United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. DENUCCI CONSTRUCTORS, LLC, Respondent.	OSHRC Docket No. 18-1847

Appearances:

Karla Jackson Edwards, Esq., Department of Labor, Office of Solicitor, Dallas, Texas
For Complainant

Anthony D. Tilton, Esq. & Patrick S. Bickford, Cotney Construction Law, LLP, Tallahassee, Florida
For Respondent

Before: Judge Patrick B. Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

On July 30, 2018, DeNucci Constructors LLC ("DeNucci" or "Respondent") performed work at a jobsite located at 500 Sabine Street in Austin, Texas ("Worksite"). (Ex. J-1 Stip. No. 5). On said date, two of Respondent's employees, Daniel Ponce ("Ponce") and Ramiro Vasquez Paz ("Paz"), entered a trench on the Worksite in order to locate and uncover existing piping. (Ex. J-1 Stip. No. 10). At approximately 10:20 a.m., an Occupational Safety and Health Administration ("OSHA") Compliance Assistance Specialist ("CAS"), Joann Natarajan happened to walk by the

Worksite. (Tr. 39, 42-43). As CAS Natarajan walked past the Worksite, she observed two employees digging under and around four exposed pipes in the bottom of the trench. (Tr. 39, 42-43, 47-48, 50, 65-66). Based on her visual observations of the trench depth, angle, sides, and sloughing of soil into the trench, she determined the trench was unsafe. (Tr. 51-56).

CAS Natarajan notified OSHA about what she observed. (Tr. 54-56). In response, OSHA initiated an inspection of Respondent and the Worksite. (Tr. 284). As a result of the inspection, Compliance Safety and Health Officer ("CSHO") Darren Beck recommended, and OSHA issued, a Citation and Notification of Penalty ("Citation") alleging two violations of the Act. (Tr. 320-321; Ex. C-2). The Citation alleged Respondent failed to train its employees on unsafe excavation conditions, exposed its employees to a cave-in hazard and proposed a penalty of $12,934. *See* 29 C.F.R. §§ 1926.21(b)(2), 1926.652(a)(1). Complainant withdrew Citation 1, Item 1, at the beginning of the trial. (Tr. 9-10). *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3 (1985) (holding Secretary's discretion to withdraw citation is unreviewable). As a result of the withdrawal, the only remaining item before the Court was Citation 1, Item 2, with a proposed penalty of $6,467. (Tr. 9-10, 321-324).

Respondent filed a timely notice of contest bringing the matter before the Occupational Safety and Health Review Commission (the "Commission"). The matter was designated for Simplified Proceedings by the Chief Administrative Law Judge and assigned to this Court on December 17, 2018. On January 31, 2019, Respondent moved to discontinue simplified proceedings in favor of conventional proceedings, which motion was granted on February 19, 2019. A trial was held on August 8 and 9, 2019, in San Antonio, Texas. The following individuals testified: (1) CAS Natarajan; (2) Ramiro Vasquez Paz, through an interpreter,[1] one of

[1] Edith Serna Pintac was sworn in as a licensed court interpreter without objection from either party. (Tr. 82-85, Ex. J-2).

Respondent's laborers; (3) Daniel Ponce, through an interpreter, another one of Respondent's laborers; (4) Jorge Morales, through an interpreter, Respondent's Worksite Foreman; (5) David Lucas, Respondent's Superintendent; and (6) CSHO Darren Beck. Both parties submitted timely post-trial briefs.[2] 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.

II. Stipulations & Jurisdiction

The parties stipulated to various facts, including several jurisdictional details.[3] (Ex. J-1). Based on the Joint Stipulations, the Court finds the Commission has jurisdiction over this action pursuant to Section 10(c) of the Act, 29 U.S.C. § 659(c). Further, the Court obtained jurisdiction over this matter under section 10(c) of the Act upon Respondent's timely filing of a notice of contest. *Id.* The Court also finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3), (5).

[2] Affirmative defenses not raised at the hearing are deemed waived and abandoned by Respondent. *Corbesco, Inc. v. Dole,* 926 F.2d 422, 428–29 (5th Cir. 1991). In its Answer, Respondent raised several affirmative defenses, including unavoidable employee misconduct and infeasibility, that Respondent did not pursue at the hearing or in its post hearing brief. Any affirmative defenses not raised at the hearing are deemed waived by Respondent. *Corbesco, Inc. v. Dole*, 926 F.2d 422, 428–29 (5th Cir. 1991). As such, the Court deems these affirmative defenses abandoned. *See Georgia-Pacific Corp.,* 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

[3] References to the parties' Joint Stipulations will indicate the source and specific stipulation, e.g., "Stip. No. ___". The Joint Stipulations were received and admitted as J-1.

III. Factual Background[4]

The Company and Worksite

DeNucci Constructors, Inc. operates as a construction company performing various construction and excavation services in the State of Texas. (Tr. 8; Ex. J-1 Stip. Nos. 2, 5). In 2018, DeNucci was engaged in construction and excavation work on a Worksite located on Sabine Street in Austin, Texas, with at least seven employees. (Ex. J-1 Stip. Nos. 5 & 6).

DeNucci's Worksite management consisted of a general superintendent and Worksite foreman. (Ex. J-1 Stip. No. 6). On July 30, 2018, DeNucci's general superintendent was David Lucas and its Worksite foreman was Jose Martin Morales. (Ex. J-1 Stip. No. 6). Both individuals oversaw all operations at the Worksite, including the excavation of a trench. (Ex. J-1 Stip. Nos. 6, 7, 8, 10, 12). On July 30, 2018, Superintendent Lucas and foreman Morales knew two DeNucci laborers, Daniel Ponce and Ramiro Vasquez Paz, entered the trench to locate existing piping. (Ex. J-1 Stip. Nos. 10, 12).

The Trench

On July 30, 2018, DeNucci's operator, Miquel Hernandez, dug a trench at the Worksite with an excavator. (Ex. J-1 Stip. Nos. 6, 8). DeNucci was attempting to locate existing communication lines to replace them with new ones. (Tr. 160, 179, 236-239; Ex. R-28 at 1). At the bottom of the trench, DeNucci's employees located four pipes at approximately 8-9 feet deep. (Tr. 40, 51, 292, 299-300, 385-386; Exs. R-13 at p. 2, R-21 at p. 4). At approximately 10:00 a.m., DeNucci's employees Paz and Ponce entered the trench to hand dig the soil surrounding the four pipes. (Tr. 39-40, 47, 87-88, 385-386; Exs. J-1 Stip. No. 10, R-28 at p. 1). In order to enter the trench, both employees climbed down a ladder leaning on the northern end of the trench. (Tr. 48-

[4] The factual background is based on the credible record evidence, as discussed below, and consideration of the record as a whole. Contrary evidence is not credited.

49, 89-90). Paz testified before he entered the trench, he could see the four pipes at the bottom of the trench because they had already been exposed. (Tr. 109-110). Paz further testified in order to hand dig around the pipes, he had to step off the ladder and stand on the bottom of the trench. (Tr. 90). Superintendent Lucas corroborated Paz's testimony by testifying he observed both Paz and Ponce standing at the bottom of the trench while they dug around the exposed pipes. (Tr. 258-259). Ponce and Paz were in the trench for approximately 5-15 minutes. (Tr. 241; Ex J-1 Stip. No. 11).

After DeNucci's employees had entered the trench, OSHA CAS Natarajan walked by the Worksite, by happenstance, while on her way to an unrelated conference. (Tr. 39-41). As CAS Natarajan was walking by the Worksite, she observed two men in the bottom of a trench digging around four exposed pipes. (Tr. 39, 50). Through her observations, Natarajan estimated the trench to be 8-9 feet deep, lacked proper sloping, had material sloughing into it, and was ultimately unsafe. (Tr. 54-56). Based on her observations and experience, Natarajan called the OSHA Austin Area Office to make a safety hazard referral. (Tr. 55-56).

The OSHA Inspection

After receiving the referral from CAS Natarajan, CSHO Darren Beck traveled to the Worksite and inspected it the same day. (Tr. 284-285). Through the course of CSHO Beck's investigation, he spoke with David Lucas, Jose Martin Morales, Daniel Ponce, Ramiro Vasquez Paz, and Paul DeNucci, the owner of DeNucci. (Tr. 299-300, 319-320, 356-357, 391; Exs. J-I Stip. No. 6, C-2). As a result of Beck's investigation, he determined while Ponce and Paz were in the trench it was hazardous and not in compliance with the cited standard. (Tr. 316-319, 387-391). CSHO Beck found, *inter alia,* the soil was Type B, the trench was 8-9 feet deep, the mouth of the trench at its widest point was 13 feet, the west and east walls of the trench were completely vertical,

the north wall was insufficiently benched, and the south wall was not benched at all. (Tr. 292-293, 295, 304, 306-319 360-367, 377; Exs. J-1 Stip. No. 9, C-6 at p. 580, C-7, R-13; R-21). Furthermore, Beck determined the widest part of the trench's bottom to be 3 feet. (Tr. 314-315); Ex. R-21 at p. 3).

DeNucci neither had nor enforced any trench safety rules pertaining to the Worksite. (Tr. 180, 206-207; Ex. J-1 Stip. No. 13). DeNucci's superintendent Lucas testified the written trench safety plan provided to OSHA was inapplicable to the Worksite. (Tr. 206-207). Morales testified he had never seen a written trench safety plan for the Worksite. (Tr. 161-162).

Furthermore, there were no safety measures taken before DeNucci employees entered the trench. Neither superintendent Lucas nor foreman Morales took any measurements of the trench before Ponce and Paz entered the trench. (Tr. 163-165, 174-175, 218-220). The record revealed that foreman Morales did not take any steps to determine the safety of the trench before Ponce and Paz entered. (Tr. 180). In fact, the record shows foreman Morales did not know the type of soil or what degree of angle slope was required. (Tr. 172-173). Ultimately, no safety precautions were relayed to the employees to make the trench safe or properly bench and slope it. (Tr. 180, 240-241).

With the investigation concluded, Beck determined that DeNucci had violated the requirements of Section 652(a)(1). (Tr. 316-319, 387-391). Based on his findings, he recommended, and OSHA issued, a citation with two serious items for violations of 29 C.F.R. § 1926.21(b)(2) and 29 C.F.R. § 1926.652(a)(1). (Tr. 9-10, 320-321). As noted above, Complainant withdrew Citation 1, Item 1. Thus, the only item before the Court is Citation 1, Item 2, which alleges a violation of 29 C.F.R. § 1926.652(a)(1).

IV. Discussion

A. Law Applicable to Alleged Violations

In order to establish a violation of a safety standard under the Act, in this case 29 CFR §1926.652(a)(1), Complainant must prove by a preponderance of the evidence: (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. *Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982); See *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

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

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

1. Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652 (b) or (c):
>
> > On or about July 30, 2018, employees were installing an electrical manhole for the City of Austin wastewater line improvements in an excavation approximately 8 feet deep with inadequate cave-in protection, exposing employees to a cave-in hazard.

See Citation at 7.

The cited standard provides:

> 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 entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) 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).

a. The Standard 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.")

DeNucci was a construction company performing construction and excavation services when the violation occurred. (Ex. J-1 Stip. Nos. 2, 5, 7, 8). Therefore, the excavation work DeNucci performed would fall under the purview of Part 1926, Subpart P, Section 650 - Excavations. Any hazards involving excavations or trenches would fall within the scope of the aforementioned Subpart including its relevant sections. 29 C.F.R. § 1926.650.

The scope and application paragraph of 29 C.F.R. § 1926.650 is quite extensive and broad in its applicability. The excavation regulations scope applies to "all open excavations made in the

earth's surface" and "excavations are defined to include trenches." 29 C.F.R. § 1926.650(a). Excavation is further defined as "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." *See* 29 C.F.R. § 1926.650(b). A trench or trench excavation is defined as "a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet (4.6 m) …" *See* 29 C.F.R. § 1926.650(b). CSHO Beck concluded the trench was 8-9 feet deep, the mouth of the trench at its widest point was 13 feet and was three feet wide at the bottom. The trench was deeper than it was wide. (Tr. 314-315, 385-386; Ex. R-21). The Court finds 29 C.F.R. § 1926.652(a)(1) applies.

b. The Standard was Violated.

Although the cited standard applies, Respondent contends Complainant failed to show Respondent did not comply with its terms. Respondent argues between the time CAS Natarajan saw two men in the trench and when CSHO Beck arrived on scene, the excavation was materially altered. The Court finds Respondent's argument unpersuasive.

Here, the cited standard required Respondent to safeguard trenches in Type B soil[5] by utilizing a system of benches and slopes at a 1:1 ratio or no more than a 45-degree angle or the use of trench box. *See* 29 C.F.R. § 1926.652(b); 29 C.F.R. § 1926 Appendix B to Subpart P (Table B-1.2). The record reveals the west and east walls of the trench were not sloped to 45-degrees when Ponce and Paz were in the trench. (Tr. 54, 99-100, 186-187, 214, 310; Ex. C-6 at pp. 573-574, 580). It is undisputed Respondent did not use a trench box. Instead, the record shows the west and east walls were vertical at the time the employees were in the trench and at the time CSHO Beck arrived. (Tr. 54, 99-100, 186-187, 214, 310; Ex. C-6 at pp. 573-574, 580).

[5] The parties stipulated the soil type was Type B. (Ex. J-I Stip. No. 9).

Furthermore, the north and south sides of the trench had inadequate benching and/or sloping or none at all. (Tr. 310-313, 318-319; Ex. R-13). The north side of the trench contained three partial benches. (Tr. 306-311; Ex. R-21 at p. 4). Superintendent Lucas and CSHO Beck measured the height of the partial benches from the bottom of the trench as 3 feet 6 inches, 2 feet, and 2 feet 6 inches. (Tr. 295, 306-311; Ex. R-21 at p. 4). The north wall was also measured as benched back 5 feet. (Tr. 309-310; Ex. R-21 at p. 4). This partial benching did not extend the entire width of the trench. (Tr. 310; Ex. R-21 at p. 4). Additionally, the south side of the trench contained no slopping or benching. (Tr. 312-313; Ex. R-13 at p. 3). It would have been impossible for Respondent to slope the south wall at a 1:1 ratio without cutting through the paved sidewalk. (Tr. 53, 389-390; Ex. R-13 at p. 3). Because the trench was 8-9 feet deep, Respondent would have needed to slope or bench every wall of the trench back at least 8-9 feet in order to comply with the required 1:1 ratio in the cited standard. *See* 29 C.F.R. § 1926.652(b); 29 C.F.R. § 1926 Appendix B to Subpart P (Table B-1.2). However, the record reveals Respondent not only failed to bench the north side of the trench at least 8-9 feet back but did not bench or slope any of the trench's walls at a 1:1 ratio. (Tr. 295, 306-311; Ex. R-21 at p. 4).

Respondent asserts after Ponce and Paz exited the trench, the excavation was materially changed due to continued excavator and skid-steer operations. (Tr. 104, 108, 114, 115, 142). Respondent claims these operations significantly altered the configuration and dimensions of the trench. The Court finds these claims lack merit. While the testimony supports excavation activities continued after 10:30 a.m. (Tr. 104, 108, 114, 115, 142), the record overwhelmingly shows the area where Ponce and Paz were working by the pipes was undisturbed. (Tr. 89-90, 109-110, 133-135; Exs. C-6 at pp. 572-573, R-21 at pp. 1, 4, R-28 at pp. 1-2). Both Ponce and Paz recalled standing and cleaning on and around the pipes prior to CSHO Beck's arrival. (Tr. 89-90,

109-110, 133-135). Two hours later when CSHO Beck arrived, these same four pipes were still clean and unaltered by subsequent excavation. (Tr. 292, 295-296, 316-319, 387-391; Exs. C-6 at pp. 572-573, R-21 at pp. 1, 4, R-28 at pp. 1-2). CSHO Beck measured the depth of these pipes to be 8 feet. (Tr. 292). It was not until Respondent released white sand into the trench the pipes were covered up. (Tr. 292, 295-296, 387-391; Exs. C-6, R-21, R-28). Respondent had dumped sand into the bottom of the excavation between the time CSHO Beck arrived at the Worksite and before he could finish his investigation. (Tr. 295-296).

In addition to the unaltered depth of the trench, the record indicates the length had not changed from the morning to the time of the inspection. (Tr. 319-320, 356-357). Respondent incorrectly argues in order to measure the width of a trench opening, you also measure outside of the opening including up to the cuts in the pavement or sidewalk. (Tr. 265-268; Exs. C-6 at p. 580, R-13). Following this erroneous formula, Respondent would have measured the trench opening to be 16 feet. (Tr. 265-268; Exs. C-6 at p. 580, R-13). The record revealed when measuring an opening of an excavation, the measurement does not include horizontal flat areas or sidewalks outside of the opening. (Tr. 304-305, 316-319; Ex. C-7). This sentiment is further supported by the diagrams and tables in the standard. *See* 29 CFR §1926, Subpart P, Appendix B, Table B-1.2. CSHO Beck correctly measured the trench opening to be 13 feet. (Tr. 360-361; Ex. R-13 at p. 3). The Court finds neither measurement would bring Respondent into compliance with the cited standard. *See* 29 C.F.R. § 1926, Subpart P, Appendix B, Table B-1.2). For an 8-9 feet deep trench with Type B soil, Respondent would have had to bench or slope on a 1:1 ratio. *See* 29 C.F.R. § 1926.652(b); 29 C.F.R. § 1926 Appendix B to Subpart P (Table B-1.2). Since the depth of the trench was 8-9 feet, Respondent needed to slope or bench the walls of the trench back at least 8-9 feet. *Id.* As such, the trench's opening needed to be at least 19-feet wide to account

for a depth of 8 feet and a width at the bottom of 3 feet. (Tr. 310-311, 390-391; Ex. C-7). In order to bring the trench into compliance, Respondent would have had to remove the pavement and sidewalk that CAS Natarajan was walking on or install a trench box. (Tr. 53; Ex. C-6 at pp. 580, 590). The record does not support the contention that the pavement or sidewalk was altered at all between the time CAS Natarajan saw two men in the trench and when CSHO Beck arrived for inspection. (Tr. 53, 360-361; Exs. C-6 at pp. 580, 590, R-13). Accordingly, in light of the abovementioned, the Court finds Respondent violated the terms of the standard.

c. Employees were Exposed to a Hazardous Condition

"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 test for hazard exposure requires Complainant 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).[6]

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 the area

[6] 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").

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.

Respondent's employees, Ponce and Paz, were directly exposed to a hazardous condition when they worked in the noncompliant and unsafe trench. (Tr. 39, 50, 385-386; Ex. J-1 Stip. Nos. 10, 11). Courts have long held exposure is met by an employee's mere access to a hazardous situation. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985); *S. Hens, Inc. v. Occupational Safety & Health Review Comm'n*, 930 F.3d 667, 681 (5th Cir. 2019). Here it is undisputed, and actually stipulated to, that Ponce and Paz had access to and entered the trench during the morning of July 30, 2018. (Ex. J-1 Stip. No. 10). Specifically, there was employee exposure at approximately 10:15 a.m. as CAS Natarajan walked past the Worksite and observed two employees in the bottom of the trench. (Tr. 39, 42-43, 47-48, 50, 65-66). Both employees corroborated Natarajan's testimony when they testified they were working on removing sand around and on the four pipes that had been exposed during excavation. (Tr. 89-90, 109-110, 133-135). Furthermore, both employees, and the weight of the evidence, indicates they were in the excavation 6-7 minutes each and separately. (Tr. 39, 42-43, 47-48, 50, 65-66, 89-90, 109-110, 133-135). As such, the Court finds Ponce and Paz were exposed employees.

d. DeNucci had Actual Knowledge

Respondent's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known of the violative condition. 29 U.S.C. § 666(k); *Nat'l Eng'g & Contracting Co. v. Occupational Safety & Health Admin,* 928 F.2d 762, 767 (6th Cir. 1991). An employer's awareness of the violation may be shown through actual or

constructive knowledge of said violation. 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).

The Court finds Respondent had actual knowledge. 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"). Both superintendent Lucas and foreman Morales saw, and therefore, knew the employees were in the trench. (Ex. J-1 Stip. No. 12). Aside from Respondent stipulating to the fact Lucas and Morales had knowledge that Ponce and Paz entered the trench on July 30, 2018, the record substantiates Respondent's knowledge. Superintendent Lucas testified he saw Ponce and Paz in the trench. (Tr. 243). As such, the Court finds Respondent had actual knowledge that two of its employees had entered the Worksite trench. However, there is no proof Lucas or Morales entered the noncompliant trench.

According to the Commission, where Complainant shows a supervisor[7] had actual knowledge of the violation, such knowledge is generally imputed to the employer." *Id.* (*citing*

[7] 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 hire or fire, such power is not "sine qua non" of supervisory status. *Rawson Contractors, Inc*., 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003).

ComTran, 722 F.3d at 1307–08). *See also 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) and *Regina Constr. Co.*, 15 BNA OSHC 1044, 1046 (No. 87-1309, 1991). The Fifth Circuit, in which this case arises, has addressed the issue of whether or not a supervisor's misconduct can be imputed to the employer absent a showing of foreseeability.[8] In *Calpine Corporation v. Occupational Safety and Health Review Commission,* 774 Fed. Appx. 879 (5th Cir. 2019) (unpublished), the Fifth Circuit clarified its decision in *W. G. Yates & Sons Construction Co., OSHRC* 459 F.3d 604 (5th Cir. 2006). In *Calpine*, the Fifth Circuit clarified that *Yates* "addresses only when a supervisor's knowledge of his *own* misconduct violates an employer's policy of instructions." *See Yates,* 459 F.3d at 609 n. 8 (noting that the case addressed only situations where the supervisor himself engages in unsafe conduct contrary to the employer's policy.) There is no evidence to indicate the supervisor or foreman at the Worksite engaged in the misconduct of working in the trench – the evidence only establishes the supervisors observed the two employees working in the unprotected trench. Therefore, *Yates* is not applicable to this case.

Thus, *Calpine* and Commission precedent applies to the facts of this case. Under *Calpine* and Commission precedent, a supervisor's knowledge of his employee's misconduct may be imputed to the employer, without determining whether the supervisor's actions were foreseeable. *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).

Both superintendent Lucas and foreman Morales knew the employees were in the trench. (Ex. J-1 Stip. No. 12). Aside from Respondent stipulating to the fact Lucas and Morales had

[8] In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission 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) (citation omitted).

knowledge Ponce and Paz entered the trench on July 30, 2018, the record substantiates Respondent's knowledge. Superintendent Lucas testified to specifically observing the employees in the trench. (Tr. 243). As such, the Court finds Respondent had actual knowledge two of its employees had entered the Worksite non-compliant trench and such knowledge will be imputed to Respondent. Accordingly, Citation 1, Item 2 shall be AFFIRMED.

e. Characterization

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). Complainant 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).

Complainant alleges the violation of 29 C.F.R. § 1926.652(a)(1) is serious, which is supported by CSHO Beck's testimony. (Tr. 321). CSHO Beck testified that an improperly built trench could result in a cave-in, which has been shown to cause serious injuries, ranging from permanent disability to death. (Tr. 321; Ex. C-2). The Court finds the violation was serious within the meaning of section 17(k) of the Act.

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). The Secretary'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). It is the Complainant's burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed. *Valdak Corp*., 17 BNA OSHC at 1138; *Orion Constr. Co., Inc.*, 18 BNA OSHC 1867, 1868 (No. 98-2014, 1999) (giving less weight to the history factor as the Secretary provided little specific information).

"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,

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 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).

a. 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 assessed the gravity of the violation as moderate. He determined the severity of the violation was high due to the possibility of death or serious physical injury, but found the probability of any such injury occurring was low. (Tr. 322). Based on CSHO Beck's probability determination, which was due, in part, on Respondent having done some benching and shoring, the Court grants an additional five percent reduction.

b. 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 initially recommended a 30% reduction. (Tr. 322-323). Based upon the evidence, the Court concludes no further reduction based on size is warranted.

c. 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, and therefore could not support a repeat characterization, 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 because Respondent was not inspected during the five years prior

to CSHO Beck's inspection. (Tr. 324). The Court grants a ten percent reduction for history as there have been no citations against Respondent over the past five years.

d. 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.

There was no reduction for good faith because Respondent's safety program was not effective. (Tr. 323-324).[9] *See, e.g.*, *Daniel Crowe Roof Repair*, 23 BNA OSHC 2001, 2017 (No. 10-2090, 2011) (where Commission Judge Dennis Phillips held a company's failure to provide its roofers with any form of fall protection or training demonstrates that it is not entitled to any credit for good faith in the penalty assessment). Although not binding precedent,[10] the Court agrees with Judge Phillips and concludes Respondent's failure to provide an effective safety and health policy which it enforced demonstrates that it is not entitled to any credit for good faith.

Upon due consideration of section 666 (j) of the Act, the enumerated penalty calculation factors, and the facts of this case, the Court modifies the original penalty proposed by Complainant. Thus, a penalty of $4,746 is assessed for Citation 1, Item 2.

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[9] *See Aviation Constructors*, 18 BNA OSHC at 1922 ("While we find that [the employer] did not make good faith efforts to comply with respect to the particular provision of the standard at issue here, we nevertheless conclude that [the] overall circumstances should be taken into consideration in assessment of an appropriate penalty [for a willful violation]."); *Manganas Painting Co., Inc.*, 21 BNA OSHC 2043, 2055 (Nos. 95-0103, 2007) (consolidated) (good faith can be mitigating factor in determining penalty for willful violation), *rev'd in part on other grounds*, 540 F.3d 519 (6th Cir. 2008).

[10] Although they may be persuasive, unreviewed administrative law judge decisions do not constitute binding precedent. *KS Energy Serv. Inc.*, 23 BNA OSHC 1483 (No. 09-1272, 2011); *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976).

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 was WITHDRAWN.
2. Citation 1, Item 2 is AFFIRMED as a serious citation, and a $4,746 penalty is assessed.

SO ORDERED

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: May 15, 2020
Denver, Colorado