike. In contrast, the other three factors—size, history, and good faith—require consideration of circumstances pertaining specifically to the cited employer. The Commission frequently relies on the number of employees to evaluate the merits of altering a penalty for size. The Commission has

viewed the size factor as "an attempt to avoid destructive penalties" that would unjustly ruin a small business. *Colonial Craft Reprod*., 1 BNA OSHC at 1064. *See also Intercounty Constr. Corp*., 1 BNA OSHC 1437, 1439 (No. 919, 1973), *aff'd*, 522 F.2d 777 (4th Cir. 1975). 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"), *aff'd*, 430 U.S. 442 (1977). With respect to the size of the business, the CSHO recommended a 70% reduction of the gravity-based penalty. Szotko Decl. ¶ 26. Based upon the evidence, the Court concludes no further reduction based on size is warranted.

iii. History The next statutory consideration, history, examines an employer's full prior citation history, not just prior citations of the same standard. *Orion*, 18 BNA OSHC at 1868; *Manganas Painting Co*., 21 BNA OSHC 2043, 2055 (No. 95-0103, 2007) (Consol.) (history includes prior uncontested citations). Even if the prior violations were of a different degree or nature, they still are properly part of the employer's history for penalty purposes. *Quality Stamping Prods., Co.*, 16 BNA OSHC at 1929. There was no penalty reduction for history. Comp 't Br. 15.

iv. Good Faith. As to the final factor, good faith, this entails assessing an employer's health and safety program, its commitment to job safety and health, its cooperation with OSHA, and its efforts to minimize any harm from the violation. *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013); Nacirema, 1 BNA OSHC at 1002. The CSHO provided a 15 percent reduction for a quick fix of the hazard during the inspection which the Court determines is based on good faith. Szotko Decl. ¶ 26. No further reductions are necessary on good faith.

Respondent did not address the penalty factors in its Amended Response. Therefore, the facts as presented by Complainant are not in dispute. Upon due consideration of section 666 (j) of

the Act, the enumerated penalty calculation factors, and the facts of this case, the Court assess a penalty of $1,990 for Citation 1, Item 1.

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 is AFFIRMED as a serious citation, and a $1,990 penalty is assessed.

SO ORDERED.

Denver, CO

Dated: April 11, 2022

/s/

Patrick B. Augustine

First Judge – Denver OSHRC