UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W.— 9th Floor
Washington, DC 20036–3419

SECRETARY OF LABOR,		
Complainant,		90-0050 90-0189 90-0190
v.	OSHRC Docket Nos.	90-0191 90-0192
ANDREW CATAPANO ENTERPRISES, INC.,		90-0193 90-0771 90-0772
Respondent.		91-0026

DECISION

BEFORE: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration ("OSHA") issued nine separate sets of citations alleging numerous violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") to Andrew Catapano Enterprises ("Catapano"). The citations alleged that Catapano failed to comply with many of the same standards at nine separate work sites along Eighth Avenue in New York City where it was replacing water mains. At issue here, in addition to the merits of some of the citations, is the propriety of the Secretary of Labor's decisions to prosecute each set of citations separately, and to allege separate violations of the same standards and propose separate penalties for those violations. For the reasons that follow, we find, with one exception, that the Secretary's actions were within his discretion and within the bounds of the law. We affirm Commission Administrative Law Judge Edwin Salyers' decision with some modifications.

Background

The bulk of the OSHA inspections that gave rise to the citations were conducted from September 18, 1989 to November 6, 1989 by Compliance Officers Bert Zapken, Brian Donnelly, and Thomas Marrinan, although the last of the nine inspections was conducted on October 24-25, 1990. At each inspection, the compliance officers made it clear that each newly opened trench they observed was to be treated as a new inspection with new penalties.[1] A set of citations was issued to Catapano for each trench site on the project. Each set of citations alleged violations of standards governing excavation hazards, employee training, and personal protective equipment, as well as violations of the Act's general duty clause, section 5(a)(1), 29 U.S.C. § 654(a)(1), and violations of other standards governing recordkeeping, hazard communication, combustible liquids, traffic hazards, power tools, and compressed gas cylinders. The nine separate citations alleged 98 separate violations of more than 30 different standards and sections of the Act. Some of the citations covered overlapping periods of time, but only one violation of any standard was alleged at each worksite. The penalties proposed by the Secretary for the nine sets of citations totaled $148,000.

A different docket number was assigned to each of the nine inspections when the citations were contested. The first case, Docket No. 90-0771, involved more than eighteen days of hearings and three thousand pages of transcript. On the first day of the hearing on the second case, Docket No. 90-0772, the parties announced that "in order to shorten the length of time necessary to hear this case" and "in the interest of judicial economy," they had stipulated to the admission of a number of documents, many of which had been admitted through witnesses called in the prior proceeding. This shortened the second hearing

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[1]During two of these inspections, compliance officers posted imminent danger notices and warned employees that they were in peril, although the Secretary ultimately declined to seek an injunction against the company under section 13 of the Act, 29 U.S.C. § 662.

somewhat. Nevertheless, the compliance officers testified for approximately six days in both cases. Each testified anew, as if he had not appeared before the judge the week before.

When Chief Commission Administrative Law Judge Irving Sommer notified the parties six months later in September 1992 that "given the current workload of [Commission Administrative Law] Judge Oringer,"[2] he was reassigning the remaining seven cases to other Commission judges, both parties protested, going so far as to file jointly an interlocutory appeal with the Commission, which was denied. Judge Edwin Salyers was assigned to the seven remaining cases. The fate of the first two cases remained unclear when Judge Salyers opened his hearings, although the Secretary expressed his desire at that time not to retry those cases. At the conclusion of the hearing in the third case, Docket No. 90-0050, Judge Salyers emphasized that although he recognized that there were a different work site and perhaps different citations in each of the docket numbers, he was treating these cases as consolidated.[3] He largely ran the hearing as if the cases were officially consolidated, dispensing with repetitious testimony whenever he recognized it as such. The hearing in the fourth case was somewhat abbreviated compared to the others.

After the fourth case was tried, the parties submitted a document titled "Agreed Statement of Facts" ("the Stipulation"), in which they stipulated that the conditions constituting the alleged violations, the provisions of law allegedly violated, the defenses raised, and the other issues in dispute were substantially similar in all nine cases. The parties further agreed that the Commission should decide the remaining five cases on the evidence

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[2]Judge Oringer eventually retired without issuing a decision in these cases.

[3]Neither party ever filed a formal motion to consolidate under Commission Rule 9, 29 C.F.R. § 2200.9. Catapano's attorney did make an oral motion to "consolidate" the cases on the eleventh day of the first trial before Judge Oringer. This was not, however, to condense the trials but to bring in from other dockets evidence thought necessary to establish a selective prosecution defense that was later abandoned.

in the cases already tried. Adopting this method, Judge Salyers[4] affirmed all but twenty of the sixty-three items comprising the twenty-five citations. For those items, he assessed the penalties the Secretary proposed—$10,000 each for the ten willful violations of trenching and hard-hat standards, and $1000 for each of the forty-eight serious violations of other standards and section 5(a)(1)—for a total penalty of $148,000.

The Commission directed review of Judge Salyers' decision on a number of issues. We turn first to those concerning procedural due process.

I. Procedural Due Process Issues

Catapano makes three basic contentions: the Secretary acted improperly in (1) not treating these worksites as one construction project and one case by issuing one citation and proposing one penalty for each instance of a violation, (2) not providing Catapano an opportunity to challenge the Secretary's interpretation of the requirements of the standards in an imminent danger proceeding and , (3) violating section 8(a) of the Act, his regulations and the *Field Operations Manual* ("*FOM*").

We find that, with one exception, the Secretary's decision to prosecute these cases in the manner he did was within his discretion and did not violate Catapano's due process rights. The key fact here, which Catapano chooses to ignore, is that these trenches were different worksites. The worksites were blocks rather than miles apart and the Secretary's inspection of them was separated in time by days rather than months or years, but abating one violation of a standard did not abate the violations of that same standard at other worksites. For example, shoring or shielding one noncomplying trench would abate the violation in only that trench, not the next one or the five other trenches allegedly not in compliance. Similarly, ensuring that a hardhat be worn on one day would not ensure that it was worn a month later. For the same reasons, contesting a citation involving one worksite

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[4]Judge Salyers also retired without rendering a decision, but was ultimately retained to dispose of the case.

would stay only the correction of "the violation for which a citation has been issued."Section 10(b) of the Act, 29 U.S.C. § 659(b). It would not, contrary to Catapano's claim, stay abatement of a citation alleging a violation of the same standard at another worksite.

In Catapano's view, its right to due process was violated by requiring it to undergo multiple prosecutions for what is essentially the same course of conduct. It also claims that OSHA abused its discretion here by harassing Catapano into compliance with OSHA's view of compliance. We disagree. There is a critical distinction between this case and the multiple-prosecution cases Catapano relies on. Those cases involve a respondent being tried more than once for what the courts find to be "the same offense."As we have discussed *supra,*the cases before us include alleged violations of more than 30 different standards and the general duty clause of the Act at nine different worksites on 11 different days over a period of two months. Violations of some of the standards were alleged at more than one but not all worksites. The facts cited in support of these allegations are peculiar to the worksite where they were observed. The employer's defense to each allegation also would vary with the worksite. Clearly, with the exception of the training standards, which we address *infra,* these cases do not involve the "same offense."

We also conclude that the evidence does not show that OSHA harassed Catapano into compliance. The record shows that after the first four cases had been fully tried but before any decisions were issued, the parties entered the Stipulation pursuant to which all nine cases were ultimately adjudicated. The Stipulation enabled the judge to decide the five remaining, untried cases in accordance with the decision based on the evidence in the record at that point. According to the testimony of Catapano's vice-president and chief engineer John Ruggiero, the specter of the Secretary's recurring penalties, along with those of the other agencies that followed suit, first drove Catapano off the jobsite and into court for eight months fighting with the City and the utility companies over who would bear the cost of compliance with OSHA standards, and, then, according to Catapano's then counsel's statements to the judge, the possibility of the Secretary's endless stream of docket numbers

drove Catapano, unable to afford counsel, into the stipulation. However, the Secretary's actions are not consistent with a deliberate strategy on the part of the government to wear down an employer by subjecting it to multiple proceedings. Thus, the Secretary objected to the cases having to be heard anew by another judge, joined Catapano in an interlocutory appeal, moved to incorporate evidence common to multiple dockets, and agreed to sign the Stipulation. The Stipulation and the Secretary's apparent willingness on many occasions to merge, compact, expedite, and simplify these nine cases undermines Catapano's multiple prosecution argument.

While we would not encourage the Secretary to pursue a similar litigation strategy in the future, and would urge Commission judges to consolidate cases wherever appropriate, *sua sponte* if necessary, we nevertheless find that while the Secretary's litigation strategy in these cases may have been ill-advised and even wasteful, we cannot find that it rose to the level of a deliberate effort on the part of the government to violate Catapano's due process rights.[5]

We also find no support for Catapano's claim that it was deprived of due process by the Secretary's failure to initiate formal imminent danger proceedings in district court after the compliance officer posted an imminent danger notice. The Act contains no express provision that allows an employer to initiate such proceedings and Catapano does not provide us with a basis for concluding that the provision should be inferred. If the Secretary had arbitrarily or capriciously failed to seek relief in district court, endangered *employees* were the only ones who could seek to compel further action on his part. *See* section 13(d) of the

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[5]The decision of the United States Court of Appeals for the Seventh Circuit in *Continental Can Co., USA v. Marshall*, 603 F.2d 590 (7th Cir. 1979), does not require a different result. There, the court held that collateral estoppel precluded the Secretary, who had lost an earlier case against Continental Can, from continuing to issue and litigate citations for what the Court held were similar violations at other Continental plants. Here there was no earlier *Catapano* decision to estop the Secretary.

Act , 29 U.S.C. § 662(d). According to the *FOM*, the imminent danger notice alerts employees that the Secretary of Labor will be seeking a court order to restrain the employer from permitting employees to work in the area of the danger until it is eliminated. Catapano cites no authority for the proposition that the Secretary is required to file a legal action in cases such as this where the danger is eliminated at the end of each day. Any due process problem would seem to have been eliminated here by Catapano's ability to contest the citations. In these cases, the contest led to 40 days of hearings, which surely gave Catapano the opportunity it needed.

We also find no basis for Catapano's claim that the Secretary's conduct was barred because he failed to comply with the Act, his own regulations and the *FOM*. Section 8(a) of the Act, 29 U.S.C. § 657(a), requires the Secretary to conduct his inspections "at . . . reasonable times, and within reasonable limits and in a reasonable manner." In our view, on a construction contract of this magnitude and duration, with new worksites constantly appearing, the Secretary's method of inspection and enforcement appears eminently reasonable.

In considering Catapano's claims that the Secretary violated numerous provisions of his *FOM* in conducting the inspection, we first note that the *FOM* is not binding on the Secretary and does not create any substantive rights for employers. *Caterpillar, Inc.* 15 BNA OSHC 2153, 2173 n.24, 1991-93 CCH OSHD ¶ 29,962, p. 40,499 n. 24 (No. 87-922, 1993). Moreover, in any event, rather than prohibit the way the Secretary inspected Catapano's worksites, the FOM appears to specifically anticipate and permit the kind of follow-up inspections and citations generated in this case. Section V.C.3(b)(2) provides that when:

> inspections of the same establishment of an employer are conducted on two different occasions, and instances of the same violation are disclosed during each inspection, the second instance of the violation shall not normally be grouped with the first instance, even if a citation for the first has not yet been issued.

The one area where the Secretary exceeded his discretion involves training standards. Catapano did not instruct its employees as required by the standards and the existence of a violation is not before us.[6] However, the Secretary cited Catapano for violating the 29 C.F.R.§ 1926.21(b)(2) training standard[7] in seven of the dockets. The judge, in affirming the second in the series of training violations, noted the compliance officer's testimony that the employees told him they had not been trained since the last time he spoke with them and that a new employee had also not received any training.

The language of the standard -- "[t]he employer shall instruct each employee"-- clearly may be read to permit the Secretary to cite separate violations based on the failures to train individual employees. Here, however, the Secretary cited a failure to train in the first inspection for the same reasons he cited a failure to train in all the succeeding inspections: "Employees were not formally trained in the recognition and avoidance of unsafe working conditions and practices on or about 9/20/89." Only the date changed. As far as this record establishes, the employees did not change, and the working conditions and applicable regulations did not change. Yet Catapano was cited six more times in the

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[6]We specifically reject Catapano's argument that a training standard violation is contingent on a finding that the trench was hazardous. The Commission has held that a violation for failure to instruct is separate and distinct from the trenching violations. *See H.H.Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,058 (No. 76-4765, 1981) (violation for failure to instruct is separate and distinct from the question of whether violation of trenching and excavation standards existed).

[7]That standard provides:

> **§ 1926.21 Safety training and education.**
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> . . . .
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> (b) *Employer responsibility.*
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> . . . .
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> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

succeeding docket numbers, all for the same failure to train. We find that the evidence adduced in these cases permits only a single citation and penalty assessment under the language of section 1926.21(b)(2).[8] We therefore affirm the section 1926.21(b)(2) item in Docket No. 90-0050 and vacate the items in the other docket numbers that allege violations of section 1926.21(b)(2). Similarly, the $1,000 penalty in Docket No. 90-0050 is affirmed, while the penalties for the other violations of section 1926.21(b)(2) are vacated.

We now turn to the merits of the substantive items on review.

II. Substantive Issues

The merits of three sets of alleged violations are at issue on review. The parties specifically stipulated that in all nine cases, the conditions constituting the alleged violations are substantially similar to those in Docket Nos. 90-0050 and 90-0191.[9] In light of this Stipulation and given our holding above that per-instance penalties are generally appropriate, our findings in this part apply to the same or related issues and items in all docket numbers.

A. Cylinder Storage Violations

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[8] Our holding affirming only one of the training violations here should not be read as a holding that once a company is cited for a training violation, it thereafter becomes immune from any further citations under that standard for the duration of the "project"under any set of circumstances.

[9]The Stipulation refers almost exclusively to the cases headed by Judge Salyers,(*i.e.*, to "the two cases already tried" or to "Dockets 90-0050 and 90-0191") as the cases on which the Commission is to base its decision. Paragraph 6 of the Stipulation indicates, however, that the parties wanted the Oringer evidence also to be considered. Although Judge Salyers disposed of the cases heard by Judge Oringer in his decision, it does not appear that he relied on the evidence that was taken by Judge Oringer. Judge Salyers makes no explicit reference to any transcript pages or to the testimony of any of the witnesses who appeared exclusively in Judge Oringer's cases. In accordance with the Stipulation as a whole and in the interests of justice and judicial economy, we have analyzed this case based on all the evidence available.

In Docket No. 90-0050, the Secretary alleged that Catapano failed to comply with 29 C.F.R. § 1926.350(a)(1) [10] by not capping an oxygen cylinder and 29 C.F.R. § 1926.350(j)[11] by not separating another oxygen cylinder from an acetylene cylinder. At issue is whether the cited oxygen cylinders were being stored.

1. Uncapped Cylinder

In the failure-to-cap allegation, two valve caps were on the ground near the uncapped oxygen cylinder, which was lying on its side next to an upright acetylene cylinder. The oxygen cylinder was not attached to a regulator and hose, while the acetylene cylinder was. Compliance Officer Zapken testified that during the half an hour that he observed the oxygen cylinder it was not used. He concluded that Catapano was "storing" the oxygen cylinder based on OSHA's "bright-line" rule that when the regulator/hose is not attached, the cylinder is being stored.[12]

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[10]That standard provides:

> **§ 1926.350 Gas welding and cutting.**
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> (a) *Transporting, moving, and* ***storing*** *compressed gas cylinders.* (1) Valve protection caps shall be in place and secured.

(Emphasis added).

[11]The cited standard, 29 C.F.R. § 1926.350(j), incorporates ANSI Z49.1-1967 which provides: "Oxygen cylinders *in storage* shall be separated from fuel-gas cylinders or combustible materials . . . ." (Emphasis added).

[12]Although there was no evidence adduced from any witness on whether any of the cited cylinders were empty, the Commission has adopted the Secretary's position that safe practices require employers to presume that there is always some residual gas in the cylinders to pose a hazard. *See Trinity Indus., Inc.*, 9 BNA OSHC 1515, 1520, 1981 CCH OSHD ¶ 25, 297, p.31,323 (No. 77-3909, 1981) (citing *Williams Enterprises, Inc.*, 7 BNA OSHC 1015, 1018-19, 1979 CCH OSHD ¶ 24, 003 (No. 14748, 1979)). Catapano at no point alleged that the reason the standard did not apply was because a cylinder was empty.

The only evidence Catapano presented regarding this particular cylinder was the testimony of its vice president and chief engineer Ruggiero, who had no first-hand knowledge of the condition. On review of a photograph, Ruggiero stated that the cylinder was disconnected "apparently for the purpose of changing it." He declared that the cylinder was "not under my definition of storage . . . a place where cylinders would be placed for long term nonuse . . . a period of days or if the cylinders are not being used during that particular day."

In *American Bridge/Lashcon, J.V.,* 16 BNA OSHC 1867, 1869, 1993-95 CCH OSHD ¶ 30,484, p. 42,107 (No. 91-633, 1994), *aff'd,* 70 F.3d 131 (D.C. Cir. 1995), the full Commission, including our dissenting colleague, found that based on "the evidence as a whole," cylinders were not "in storage" under section 1926.350(j) where "it is unclear when the cited cylinders were last used or when they were to be used next." Here, in finding that the cylinders were not in storage the judge applied earlier Commission precedent on the storage issue, *MCC of Florida, Inc.*, 9 BNA OSHC 1895, 1981 CCH OSHD ¶ 25,420, p.31, 681 (No. 15757, 1981), which held that cylinders were not in storage if they were either going to be used intermittently or were available for immediate use. As the Commission noted in *American Bridge*, 16 BNA OSHC at 1869, 1993-95 CCH OSHD at p. 42,107, later precedent considered other factors, including the length of time the cylinders were not in use, to be determinative of the storage issue. *Newport News and Shipbuilding*, 16 BNA OSHC 1676, 1679-80, 1993-95 CCH OSHD ¶ 30,380, pp.41, 916-17 (No.90-2658, 1994); *Hackney/Brighton Corp.,* 15 BNA OSHC 1884, 1887-8, 1991-93 CCH OSHD ¶ 29,815, pp.40, 618-19 (No.88-610, 1992).

Applying *American Bridge* to these facts, we conclude that the evidence as a whole demonstrates that the cylinder was being stored. The compliance officer was the only witness who actually saw the cylinder and he observed that it was not used for half an hour. The company did not explain why the nearly spent cylinder was not capped while awaiting replacement. As the compliance officer remarked, "As soon as you remove the regulator

from the hoses, you have to put the valve protection cap back on . . . considering the valve protection caps are right there, I think he can do it immediately."To rebut this prima facie showing, the only evidence Catapano introduced was the testimony of Ruggiero, who was not a witness to the condition. Ruggiero's testimony concerning his own definition of storage and what was "apparently" the case according to the photo exhibit does not rebut the Secretary's case. Therefore, we affirm the violation.

Finally, the dissent suggests that our decision involves impermissible deference to a test urged by the Secretary over our own precedent. This argument is misplaced; our decision here is derived from our precedent, and not the Secretary's alternative test. The dissent states that the Secretary has argued "that compressed gas cylinders are in storage unless the regulators and hoses are actually attached." In this case we do not rely on any such definitional presumption. Rather, as precedent provides, we rely on the "the evidence as a whole." The dissent does not address this evidence. Thus, in *American Bridge* the administrative law judge found that cylinders were not in storage based on the testimony of the project superintendent to that effect. However, on review the Commission reversed the judge because the project superintendent also testified that he did not know of his own knowledge that this was the case. *Id.*, 16 BNA OSHC at 1879-1880, 1993-95 CCH OSHD at p. 42,107 Here, similarly, Respondent relies on the testimony of a witness who concededly was not present and did not know of his own knowledge whether items were in storage. In reversing the judge in *American Bridge,* the Commission, including our dissenting colleague, explained that it was deciding the case based on Commission precedent, and therefore it was not necessary to address the Secretary's argument that the Commission must defer to his interpretation of "in storage." In sum, the decision here follows the precedent in *American Bridge*, from which the dissent evidently would now depart.

2. Cylinders not Separated

The separate-storage allegation involved an oxygen cylinder and an acetylene cylinder (both capped) which were lying next to each other horizontally on the sidewalk amidst debris

and construction equipment. They were not separated by a barrier or 20 feet, as required by the ANSI standard incorporated by reference in section 1926.350(j). The compliance officer observed this condition and took a photograph of it. Under the hose/regulator attachment test, these tanks were also cited under the in-storage standards. Catapano's vice president Ruggiero, who again had not observed the condition first-hand, testified by looking at the photo exhibit that "I don't consider those tanks to be in storage. Those tanks were delivered for use during the day. They're not in long-term storage." . . . Again following *MCC of Florida*, the judge vacated the item based on Ruggierio's testimony.

Applying *American Bridge* here, we find that the judge erred in concluding that the oxygen cylinder was not in storage. It was undisputed that the oxygen cylinder was not actually in use, so the Secretary made a prima facie case that the cited standard was applicable. Catapano could have easily rebutted this prima facie case by showing that the cylinders were being "used" rather than being "stored." Catapano presented no evidence to justify treatment of these two cylinders as "in use." Both were capped and lying horizontally away from job-site activity. As in *American Bridge*, "it is unclear when the cited cylinders were last used or when they were to be used next." 16 BNA OSHC at 1869, 1993-95 CCH OSHD at p.42,107. As with the previous item, by relying on Ruggiero, who was not on the work site and could not provide testimony as persuasive as that of the compliance officer who actually observed the cylinders, Catapano failed to rebut the presumption that the oxygen cylinder was in storage and should have been separated from the oxygen cylinder.[13]

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[13]This violation was cited in Docket No. 90-0050. The judge also vacated a section 1926.350(j)item in Docket No. 90-0190, although a different ANSI standard is referenced. Because the Secretary did not petition for review of this item in his Conditional Petition for Review, we treat the item as withdrawn.

Accordingly, we affirm both violations. The Secretary proposed a $1, 000 penalty for both items. Catapano made no specific arguments as to the penalty amount and accordingly we assess $1,000 for each item.

B. Eye Protection Violations

At issue here is whether the Secretary has established that Catapano's employees were exposed to a significant risk of harm because they did not wear safety goggles when they cut ductile pipe with a "heavy-duty cut-off saw" equipped with an abrasive wheel. The Secretary alleged a violation of section 1926.28(a)[14] and proposed a single $1,000 penalty for this four-instance citation item covering three dates and four locations.

The compliance officer testified that sparks thrown by the saw would fly two to three three feet and that he saw employees duck away from sparks. The company's principal witness, chief engineer and vice president John Ruggiero, testified that all saws go out of the shop with guards on them and that the guards are designed to direct all sparks away from the employee. All the saws that the compliance officer observed were in fact equipped with a guard. The record shows that the saws left the shop equipped with guards *and* goggles.[15] Ruggiero admitted that Catapano had a problem "enforcing" employees' use of protective eyewear on that site and acknowledged that he was aware of the supervisor's practice of allowing employees to continue using the saw when the goggles that were supposed to be

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[14]That standard provides:

> **§ 1926.28 Personal protective equipment.**
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> (a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

[15]Catapano asserts in its brief that goggles were provided so that they could be used when guards were removed, but no witness testified to that effect.

attached to the saw were missing. Ruggiero agreed with the judge that wearing safety glasses when cutting with a saw is a "good practice" that provides "an extra measure of protection." The compliance officer testified that Donald Brandonelli, another Catapano representative agreed with him that employees should wear goggles, but acknowledged having some difficulty in having supervisors enforce this requirement. The judge found that the Secretary established that employees using a saw without wearing eye protection were exposed to a hazardous condition. We agree with the judge.

Under section 1926.28(a), the Secretary has the burden of showing that a hazardous condition was present and that another standard put the employer on notice that personal protective equipment would reduce the risk to employees. *L.E. Myers Co., High Voltage Sys. Div.*, 12 BNA OSHC 1609, 1614, 1986-87 CCH OSHD ¶ 27,476, p.35,604 (No. 82-1137, 1986), *aff'd in relevant part*, 818 F.2d 1270, 1275 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987). Section 1926.102(a), referenced in the citation, requires that employees "be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents." In determining whether Catapano should have been aware of the existence of a hazard requiring it to use protective equipment, we apply the well-established principle that a broad regulation must be interpreted in the light of the conduct to which it is being applied, and external, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation. *Con Agra Flour Milling Co.*, 16 BNA OSHC 1140, 1993-95 CCH OSHD ¶ 30,045, *rev'd on other grounds*, 25 F.3d 653 (8th Cir. 1994) (citing *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974) and *Brennan v. OSHRC (Santa Fe Trail Transport Co.)*, 505 F.2d 869, 872-73 (10th Cir. 1974)). The Secretary must show more than the mere possibility of or a potential for injury, but a "significant risk of harm." *See Anoplate Corp.*, 12 BNA OSHC 1678, 1681, 1986-87 CCH OSHD ¶ 27,519, pp. 35,679-80 (No. 80-4109, 1986) (when standard uses the term "hazard," Secretary must show that a significant risk of harm exists in the particular case). Significant

risk may be shown by evidence of injury rates, expert and lay opinion testimony, evidence of industry custom and practice. *See, e.g., General Motors Corp.*, 11 BNA OSHC 2062, 1984-85 CCH OSHD ¶ 26,691 (No. 78-1443, 1984) (consolidated), *aff'd* 764 F.2d 32 (1st Cir. 1985) ("*GM Parts*").

We find that Catapano's own practices and the testimony of its own officials establishes that the industry custom recognizes that using the circular saw without goggles presents a significant risk of harm. Catapano's practice was to equip the saws with guards and goggles. *See Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1532, 1983-84 CCH OSHD ¶ 26,516, p.33,747 (No. 77-3676, 1983). Ruggierio admitted that wearing safety goggles was a "good practice" that provided "an extra measure of protection." Brandonelli, another Catapano supervisor, agreed with the compliance officer that employees should wear goggles. The Commission has recently noted that employees commonly wore goggles and face shields while using grinders to clean the slag from welds at the joints of a pipeline. *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1993-95 CCH OSHD ¶ 30,757 (No. 92-1891, 1995). Lastly, the compliance officer here actually saw employees duck away from sparks.

In dissent, our colleague states that review of the photographic and video evidence precludes her from concluding that workmen using the cut-off saw without eye protection would expose workers to a significant risk of harm. The "proof" that is required here depends not on our assessment of reasonableness but, as Catapano's brief urges, "what a reasonable man familiar with industry practices would have done in the circumstances. . . ." In this case, as summarized above, the evidence attributable to those who were familiar with the industry---as shown by the routine practices of Catapano and the testimony of its

experienced and responsible witnesses---precludes us from drawing the conclusion drawn by our colleague, and supports a conclusion to the contrary.[16]

We therefore affirm the judge and find a violation of section 1926.28(a) in Docket No. 90-0050. Catapano made no specific arguments as to the penalty so we assess $1,000, as proposed by the Secretary.

C. Trench Protection Violations

The Secretary alleged that Catapano violated various trench safety standards including those requiring protective systems against cave-ins, and those covering exit ladders, spoils piles, and various traffic control equipment. Only the merits of the alleged violations of the trench-protection system standard, § 1926.652(b), are on review.

The cited standard, 29 C.F.R.§ 1926.652(b),[17] provided:

> Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced sloped or otherwise supported by means of sufficient strength to protect the employees working within them.

The eleven different trenches in this case were not especially deep, ranging from four to eight feet deep. They were five to six feet wide and ten to forty feet long. In some places, utility pipes ran parallel to the length of the trench, either visible or buried in the trench walls; at other spots, utilities ran perpendicular, jutting out from the walls of the trench. The

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[16] Our dissenting colleague also relies on the evidence that some employees did not wear goggles---i.e., the evidence that would show a violation here. Particularly in the face of Catapano's overall practices and the testimony of its supervisory employees, that some employees did not wear goggles does not prove that a reasonable employee would not wear them, or that a reasonable employer would not take measures to ensure their use. *See Clarence M. Jones Co.*, 11 BNA OSHC at 1532, 1983-84 CCH OSHD at p. 33,747 (employer who leaves choice up to individual employees and only provides goggles on request does not comply with the standard).

[17]The Excavation Standard was revised on October 31, 1989.

consensus among the three compliance officers[18] was that the trench walls were composed of soft, sandy material and that they were vertical and had no sloping, shoring, or any other form of support provided by Catapano. They reiterated that even in those trenches that had preexisting gas or steam pipes buried in their walls that might have added some measure of employee protection, the exact location of the pipes, based on various utility plats and maps, was often uncertain, leaving a potential for chunks of earth weighing more than 100 lbs. per cubic foot to fall into the trench. Ruggiero, whose personal knowledge was limited to the soil in test pits and who had not seen what the compliance officers observed, described the soil as having "cohesiveness" and "certain natural cementing properties" with a "stand-up time" of more than twenty-four hours owing to years of steady traffic and percolation of water. According to Ruggiero, regardless of the nature of the soil, the gas and steam mains served as a form of support for the sidewalls of the trench.

The judge found both Ruggiero and Zapken to be credible witnesses. Ruggiero he described as "intelligent, thoroughly familiar with trenching operations, and had lengthy experience in the removal and installation of water mains." However, Judge Salyers, impressed with Zapken's "thoroughness and attention to detail" as well as with the photographs and videotapes, gave "full weight" to Zapken's testimony which he found "was, for the most part, unchallenged by Catapano."

We agree with Judge Salyers that a preponderance of the evidence supports the finding of violations here. As the judge noted, and the record establishes, compliance officers Zapken, Donnelly and Marrinan inspected each trench in some detail, measuring dimensions, taking soil samples, and noting employee exposures to violative conditions. Catapano does not really dispute the evidence gathered during these inspections. Catapano did not produce

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[18]Bert Zapken at the time of the inspections had conducted fifty trench inspections during his one year of experience; Brian Donnelly had two years of experience; and John Marrinan, a more senior compliance officer with twenty years of experience, had conducted 300 inspections involving trenches.

a witness who saw what the compliance officers saw (the supervisor, Al Trapasso, no longer worked for the company and was not found by the time of the hearing). Instead, Catapano relies on Ruggiero, who was not able to testify to the actual conditions in the trenches inspected by the three compliance officers. Rather than address the specifics of the conditions found by the compliance officers, Catapano argues that OSHA's failure to prosecute an imminent danger action, along with New York City and other inspectors' failure to issue their own citations or warnings, shows that there was no hazard. Having reviewed the testimony in both the Oringer and Salyers records, however, we find that the fact that various state and local non-OSHA inspectors decided not to cite Catapano for trench-protection problems does not in and of itself outweigh the detailed testimony and exhibits introduced by the Secretary. Lax enforcement by other agencies is not binding on the Secretary. The witnesses that Catapano claims would corroborate Ruggiero's testimony may have failed to issue their own warnings or citations to Catapano until after OSHA inspected the sites and found problems, but they refused to testify affirmatively that the trench walls were stable or safe. Nor does the Secretary's decision not to proceed with an imminent danger action mean that there was no violation.

In conclusion, on the basis of all the evidence, the Secretary established a prima facie violation of section 1926.652(b). We now consider whether Catapano established the affirmative defense of infeasibility.

Infeasibility Defense[19]

It is an affirmative defense to a charge of violating an OSHA standard that compliance was infeasible. To establish the affirmative defense of infeasibility, an employer must show

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[19] Under Commission Rule 36(b), 29 C.F.R. 2200.36(b), an affirmative defense ordinarily must first be pleaded in the employer's answer. Although Catapano did not clearly raise the defense in its answer, the Secretary has not objected to its inclusion in the direction for review and the parties have briefed the issue so we will address it here. *See Westvaco Corp.*, 16 BNA OSHC 1374, 1380 n.14, 1991-93 CCH OSHD ¶ 30,201, p.41,570 n.14 (No.90-1341, 1993).

that (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.,* 16 BNA OSHC 1873, 1874, 1993-95 CCH OSHD ¶ 30, 485, p. 42,109 (No. 91-1167, 1994). *See Bancker Constr. Corp. v. Reich,* 31 F.3d 32 (2d Cir. 1994) (citing *Brock v. Dun-Par Engineered Form Co.*, 843 F.2d 1135, 1136 (8th Cir. 1988)).

1. Technological Infeasibility

Ruggiero testified before Judge Oringer that using a trench box was " the only feasible option that we could pick out of the options that were available to us." He made a similar statement before Judge Salyers. Using a "trench box . . was the only feasible way that we felt we could comply with OSHA requirements." After struggling with the City and the utility companies over who could or would reroute the pipes and lines to make way for a trench box, Catapano sought resolution of the dispute in court. The utility companies were ultimately ordered to clear the way, and Catapano eventually demonstrated the technological feasibility of abatement by installing sheeting or using a trench box in similar trenches later in the project. While the known outcome does not instantly dispose of the technological infeasibility issue, it does serve as evidence that it was feasible for Catapano to have made arrangements for the utility lines to be moved and a trench box installed at the outset, when the digging began, so as to avoid creating a hazard in the first place. The Commission has noted that the sheer fact of abatement after an OSHA inspection does not categorically bar an infeasibility defense. *See Pitt-Des Moines, Inc.,* 16 BNA OSHC 1429, 1434 n.10, 1993-95 CCH OSHD ¶ 30,225, p. 41,608 n.10 (No.90-1349, 1993) (emphasis in original). It is undisputed, however, that Catapano, who thought there was no danger, made little or no effort to protect its employees until after the citations were issued.

2. Economic Infeasibility

In considering claims that compliance was economically infeasible, the Commission considers whether the employer had "demonstrated that the costs were unreasonable in light of the protection afforded and [had] shown what effect, if any, th[o]se costs would have on the business as a whole."*Dun-Par Engd. Form Co.*, 12 BNA OSHC 1962, 1966, 1986-87 CCH OSHD ¶ 27,651, p.36,033 (No. 82-928, 1986). *See also State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161, 1993-1995 CCH OSHD ¶ 30,042, p.41,227 (No. 90-1620, 1993) (consolidated cases) (evidence of increased costs alone is insufficient to establish "severe adverse economic impact"); *Peterson Bros. Steel Erec. Co.*, 16 BNA OSHC 1196, 1203, 1993-95 CCH OSHD ¶ 30, 052, p.41,303 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir.1994) (Commission must look at the effect that compliance would have on the company's "financial position as a whole" to determine whether the company would be "adversely affected").

As indicated above, the evidence shows that abatement came at a high cost. However, the record was devoid of evidence on Catapano's profits or the company's ability to recoup, absorb or pass along the expenses it incurred in protecting its employees. The record showed that Catapano bids in the tens of millions of dollars of work each year for the City of New York and does about $40 million of work each year on jobs worth from $50,000 to $50 million. As a government contractor, Catapano was under no obligation to bid on this job, and when it did it undertook the obligation of complying with all Federal, State and local safety laws. As a highly experienced contractor, it should have factored in the costs of that compliance before it bid on this contract. Moreover, the pure cost of compliance—as opposed to the legal costs and lost opportunity costs associated with the aftermath of the inspections—was never conclusively established on this record. Nor was the impact on Catapano's business as a whole ever made plain, including Catapano's ability to pass on the added expenses. The raw numbers in some of Ruggiero's estimates, all unrebutted by the Secretary, are discomfiting. Nevertheless, without the benefit of the contextual evidence necessary to put the numbers into perspective, we cannot vacate the

citations. Whether or not Catapano might have been able to establish the defense of economic infeasibleness, it failed to do so on the record here.

III. Penalties

Section 17(j), 29 U.S.C.§ 666(j), of the Act states that the Commission is to give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." Catapano claims that we should group violations for penalty purposes because the Secretary unfairly multiplied the number of violations by using different docket numbers. As we have concluded, *supra.,* the Secretary's decision to treat his inspections of the separate trenching worksites here as separate worksites was a reasonable response to Catapano's method of operation and not an abuse of discretion. We need not consider whether *Hoffman Constr.,* 6 BNA OSHC 1274, 1975-76, 1977-78 CCH OSHD ¶ 22,489, p. 27,120 (No. 4182, 1978) is correct, because even under *Hoffman* there is no basis for reducing the penalties here.[20] This is not a case where abatement of one violation

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[20]In any event, our dissenting colleague overlooks the striking differences between *Catapano* and the cases on which she relies, including *Hoffman.* In *Hoffman Constr.,* 6 BNA OSHC 1274, 1275-76, 1977-78 CCH OSHD ¶ 22,489, p. 27,120 (No. 4182, 1978) the Commission reversed the judge's decision to group two separate violations of the same standard at the same worksite, but agreed with the judge's evaluation of the penalty factors and left the judge's single penalty assessment undisturbed.

Cleveland Consol., 13 BNA OSHC 1114, 1118, 1986-87 CCH OSHD ¶ 27,829, p. 36,430 (No. 84-696, 1987) , *Alpha Poster*, 4 BNA OSHC 1883, 1884, 1976-77 CCH OSHD ¶ 21,354, p. 25,644 (No. 7869, 1976), and *H.H.Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981) involved violations of two different standards which could be abated by a single act. Neither of those circumstances is present here. The violations cited in these separate cases were discovered during different inspections on different days at different worksites. Indeed, the type of grouping our dissenting colleague claims is within the Commission's discretion here is more akin to what was done in Docket No.90-0050, where the Secretary cited four instances of failure to comply with section 1926.28(a), but proposed a single penalty of $1,000.

would abate other violations of the same standard at other worksites, or where there is any other reason not to consider the penalty factors for each violation separately. For example, the gravity of the trenching violations cited under section 1926.652 and those involving a failure to wear hardhats cited under section 1926.100(a) certainly is not "minimal" as our colleague would have it. Many of these violations exposed Catapano's employees to the possibility of serious injury or death over a period of two months at as many as nine separate worksites. Whatever the ability of the Commission to impose a single penalty where multiple penalties would be lawful, this case involves multiple violations on a major construction project undertaken by a leading contractor which covered a significant portion of a large city. Moreover, it is not a case where the employer's good faith merits a penalty reduction. Catapano, which had a history of OSHA violations, including violations of the same trenching standard cited here, was warned by OSHA's compliance officers at the first inspection that it was not complying with certain standards, yet it violated the same standards over and over again. As the judge found, Catapano's representative at the worksite "ignored [the compliance officer's] warnings and eventually refused to even listen to him."

Furthermore, our dissenting colleague fails to explain why the facts warrant grouping here and did not in prior cases where she applied the same section 17(j) penalty factors and assessed multiple penalties for multiple violations of the same standard.[21] *See e.g., Caterpillar, Inc.,*(167 separate penalties for 167 other-than-serious recordkeeping violations);

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[21] Our dissenting colleague contends that *Caterpillar* is premised on *Hoffman.* Yet, Hoffman is not applied in *Caterpillar*. In fact, *Hoffman* is not even mentioned let alone discussed in the penalty discussion section of *Caterpillar*. In *Caterpillar*, the Commission assessed 167 separate penalties for 167 other-than-serious recordkeeping violations. Taking into account the section 17(j) factors, and noting specifically Caterpillar's history of previous violations, which was minimal for a large company, the low gravity of these recordkeeping violations, and Caterpillar's showing of some good faith, the Commission assessed penalties ranging from $100 to $550 for these recordkeeping violations, with most of the penalties $200 or less.Yet, notwithstanding the low penalties assessed based on the section 17(j) factors, there was no discussion in *Caterpillar* about grouping these penalties.

Sanders Lead Co., 17 BNA OSHC 1197, 1993-95 CCH OSHD ¶ 30, 740 (No. 87-260, 1995) (Commission assessed 15 separate penalties of $1,000 for each violation of the medical removal standard and 14 separate penalties of $800 per instance for the 14 respirator fit-test violations); *J.A.Jones Constr. Co.,* 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶ 29, 964 (No.87-2059, 1993)(affirmed 45 serious guarding violations and remanded for the judge to provide an adequate factual basis for separate penalties). Moreover, in *Andrew Catapano Enter., Inc.*, 16 BNA OSHC 1949, 1952, 1993-95 CCH OSHD ¶ 30,531, p.42,214 (No.89 -1981, 1994), which involved the same employer as the present case, our dissenting colleague joined the Commission in voting to raise the judge's penalty assessment for a willful violation of section 1926.652(b) similar to those cited here from $5,000 to $7,500, where only one employee was exposed. Here, in contrast, as many as eight Catapano employees were exposed to the unshored walls of a trench on as many as seven occasions.

Apart from claiming that the violations here should be grouped for penalty purposes and that the Secretary should not be rewarded by the assessment of heavy penalties, Catapano has made no specific arguments as to the penalties. Accordingly, with the exception of the training items, six of which we vacate, and the three cylinder items, two of which we affirm, and one we treat as withdrawn, the judge's penalty assessments are affirmed.

Stuart E. Weisberg

Stuart E. Weisberg
Chairman

Daniel Guttman

Daniel Guttman
Commissioner

Dated: September 30, 1996

IV. Appendix

In order to clarify the status of the numerous items in these cases, we summarize the holdings in the case as a whole, both the judge's findings and penalty assessments that we did not review as well as those that we addressed above.

Docket No. 90-0050

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 5(a)(1) of the Act	Affirmed	$1,000.00
2	§ 1926.21(b)(2)	Affirmed	$1,000.00
3	§ 1926.28(a)	Affirmed	$1,000.00
4	§ 1926.152(a)(1)	Vacated	--
5	§ 1926.202	Vacated	--
6	§ 1926.350(a)(1)	Affirmed	$1,000.00
7	§ 1926.350(a)(7)	Affirmed	$1,000.00
8	§ 1926.351(a)(9)	Affirmed	$1,000.00
9	§ 1926.350(f)(7)	Affirmed	$1,000.00
10	§ 1926.350(j)	Affirmed	$1,000.00
11	§ 1926.650(f)	Affirmed	$1,000.00
12	§ 1926.651(I)(1)	Affirmed	$1,000.00
13	§ 1926.652(h)	Affirmed	$1,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.100(a)	Affirmed	$10,000.00
2	§ 1926.652(a)	Vacated	--

Item	Standard	Disposition	Penalty
3	§ 1926.652(b)	Affirmed	$10,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	$ - 0 -
2	§ 1926.59(g)(1)	Affirmed	$ - 0 -
3	§ 1926.59(h)	Affirmed	$ - 0 -

Docket No. 90-0191

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.100(a)	Affirmed	$10,000.00
2	§ 1926.100(b)	Affirmed	$10,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.21(b)(2)	Vacated	--
2	§ 1926.28(a)	Affirmed	$1,000.00
3a	§ 1926.202	Vacated	--
3b	§ 1926.651(s)	Affirmed	$1,000.00
4	§ 1926.650(f)	Affirmed	$1,000.00
5	§ 1926.651(I)(j)	Affirmed	$1,000.00
6	§ 1926.652(h)	Affirmed	$1,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	--
2	§ 1926.59(g)(1)	Affirmed	--
3	§ 1926.59(h)	Affirmed	--

Docket No. 90-0189

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.652(b)	Affirmed	$10,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 5(a)(1) of the Act	Affirmed	$1,000.00
2	§ 1926.21(b)(2)	Vacated	--
3a	§ 1926.202	Vacated	--
3b	§ 1926.651(s)	Affirmed	$1,000.00
4	§ 1926.651(I)(1)	Affirmed	$1,000.00
5	§ 1926.652(h)	Affirmed	$1,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	--
2	§ 1926.59(g)(1)	Affirmed	--
3	§ 1926.59(h)	Affirmed	--
4	§ 1926.450(a)(9)	Affirmed	$ - 0 -
5	§ 1926.450(a)(10)	Affirmed	$ - 0 -

Docket No. 90-0190

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.100(a)	Affirmed	$10,000.00
2	§ 1926.651(c)	Vacated	--

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.21(b)(2)	Vacated	--
2	§ 1926.350(j)	Vacated	--
3	§ 1926.651(I)(1)	Affirmed	$1,000.00
4	§ 1926.651(y)	Affirmed	$1,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	--
2	§ 1926.59(g)(1)	Affirmed	--
3	§ 1926.59(h)	Affirmed	--

Docket No. 90-0192

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.100(a)	Affirmed	$10,000.00
2	§ 1926.652(a)	Vacated	--

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.21(b)(2)	Vacated	--
2	§ 1926.28(a)	Affirmed	$1,000.00
3	§ 1926.152(a)(1)	Vacated	--
4a	§ 1926.202	Vacated	--
4b	§ 1926.651(s)	Affirmed	$1,000.00
5	§ 1926.651(I)(j)	Affirmed	$1,000.00
6	§ 1926.652(h)	Affirmed	$1,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	--
2	§ 1926.59(g)(1)	Affirmed	--
3	§ 1926.59(h)	Affirmed	--
4	§ 1926.450(a)(9)	Affirmed	$ - 0 -
5	§ 1926.450(a)(10)	Affirmed	$ - 0 -

Docket No. 90-0193

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.652(b)	Affirmed	$10,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.21(b)(2)	Vacated	--
2	§ 1926.28(a)	Affirmed	$1,000.00

Item	Standard	Disposition	Penalty
3	§ 1926.202	Vacated	--
4	§ 1926.651(s)	Affirmed	$1,000.00
4a	§ 1926.302(b)(1)	Vacated	--
5	§ 1926.650(f)	Affirmed	$1,000.00
6	§ 1926.651(I)(1)	Affirmed	$1,000.00
7	§ 1926.652(h)	Affirmed	$1,000.00

Docket No. 90-0771

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.302(b)(1)	Vacated	--
2	§ 1926.450(a)(10)	Affirmed	$1,000.00
3	§ 1926.651(I)(1)	Affirmed	$1,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.651(c)	Vacated	--
2	§ 1926.652(b)	Affirmed	$10,000.00

Docket No. 90-0772

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.20(b)(1)	Affirmed	$1,000.00
2	§ 1926.20(b)(2)	Affirmed	$1,000.00

Item	Standard	Disposition	Penalty
3	§ 1926.21(b)(2)	Vacated	--
4	§ 1926.28(a)	Affirmed	$1,000.00
5	§ 1926.100(a)	Affirmed	$1,000.00
6	§ 1926.450(a)(9)	Affirmed	$1,000.00
7	§ 1926.650(f)	Affirmed	$1,000.00
8	§ 1926.650(s)	Affirmed	$1,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.652(b)	Affirmed	$10,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1904.2(a)	Vacated	--
2	§ 1904.4	Vacated	--

Docket No. 91-0026

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 5(a)(1) of the Act	Affirmed	$1,000.00
2	§ 1926.100(a)	Affirmed	$1,000.00
3	§ 1926.651(c)(2)	Affirmed	$1,000.00
4	§ 1926.651(h)(1)	Vacated	--
5	§ 1926.652(a)(1)	Affirmed	$1,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1904.2(a)	Vacated	--

TOTAL PENALTIES ASSESSED: $144,000.00

MONTOYA, Commissioner, concurring in part and dissenting in part:

I agree with the majority that OSH Act sections 8(a), 29 U.S.C. § 657(a), and 10(b), 29 U.S.C. 659(b), did not bar the Secretary from treating each section of trench he observed as a separate inspection. I also agree that the Secretary has not engaged in the sort of multiple-prosecution that would violate Catapano's right of due process. I therefore have no disagreement with the majority's conclusion that the Secretary had the authority to issue separate citations for each of the nine inspection dates, even though these citations alleged violations of the same standards, and the same violation of the general duty clause, OSH Act section 5(a)(1), 29 U.S.C. § 654(a)(1).

Cylinder Storage Violations

As for the alleged violations of 29 C.F.R. § 1926.350(a)(1), for not capping a compressed gas cylinder, and 29 C.F.R. § 1926.350(j), for not separating two compressed gas cylinders, the majority has concluded that the gas cylinders observed by the compliance officer were in storage and that the standards therefore applied. The record, on the other hand, indicates that the cylinders were in fact being used periodically during the day, and that the cylinders were actually stored at a different location overnight. Under Commission precedent of long standing, compressed gas cylinders are not considered to be "in storage" for purposes of this standard when they are "available for use." *MCC of Florida, Inc.*, 9 BNA OSHC 1895, 1897, 1981 CCH OSHD ¶ 25,420, p. 31,681 (No. 15757, 1981). The Secretary offered no rebuttal to Catapano's evidence that these gas cylinders were located in an area where they were being intermittently used, and Judge Salyers was therefore correct to conclude that these cylinders were not in storage and to vacate the citations.

The Secretary has argued for a different test, that compressed gas cylinders are in storage unless the regulators and hoses are actually attached. As the Secretary knows, this test has been firmly rejected by the Commission. *See MCC of Florida, Inc.*, 9 BNA OSHC at 1897, 1981 CCH OSHD at p. 31,681; *Grossman Steel & Aluminum Corp.*, 6 BNA OSHC 2020, 2024, 1979 CCH OSHD ¶ 23,097, p. 27,915 (No. 76-2834, 1978); and *United Engineers & Constructors., Inc.*, 3 BNA OSHC 1313, 1314, 1974-75 CCH OSHD ¶ 19,780,

p. 23,589 (No. 2414, 1975). Though our law on this point is well settled, the Secretary is urging the Commission to reconsider his preferred test in light of *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991). In that case, the Supreme Court held that the Commission, like all reviewing courts, must give deference to the Secretary's reasonable interpretation of an ambiguous OSHA standard. However, as we made clear in *Unarco Commercial Products*, 16 BNA OSHC 1499, 1502-03, 1994 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993), the duty to defer does not arise unless the Commission has first found that the standard in question is genuinely ambiguous, and I am not persuaded that the necessary ambiguity presents itself here. The cited subsections, 29 C.F.R. § 1926.350(a)(1) and (j), make no mention of regulator and hose attachments, and certainly do not define storage in those terms. Indeed, regulator and hose attachments are not mentioned anywhere in 29 C.F.R. § 1926.350(a), under which safety standards for transporting and moving compressed gas cylinders are also prescribed.

What the Secretary really asks is that the Commission conform its case law to versions of the American National Standards Institute ("ANSI") source standard[1] that were written subsequent to the promulgation of the cited OSHA standards. This approach, of course, denies the employer any prior notice of what is required for compliance with the OSHA standards. The Secretary's proper course here, as the Third Circuit Court of Appeals recently said, would be to "remedy the situation by promulgating a clearer regulation rather than forcing the judiciary to press the limits of judicial construction." *Georgia Pacific Corp. v. OSHRC*, 25 F.3d 999, 1006 (11 Cir. 1994). *See also Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 5 (1st Cir. 1993); *Kropp Forge Co. v. Secretary of Labor*, 657 F.2d 119, 124 n. 10 (7th Cir. 1981); *Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1232 (3rd Cir. 1980); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

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[1]American National Standards Institute ("ANSI"), Z49.1-1967, *Safety in Welding and Cutting.*

I have a further reason to question whether deference should be accorded in this case. The only issue actually decided by the *CF&I Steel* Court was "which administrative actor -- the Secretary or the Commission -- did Congress delegate 'interpretive' lawmaking power [to] under the OSH Act." 499 U.S. at 151. Deciding this question in favor the Secretary, the Court was careful to emphasize that "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policy making prerogatives, the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."*Id.* at 151.[2] This reasoning would certainly apply whenever a genuine ambiguity is found in a standard promulgated by the Secretary pursuant to the notice and comment rulemaking provisions of OSH Act section 6(b). However, OSHA's "unique expertise and policy making prerogatives" are not nearly so evident, when, as here, the standards were adopted from other sources under the provisions of OSH Act 6(a). Reviewing what little rulemaking record the Secretary provided, it is apparent that sections 1926.350(a)(1) and (j) were derived from ANSI Z49.1-1967, *Safety in Welding and Cutting*. These standards were originally promulgated, with no specific preamble from which a rulemaking history can be determined, on April 17, 1971 pursuant to the Construction Safety Act of 1969, 36 Fed. Reg. 7340. They were then adopted verbatim as "established Federal standard[s]" on December 7, 1971 pursuant to 29 C.F.R. § 1910.12, 36 Fed. Reg. 8754.

While section 6(a) permitted this sort of expedited rulemaking during the first two years of the OSH Act, it seems incongruous to me that the Commission, or any reviewing court, should accord deference to the Secretary's interpretation of these standards, which were developed through the "unique expertise" of ANSI.[3] And, while it can certainly be

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[2]The Court remanded the dispositive deference questions, such as threshold ambiguity and the reasonableness of the Secretary's interpretation, to the Tenth Circuit Court of Appeals.

[3]Prior to *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991), two courts of appeals concluded that interpretations of OSHA regulations by the Secretary were less persuasive and

(continued...)

argued that the adoption of these standards represented an exercise of the Secretary's "policy making prerogatives," it must be remembered that the original ANSI source standard was not intended to have the force and effect of law. On balance, I consider the traditional rules of statutory construction to be a far more appropriate method of resolving ambiguities in standards such as these. Had the *CF&I Steel* Court known that reviewing authorities might feel constrained by its decision to defer to the Secretary's interpretation of standards derived from ANSI recommendations, rather than developed under his own "delegated lawmaking powers," perhaps the Court would have provided a broader disposition of these issues.

Eye Protection Violations

I also disagree with the majority's decision to affirm the violations of 29 C.F..R. § 1926.28(a) alleging that Catapano failed to require employees to wear safety goggles when they used a heavy-duty, cut-off saw to cut pipe. Under section 1926.28(a), the Secretary has the burden of showing that a hazardous condition was present and that another standard put the employer on notice that personal protective equipment would reduce the risk to employees. The citations refer to 29 C.F.R. § 1926.102(a), which requires that employees "be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents." However, the

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[3](...continued)
entitled to less weight when the regulations were adopted from national consensus standards pursuant to OSH Act section 6(a). See *Marshall v. Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979); *Bethlehem Steel Corp. v. OSHRC*, 573 F2d. 157, 160 (3rd Cir. 1978). Though its decision was written in terms of deference rather than weight, the *CF&I Steel* Court stated that interpretations announced in interpretive rules and agency guidelines "are not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers." 499 U.S. 157. However, if deference is the measure by which OSHA's regulatory ambiguities are to be resolved, then the real issue for the reviewing authority to decide would seem to be whether the proposed interpretation is reasonable. It is not clear what, if any, practical effect such a reduction in deference would have, unless of course it would be a basis to question the reasonableness of the Secretary's interpretation.

Secretary must prove not only a possibility of or a potential for injury, but a "significant risk of harm." *See Anoplate Corp.*,12 BNA OSHC 1678, 1681 1986-87 CCH OSHD ¶ 27,519 (No. 80-1409, 1986) (when standard uses the term "hazard," Secretary must show that a significant risk of harm exists in the particular case).

Having reviewed both photographic and video evidence, I cannot conclude that a workman using this cut-off saw without eye protection would be exposed to a significant risk of harm. As one can plainly see, the saw itself is held between the work and the workman's head and upper body, and the saw is guarded in such a way as to direct all sparks and other cutting debris toward the ground. This may well explain why no Catapano employee had ever suffered an eye-injury due to failure to wear goggles while using such a saw, and why some employees would ask their supervisor for permission not to wear them. *See General Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 1984-85 CCH OSHD ¶ 26,961 (No. 78-1443, 1984) (consolidated), *aff'd*, 764 F.2d 32, 12 BNA OSHC 1377 (1st Cir. 1985) (low injury rate together with refusal to wear personal protective equipment by "those persons most clearly familiar with the industry," *i.e.*, the employees, indicates lack of significant risk and lack of knowledge that protection should be required). While wearing safety goggles might be "a good idea," as Catapano's witness Ruggiero put it, the Secretary has not shown that failure to do so presents a significant risk of harm and the citation should therefore be vacated.

Trench Protection Violations

Finally, I disagree with the majority's decision to reach the feasibility issue with regard to the trench-protection violations alleged under 29 C.F.R. § 1926.652(b). As Rule 92(c) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.92(c), states: "[t]he Commission will not ordinarily review issues that the judge did not have the opportunity to pass upon." The term "feasible" appears only in paragraph 3(f) of Catapano's answer to the Secretary's complaint, where it is buried amidst a disjointed array of boilerplate representations. Feasibility is not among the affirmative defenses Catapano asserted in

paragraph 5 of its answer, and Catapano's brief to Judge Salyers did not address raise the issue. Though Catapano's petition for review insists that "Respondent also defended on the basis that it was infeasible to use the protective measures Complainant demanded," feasibility was never specifically argued as an affirmative defense below. I would therefore affirm Judge Salyers' decision that the feasibility defense, even if it was raised, was abandoned.

Penalties

Unlike the majority, I do not consider separate penalties for each violation of the same standard, or each violation of the general duty clause, to be appropriate here. Section 17(j) of the OSH Act, 29 U.S.C. § 666(j), grants the Commission the express authority to "assess all civil penalties" in contested cases. So long as the four factors set forth in section 17(j) are given due consideration, the OSH Act gives the Commission broad discretion as to penalties. *Hern Iron Works*, 16 BNA OSHC 1619, 1621-23, 1993-95 CCH OSHD ¶ 30,363, pp. 41,881-83 (No. 88-1962). As I recently observed in *Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1560 n.3, 1996 CCH OSHD ¶ 30,986, p. 43,176 n.3 (No. 93-2535, 1996), the Commission has long recognized that this discretion includes the authority to assess a single penalty when the Secretary cites multiple violations of the same standard. In *Hoffman Construction Co.*, 6 BNA OSHC 1274, 1275-76, 1977-78 CCH OSHD ¶ 22,489, p. 27,120 (No. 4182, 1978), the Commission held that while the Secretary did have the prosecutorial authority to cite an employer for separate, non-duplicative violations of the same guardrail standard, it would not disturb the judge's assessment of a single penalty that was based on a grouping of those violations. *See also Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1118, 1986-87 CCH OSHD ¶ 27,829, p. 36,430 (No. 84-696, 1987) (two citation items involving substantially the same violative conduct held to be single violation and single penalty assessed); *Alpha Poster Service, Inc.*, 4 BNA OSHC 1883, 1884, 1976-77 CCH OSHD ¶ 21,354, p. 25,644 (No. 7869, 1976) (two items involving substantially the same violative

conduct should merge into single violation); *cf. H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981) (where one act will abate violations of different standards, the Commission may group the violations for penalty purposes and assess a single penalty).[4]

Looking again at *Hoffman*, the Commission found that the single penalty assessed by the judge was adequate, because the judge had properly considered the penalty factors set forth in section 17(j). No further criteria were provided. With the advent of the Secretary's "egregious willful case policy,"[5] a number of cases alleging multiple violations of the same standard have come before the Commission.[6] Though I have found no case since *Hoffman* in which a party has requested that the Commission group such separately cited violations

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[4]Indeed, the practice of grouping violations originated with the Secretary, whose enforcement procedures have included instructions on the grouping of violations since the earliest days of the OSH Act. In its original 1971 Compliance Operations Manual (COM), OSHA devoted all of Chapter X, Section B to the "Grouping of Violations." When OSHA replaced the COM with the Field Operations Manual (FOM) in 1974, virtually the same instructions were included as Chapter X, Section C, (reorganized as Chapter V, Section C, in 1983 under the heading "Grouping and Combining of Violations"). In 1994, OSHA removed this section from the FOM and added it to the newly issued Field Inspection Reference Manual (FIRM) as Chapter III, Section C.5, under the heading "*Combining and Grouping of Violations.*"

[5]FOM, Chapter VI, section A.2.i(4), p. VI-8 (September 21, 1987, *amended* December 31, 1990), and OSHA Instruction CPL 2.80, *Handling of Cases to be Proposed for Violation-by-Violation Penalties,* 1 BNA OSHR Ref. File 21:9649, 9650, 1990 CCH ESHG New Developments, ¶ 10,662, pp. 13,589-90 (Transfer Binder) (October 1, 1990).

[6]*See, e.g., Hartford Roofing Co.* 17 BNA OSHC 1361, 1995 CCH OSHD ¶ 30,857 (No. 92-3855, 1995); *Arcadian Corp.,* 17 BNA OSHC 1345, 1995 CCH OSHD ¶ 30,856 (No. 93-3270, 1995), *petition for review filed,* No. 96-60126 (5th Cir. Feb. 28, 1996); *S.A. Healy Co.*, 17 BNA OSHC 1145, 1993-95 CCH OSHD ¶ 30,719 (No. 89-1508, 1995), *rev'd*, Nos. 95-2421 & 95-2907 (7th Cir. Sept. 18, 1996); *Kohler Co.*, 16 BNA OSHC 1769, 1993-95 CCH OSHD ¶ 30,457 (No. 88-237, 1994); *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶ 29,964 (No. 87-2059, 1993); *Caterpillar, Inc.*, 15 BNA OSHC 2153, 1991-93 CCH OSHD ¶ 29,962 (No. 87-922, 1993).

for penalty purposes, there can be no question that *Hoffman* remains the controlling precedent. Not only is the Commission's decision in *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173, 1991-93 CCH OSHD ¶ 29,962, pp. 41,006-7 (No. 87-922, 1993) specifically premised on *Hoffman,* but two recent Commission decisions have cited *Hoffman* for this very proposition. *Hartford Roofing Co.*, 17 BNA OSHC 1361,1367, 1995 CCH OSHD ¶ 30,857, p. 42,936 (No. 92-3855, 1995); *Arcadian Corp.,* 17 BNA OSHC 1345, 1352, 1995 CCH OSHD ¶ 30,856, p. 42,920 (No. 93-3270, 1995), *petition for review filed,* No. 96-60126 (5th Cir. Feb. 28, 1996). In any event, the decision to group violations for penalty purposes is nothing more than an exercise of discretion under the Commission's Congressional grant of assessment authority. *See Miniature Nut and Screw,* 17 BNA OSHC at 1560, 1996 CCH OSHD at p. 43,176.

While Catapano was not cited with per-instance violations under the egregious willful case policy itself, the effect has been much the same: the Secretary issued citations alleging numerous violations of the same standards, as well as three instances of the same general duty clause violation, all of which arose from Catapano's performance under a single excavation contract. As the Secretary himself concedes, treating each section of trench observed over a period of approximately eight weeks as a separate inspection in order to issue separate citations and proposed penalties was an "uncommon" and "somewhat improvisatory" practice. With these admissions in mind, and evaluating the facts of this case under the statutory penalty factors set forth in section 17(j), as the Commission did in *Hoffman*, I think that a single penalty for each standard violated, and a single penalty for the general duty clause violations, would be more than appropriate.[7] Though Catapano is a large

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[7]These citations were issued prior to the effective date of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990), which amended section 17(a) of the OSH Act, 29 U.S.C. § 666(a) to provide a penalty of "not less than $5000 for each willful violation." Since these citations predate this amendment, I need not consider whether it has

(continued...)

employer with a history of OSHA violations, the gravity of these violations was relatively low. The number of employees exposed to the various violations, from riding a front-end loader to working in an improperly protected trench, was minimal. The sections of trench were not especially deep, ranging from four to eight feet. Furthermore, the trench walls were partially supported by various utility lines, further decreasing the likelihood that a serious accident could occur.[8]

Dated September 30, 1996

Velma Montoya
Commissioner

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[7](...continued)
affected the Commission's discretion to group willful violations for penalty purposes.

[8]Because I would have grouped these violations for penalty purposes, I do not reach the question of whether the penalties proposed pursuant to this enforcement exercise were punitive, and therefore in excess of the civil remedial penalty authority of the OSH Act. *See S.A. Healy Co.*, Nos. 95-2421 & 95-2907, slip op. at 9-10 (7th Cir. Sept. 18, 1996), *rev'g* 17 BNA OSHC 1145, 1993-95 CCH OSHD ¶ 30,719 (No. 89-1508, 1995).

United States of America
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Office of
Executive Secretary

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SECRETARY OF LABOR, Complainant, v. ANDREW CATAPANO ENTERPRISES, INC., Respondent.	Docket Nos. 90-0050 90-0189 90-0190 90-0191 90-0192 90-0193 90-0771 90-0772 91-0026

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 30, 1996. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Date: September 30, 1996

Ray H. Darling, Jr.
Executive Secretary

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick
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SECRETARY OF LABOR Complainant, v. ANDREW CATAPANO ENTERPRISES, INC., Respondent.	OSHRC DOCKET NOS. 90-0050 90-0191 91-0026 90-0189 90-0192 90-0771 90-0190 90-0193 90-0772

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 3, 1994. The decision of the Judge will become a final order of the Commission on July 5, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before June 23, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr./jw

Date: June 3, 1994

Ray H. Darling, Jr.
Executive Secretary

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SECRETARY OF LABOR, Complainant, v. ANDREW CATAPANO ENTERPRISES, INC., Respondent.	OSHRC Docket Nos.: 90-0050, 90-0189, 90-0190 90-0191, 90-0192, 90-0193, 90-0771, 90-0772, 91-0026

Appearances:

Mark Holbert, Esquire
Office of the Solicitor
U. S. Department of Labor
New York, N.Y.
For Complainant

Robert D. Moran, Esquire[1]
Washington, D.C.
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

Andrew Catapano Enterprises, Inc. (Catapano), is a major water main contractor for New York City (NYC) and surrounding areas. In 1988, the NYC Department of Transportation (DOT) Bureau of Highway Operations, as part of an effort to rebuild the city's aging infrastructure, submitted a proposal for bids for the reconstruction of Eighth Avenue from West 42nd Street to West 58th Street and Central Park West from West 62nd Street to West 77th Street in Manhattan. Contracts for the work necessary to complete the

[1] Robert D. Moran is now deceased, having succumbed to a heart attack on February 28, 1994. All further matters in these proceedings will be directed to John Ruggiero, AFC Enterprises, Inc., 88-43 76th Avenue, Glendale, New York 11385. In compliance with Mr. Ruggiero's request, a copy of this decision will be mailed to F. Scott Railton, Esquire, Reed, Smith Shaw & McClay, 8251 Greensboro Drive, Suite 1100, McLean, VA 22102-3844.

project were awarded in 1988 to several different contractors. One of them, Willets Point Contracting Corporation (WPC), entered into a contract with NYC DOT on September 20, 1988, for the reconstruction of Eighth Avenue. On January 9, 1989, WPC subcontracted with Catapano for the removal of existing water mains and the installation of new 20-inch water mains, as well as incidental work on the east side and west side of Eighth Avenue and additional work on Central Park West. Catapano began work on the project in April, 1989 (Exhs. C-11A, C-11B, C-14; Tr. 1506-1509).[2]

Beginning on September 18, 1989, and continuing through October 25, 1990, the Occupational Safety and Health Administration (OSHA) conducted nine separate inspections of Catapano's Eighth Avenue worksite. The inspections resulted in citations alleging willful, serious, and "other" violations of the Occupational Safety and Health Act of 1970 (Act). The citations contain 97 separate items alleging violations of 29 C.F.R. § 1926, Subpart P (Excavations, Trenching and Shoring). Catapano contested all citations and proposed penalties.

These cases were originally assigned to Commission Judge David G. Oringer who conducted hearings in Docket Nos. 90-0771 and 90-0772 during January and February, 1992.[3] He did not, however, issue decisions in these two cases prior to his retirement. By order of the Chief Judge dated September 23, 1992, all nine cases were reassigned to the undersigned for further action and disposition. During prehearing discussions with the court, the parties agreed it would be unnecessary to rehear the evidence taken by Judge Oringer in Docket Nos. 90-0771 and 90-0772, but that the record made in those cases could be used, if necessary, as evidence in any of the remaining seven cases. It was also recognized that the taking of full-blown evidence in each of the remaining seven cases would seriously strain the resources of the parties as well as the court. Accordingly, it was agreed that all nine cases would be consolidated for further hearings, briefing and final disposition. It was anticipated that a point would be reached in the subsequent

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[2] Unless otherwise noted in the text of this decision, all citations to the transcript and exhibits are to the record made at the hearing held by the undersigned in Docket Nos. 90-0050 and 90-0191.

[3] The hearing of these two cases required 23 days of testimony and produced 4,122 pages of transcript.

proceedings where the parties would enter into stipulations and/or agreements to facilitate the disposition of all contested issues without the need to engage in repetitive testimony.

On February 16, 1993, proceedings were commenced in the consolidated cases beginning with Docket No. 90-0050 followed by Docket No. 90-0191. As a result of the World Trade Center bombing, the location where these proceedings were initially conducted, the hearings were abruptly interrupted on February 26, 1993, and were resumed at a new location on March 16, 1993.[4]

Throughout the proceedings, the parties and the court engaged in discussions, both on and off the record, in an effort to devise a means by which this entire matter could be expeditiously resolved. On March 22, 1993, the parties requested in open court that a recess be granted to afford them an opportunity to confer and explore the possibility of such a disposition (Tr. 3073-3094). The following day, the parties submitted a document entitled "Agreed Statement of Facts" which was received in evidence as J-1 and forms the basis for disposition of all issues in the consolidated cases. In essence, this document represents that "the conditions constituting the alleged violations . . . the law . . . the defenses and the other issues in dispute (in the other seven cases) are substantially similar to those at issue in Docket Nos. 90-0050 and 90-0191." It further specifies that "the Commission shall decide the remaining seven cases (including Docket Nos. 90-0771 and 90-0772) upon the evidence received in Docket Nos. 90-0050 and 90-0191 plus the stipulations of the parties and the matters admitted into evidence by agreement of the parties in open court on March 23, 1993" (J-1 para. 3). For ready reference, Exhibit J-1 is reproduced below in its entirety:

<u>Agreed Statement of Facts</u>

Pursuant to Commission Rule 61, 29 C.F.R. § 2200.61, the parties agreed to submit the matters entitled *Secretary of Labor v. Andrew Catapano Enterprises, Inc.,* OSHRC Docket Nos. 90-0050, 90-0189, 90-0190, 90-0191, 90-0192, 90-0193, 90-0771, 90-0772 and 91-0026, for decision on the following basis:

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[4] As a matter of interest, the resumption of proceedings were further delayed due to the "storm of the century" which shut down all metro airports.

1. All of the matters listed above arise out of work performed by respondent as a subcontractor on a water main project pursuant to contracts that are in evidence in the case docketed as OSHRC No. 90-0050 as Exhibits C-11A, C-11B and C-14.

2. Trial of the cases docketed as OSHRC Nos. 90-0050, 90-0191, 90-0771 and 90-0772 is now complete.

3. In all 9 of the cases listed above, the conditions constituting the alleged violations, the provisions of law allegedly violated, the defenses thereto, and the other issues in dispute are substantially similar to those at issue in Docket Nos. 90-0050 and 90-0191. Consequently, the parties agree as follows:

   (a) The Commission shall decide each alleged violation in the remaining 7 cases (OSHRC Docket Nos. 90-0189, 90-0190, 90-0192, 90-0193, 90-0771, 90-0772 and 91-0026) upon the evidence in the 2 cases already tried plus the stipulations of the parties and the matters admitted into evidence by agreement of the parties in open court on March 23, 1993.

   (b) As an example to demonstrate and clarify the parties' intent with respect to the foregoing, the disposition of the 29 C.F.R. § 1926.652(b) allegations in Docket No. 90-0193, and all other cases listed above that include such an allegation, if any, shall be made upon (1) the evidence relevant to the § 1926.652(b) allegations in Docket No. 90-0050, (2) the evidence relevant to a § 1926.652(b) allegation admitted by agreement of the parties in open court on March 23, 1993, and (3) the relevant stipulations of the parties.

   (c) The parties do not intend by this agreement to limit the authority of the Commission and its administrative law judges to determine the weight of the evidence or to assess appropriate penalties, or to change or affect in any way the law that applies to stipulations, admissions, agreed statements of facts, evidence admitted by agreement of the parties, or any other matter not specifically mentioned herein. The parties further agree that with respect to the alleged violation of 29 C.F.R. § 1926.652(a)(1), the new trenching standard in Docket No. 91-0026, shall be treated in the manner as above.

(d) By entering this agreement, the respondent does not waive any defenses heretofore raised or argued including those involving multiplicity and inspection propriety.

4. The parties agree that there exists in some of the remaining 7 cases identified above, alleged violations of occupational safety and health standards or regulations that are not at issue in either Docket No. 90-0050 or 90-0191. The parties agree as follows with respect thereto:

(a) 29 C.F.R. § 1926.651(c). That standard is part of the Subpart P "specific excavation requirements" as opposed to its "specific trenching requirements." Respondent waives any defense that the cavity in the ground at issue in any § 1926.651(c) allegation is a trench rather than an excavation, and the parties agree that the factual evidence relevant to each § 1926.651(c) allegation shall be deemed to be the same as that for the § 1926.652(a) allegation in Docket No. 90-0050.

(b) 29 C.F.R. §§ 1926.450(a)(9), 1926.450(a)(10) and 1926.651(y). Each of those 3 standards regulate ladders or the use thereof. The parties agree that the factual evidence relevant to each allegation of noncompliance with those 3 standards shall be deemed to be the same as that for the § 1926.652(h) allegations in Docket Nos. 90-0050 and 90-0191.

(c) 29 C.F.R. §§ 2936.20(b)(1) and 1926.20(b)(2). An alleged violation of each of those standards appears in the Docket No. 90-0772 case and no others. That case also includes a citation alleging a violation of a similar standard, § 1926.21(b)(2), which was also tried in the Docket Nos. 90-0050 and 90-0191 cases. The parties agree that the same evidence as that heard by the Commission for the § 1926.21(b)(2) allegations in the said two cases shall also be considered for the § 1926.20(b)(1) and § 1926.20(b)(2) allegations.

(d) 29 C.F.R. § 1904.2(a) and § 1904.4. Those regulations at issue in Docket Nos. 90-0772 and 91-0026 require the keeping of records on recordable occupational injuries and illnesses. Respondent supplied records in response to an administrative subpoena (reference: exhibits C-24 and C-25, Docket No. 90-0050). The parties agree that the decision on these allegations shall be based upon exhibit C-32 in Docket No. 90-0772 together with the testimony of record in Docket No. 90-0772.

(e) The parties do not believe that there are any standards or regulations at issue in any of the 9 cases mentioned above except those that have been tried in the Docket No. 90-0050 and 90-0191 cases and those stated in subparagraphs (a) through (d) above. If, however, the parties should be mistaken in that belief, they agree to either stipulate to the disposition of the allegations of violation of such standards and/or regulations, or to agree upon a basis upon which the same can be decided by the Commission.

5. All trenches and excavations that are at issue in the 9 cases mentioned above were made in the public streets or highways of the Borough of Manhattan, City of New York, and identified by street or avenue name upon the citations. The composition of the walls, sides or faces of each such trench or excavation shall be deemed to be the same as those that were the subject of the 2 cases that were tried: OSHRC Docket Nos. 90-0050 and 90-0191, unless the evidence referred to in paragraph 3(a), above, is otherwise.

6. The parties herewith submit all 9 cases identified above for disposition upon the matters stated above, the stipulations and agreements of the parties made in open court, and the record in Docket Nos. 90-0050, 90-0191, 90-0771 and 90-0772.

7. The parties agree that the foregoing represents the complete agreement of the parties in this matter.

Catapano's Affirmative Defenses

Catapano raises three affirmative defenses in each case which must be addressed before turning to the specific violations charged. Catapano argues that the citations should be dismissed because: (1) The eight inspections conducted after the initial inspection docketed as No. 90-0050 were invalid; (2) The Secretary failed to issue the citations with "reasonable promptness;" and (3) The construction standards cited in these cases are invalid.

None of these affirmative defenses has merit, as will be discussed *infra.*

1. The Validity of the Inspections

OSHA compliance officer Bert Martin Zapken conducted an inspection of Catapano's worksite on September 18, 20, and 27, 1989. This inspection was subsequently docketed as

No. 90-0050. Seven inspections followed within the next six weeks, the last being completed on November 6, 1989. A ninth inspection was conducted in October, 1990.

In its post-hearing brief, Catapano argues that it "promptly contested the resulting citations within the 15 working day time limit provided in 29 U.S.C. § 659(c). Thus, there was at the time of all subsequent inspections, a pending Review Commission case between the parties to this proceeding" (Catapano's Brief, pp. 206-207).[5]

Catapano's authority for its claim that no new inspections may be conducted while a Review Commission case is pending is based upon statements contained in OSHA' Field Operation Manual (FOM). Catapano argues that OSHA's inspections were invalid because OSHA did not follow its own procedures set out in its FOM and its internal memoranda for conducting trenching and excavating inspections.

The Review Commission has succinctly addressed claims of the Secretary's wrongdoing based on OSHA's failure to comply with the FOM and other internal documents:

> [T]he Commission has consistently held that the FOM is an internal manual that provides guidance to OSHA professionals, but does not have the force and effect of law, nor does it confer important procedural or substantive rights or duties on individuals. *H. B. Zachry Co.*, 7 BNA OSHC 2202, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980), *aff'd*, 638 F. 2d 812 [9 OSHC 1417] (5th Cir. 1981). We therefore conclude that there is no reason to examine the Secretary's actions in this case to determine whether they conformed to the procedures outlined in the FOM.

Caterpillar, Inc., 15 BNA OSHC 2153, 2173, footnote 24, 1993 CCH OSHD ¶ 29,962 (No. 87-0922, 1993). Following *Caterpillar*, it is concluded that there is no reason to examine the Secretary's actions in this case to determine whether they conformed to the procedures outlined in the FOM or in any other internal memoranda of the agency. OSHA's inspections of Catapano's worksite were valid.

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[5] This statement is disingenuous. What Catapano fails to mention is that the Secretary did not issue the citations in Docket No. 90-0050 until November 7, 1989, the day after the eighth inspection was completed. At the time of the first eight inspections, there was no pending Review Commission case because Catapano had not yet been cited.

2. The Timeliness of the Issuance of the Citations

Catapano argues that the Secretary unreasonably delayed the issuance of the citations in all nine of the cases at issue. Section 9(c) of the Act provides:

> No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

All of the citations were issued well within the statutory six-month period, as shown by the following table:

Docket No.	Inspection Dates	Citation Issuance Dates
90-0050	Sept. 18 - Oct. 20, 1989	Nov. 7, 1989
90-0189	Oct. 26-30, 1989	Jan. 12, 1990
90-0190	Oct. 20-30, 1989	Jan. 12, 1990
90-0191	Oct. 26-30, 1989	Jan. 12, 1990
90-0192	Oct. 25-30, 1989	Jan. 12, 1990
90-0193	Oct. 26-30, 1989	Nov. 9, 1989 & Jan. 12, 1990
90-0771	Nov. 3-6, 1989	Feb. 8, 1990
90-0772	Nov. 6, 1989	Feb. 8, 1990
91-0026	Oct. 24-25, 1990	Dec. 3, 1990

Catapano bases its challenge to the timeliness of the issuance of the citation on § 9(a) of the Act, which provides that the Secretary "shall with reasonable promptness issue a citation to the employer." Catapano erroneously cites *Brennan v. Chicago Bridge and Iron Company,* 514 F. 2d 1082 (7th Cir. 1975) as holding that "reasonable promptness" means within 72 hours from the time the violation is detected (Catapano's brief, p. 200). In fact, *Chicago Bridge* stands for the opposite of what Catapano claims. The Seventh Circuit *vacated* the Review Commission's holding that "reasonable promptness" means within 72 hours as invalid, and remanded the case to the Review Commission for a decision on the merits.

The Review Commission's most recent pronouncements on the issue of "reasonable promptness" focus on the prejudice to the employer from the delay rather than whether the delay was justified, following *National Industrial Constructors, Inc.*, 10 BNA OSHC 1081,

1084, 1981 CCH OSHD ¶ 25,743 (No. 76-4507, 1981). The Review Commission has held that the "reasonable promptness" requirement of § 9(a) and the six-month period of § 9(a)(c) work together:

> to indicate that a citation issued within the six-month limitation period is generally considered to have been issued with reasonable promptness unless an employer demonstrates that, in its particular case, the length of time taken to issue the citation was unreasonable.
>
> To show a lack of reasonable promptness, an employer must establish prejudice to the defense of the case. A lapse of time of less than six months, "cannot operate to exclude evidence obtained in [an] inspection when there is no showing that the employer was prejudiced in any way," for "[t]he manifest purpose of the Act, to assure safe and healthful working conditions, militates against such a result." *Accu-Namics, Inc. v. OSHRC,* 515 F. 2d [828,] 833 [(5th Cir. 1975)], quoted in *Stephenson Enterprises, Inc. v. Marshall,* 578 F. 2d, 1021, 1023 [6 OSHC 1860] (5th Cir. 1978). Therefore, the Commission has held that a citation will not be vacated on "reasonable promptness" grounds unless the employer shows prejudice. *E.G., Stripe-A-Zone, Inc.,* 10 BNA OSHC 1694, 1982 CCH OSHD ¶ 26,069 (No. 79-2380, 1982).

Bland Construction Co., 15 BNA OSHC 1031, 1040-1041, 1981 CCH OSHD ¶ 29,325 (No. 87-992, 1991).

Catapano offered no evidence that it was prejudiced in any way by the time period that elapsed between the inspections and the issuance of the citations. Catapano does not claim it was prejudiced, and in fact, argues that using prejudice as the primary factor in determining "reasonable promptness" is erroneous (Catapano's brief, p. 203, footnote 40).

Catapano's affirmative defense that the Secretary failed to issue the citations with reasonable promptness has no merit and is rejected.

3. <u>The Validity of the Cited Standards</u>

Catapano challenges the validity of the cited construction standards, claiming that they were improperly adopted in 1971 and thus are unenforceable. The Review Commission has recently dealt with this issue and has rejected the challenge to the validity of the standards.

In *Morrison-Knudsen Co., Inc./Yonkers Contracting Co., Inc., A Joint Venture,* 16 BNA OSHC 1105, 1993 CCH OSHD ¶ 30,048 (No. 88-572, 1993), the employer argued that the construction standards are invalid pursuant to sections 6(a) and 3(10) of the Act. Because the argument raised by *Morrison-Knudsen* is identical to the one raised by Catapano (the employers shared the same counsel), the Review Commission's summary of Morrison-Knudsen's argument is reproduced here.

> The cited construction standards, section 1926.55(a) and (b), were originally promulgated pursuant to the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333 *et seq.* ("the Construction Safety Act"). They were later adopted as occupational safety and health standards pursuant to section 6(a), 29 U.S.C. § 655(a), of the Occupational Safety and Health Act. Section 6(a), of the Act states, in pertinent part:
>
> > Without regard to [the Administrative Procedure Act] or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard . . . .
>
> The Act, at section 3(10), 29 U.S.C. §652(10), provides a definition of an "established Federal Standard." It states:
>
> > The term "established Federal Standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act.
>
> The Construction Safety Act was "in force on the date of enactment of this Act," which was December 29, 1970, but the construction safety standards promulgated pursuant to the Construction Safety Act did not become effective until thereafter, on April 27, 1971. Our Act became effective the next day, April 28, 1971. Thus, the "established Federal standards" were "operative" and "presently in effect" on the effective date of the Act but not on "the date of enactment," in the language of section 3(10) of the Act.

Id. at p. 41,264.

The Review Commission rejected the argument that this circumstance rendered the standards invalid. After recounting in detail the legislative history of the Act, the Review Commission concluded:

> [S]ection 6(a) permits adoption of eligible established Federal Standards on the Act's effective date rather than its enactment date. . . .
>
> More importantly, the Act itself and the circumstances existing on the date of its enactment suggest that Congress intended to refer to the Act's effective date as the date by which established Federal standards must have been in effect for adoption pursuant to section 6(a). Section 4(b)(2) of the Act that Congress sent to the President for signature and that became law stated plainly that "standards promulgated under the . . . Act of August 9, 1969 (40 U.S.C. 333) . . . in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act . . . ." Thus the Act that Congress sent to the President for enactment looked forward to another date for the purpose of finding interim standards, and the reason is plain. On the date of enactment, no standards had been promulgated under "40 U.S.C. 333," popularly known as the Construction Safety Act. *See Daniel Intl. Corp. v. OSHRC,* 656 F.2d 925, 927-28 (4th Cir. 1981) (setting forth the history of the construction standards). We must not presume that Congress included meaningless instructions in the statute, but must presume that Congress intended standards to be promulgated under "40 U.S.C. 333" after the Act's enactment date and in time to be adopted under sections 6(a) and 3(10) of the Act. Therefore, because the construction standards were effective on the Act's effective date, they are valid.

Id. at p. 41,266.

Catapano also argues that the construction standards are invalid because the Secretary did not allow the 30-day notice and comment period required by the Administrative Procedure Act (APA). That argument was rejected in *National Industrial Constructors, Inc. v. OSHRC*, 583 F.2d 1048 (8th Cir. 1978).

Based upon *Morrison-Knudsen* and *National Industrial Construction, Inc.,* Catapano's challenges to the validity of the construction standards are rejected.

Over Labor Day weekend in 1989, a steam main exploded in Manhattan at Fifty-first Street and Eighth Avenue, resulting in a ruptured water main (Tr. 1530). The City set up a mobile command center at Eighth Avenue and Fifty-second Street and brought in an emergency repair contractor, Varlotta Construction Company (Varlotta), to do the repair work. Catapano was also called in to help that weekend (Tr. 1530). After Varlotta completed the emergency repair work over the weekend, Catapano worked at the site on Tuesday, September 5, 1989, to do some tie-in work. Catapano then returned to the work it had been doing on the project (Tr. 1536-1537).

Later that week, New York State OSHA received a complaint stating that men were working in an unsecured trench at Eighth Avenue and Fifty-first Street. New York State OSHA sent an investigator to the site. The investigator observed employees in an unshored trench, but decided that an inspection would be beyond New York State OSHA's jurisdiction because the state plan limits its OSHA enforcement authority to public employees (Tr. 63, 65).

New York State OSHA attached the complaint to a referral report and sent it to the OSHA Regional Office in NYC, where it was received on September 13, 1989 (Tr. 69-71). The referral states (Exh. C-1):

> Men working in unsecured trench. No head protection. Man using jack hammer in trench without head, ear or eye protection. Note: Water main being replaced covered by asbestos.

The OSHA Regional Office forwarded the referral report to OSHA's Manhattan Area Office (Exh. C-1; Tr. 64). The safety supervisor for the Manhattan Area Office, Angelo Signorile, assigned compliance officer Bert Zapken to inspect Catapano's Eighth Avenue site (Tr. 77).

On September 18, 1989, Zapken went to Eight Avenue and Fifty-First Street, the site address identified in the referral report. Upon arrival at this site, Zapken did not see any construction activity. Zapken looked north up Eight Avenue and saw earth-moving

equipment and a spoil bank. Zapken proceeded to this site on Eight Avenue between Fifty-third and Fifty-fourth Streets (Tr. 82).

Zapken introduced himself to Al Trapasso, who identified himself as Catapano's superintendent for the project (Tr. 83). Zapken held a lengthy opening conference with Trapasso, who claimed he was unfamiliar with OSHA (Tr. 84, 88). Zapken gave Trapasso a copy of 29 C.F.R. Part 1926, and a copy of the OSHA publication "Excavating and Trenching Operations" (Exh. C-5; Tr. 243-244, 246-247).

Following the opening conference, Zapken initiated a walkaround accompanied by Trapasso (Tr. 90-91). He returned to the site on September 20 and 27, 1989, to continue his inspection and held a preliminary closing conference with Trapasso on September 27. On November 7, 1989, the Secretary issued three citations to Catapano based on Zapken's inspection. Citation No. 1 contains thirteen alleged serious violations of the Act. Citation No. 2 contains three alleged willful violations of the Act. Citation No. 3 contains three "other" violations of the Act.

In the consolidated hearing held by the undersigned, OSHA compliance officer Bert Zapken and Catapano vice-president John Ruggiero were the only witnesses. It was obvious that Ruggiero was intelligent, thoroughly familiar with trenching operations, and had lengthy experience in the removal and installation of water mains. However, he was not present at any of the worksites at the time of the Secretary's inspections and had no personal knowledge of the conditions observed by Zapken. Only Zapken had first-hand knowledge of the conditions in existence at the worksites during his inspections. In view of the parties' stipulation, Zapken's testimony will be given full weight in ascertaining the facts of the alleged violations since it was, for the most part, unchallenged by Catapano. Zapken was a credible witness and the court was impressed with his thoroughness and attention to detail. Much of his testimony was supported by photographs or videotapes which depict the violative conditions described by him.

At first blush it might appear that proceeding in the fashion agreed to by the parties, places the respondent at a disadvantage. It is noted, however, that the facts of the various cases are substantially similiar and, as noted by counsel for Catapano "there is nothing unique about (the) nine cases" which present "the same things over and over again"

(Tr. 3077). It was counsel's suggestion, as a means of expediency, that the court decide Docket Nos. 90-0050 and 90-0191 on their respective merits and then resolve all issues in the remaining cases based upon the results reached in those two cases (Tr. 3084). Both parties were represented by competent counsel and were afforded the opportunity to present their respective cases as they deemed appropriate.

Citation No. 1

Item 1: Alleged Serious Violation of § 5(a)(1)

The Secretary alleges that Catapano seriously violated § 5(a)(1), which provides:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

To prove that an employer violated § 5(a)(1), the Secretary must show:

> (1) that a condition or activity in the employer's workplace presented a hazard to employees; (2) that the cited employer or the employer's industry recognized the hazard; (3) that the hazard was likely to cause death or serious physical harm; and (4) that feasible means existed to eliminate or materially reduce the hazard. *United States Steel Corp.*, 12 BNA OSHC 1692, 1697-98, 1986-87 CCH OSHD ¶ 27,517, p. 35,669 (No. 79-1998, 1986).

Coleco Industries, Inc., 14 BNA OSHC 1961, 1963, 1991 CCH OSHD ¶ 29,200 (No. 84-546, 1991).

Item 1 of Citation No. 1 alleges that Catapano's employees were exposed to:

> The hazard of falling off of a moving vehicle while traveling in traffic. Employees were riding on the back (in a sitting position) and the side (standing on the ladder) of a Caterpillar 1-936 Front Loader on or about 9/20/89. This vehicle had only one seat to accommodate the operator. As the Operation and Maintenance Manual states: "Do not allow riders on the machine unless additional seat, seatbelts and rollover protection are provided."

On September 20, 1989, at approximately 1:10 p.m., Zapken observed a front-end loader being operated at the intersection of Eighth Avenue and Fifty-third Street. In addition to the operator, there were three other employees, two of them identified as

Nathan Martin and Dawn Randeel, riding on the front-end loader, on its back and sides (Exh. C-4, photographs 8b and 9b; Tr. 352-354). The front-end loader was traveling in traffic and was not equipped with seat belts or rollover protection (Tr. 905). The loader was traveling west on Fifty-third Street and Zapken estimated its speed to be between 5 and 10 m.p.h. (Tr. 353, 908).

Zapken called the incident to Trapasso's attention, telling him that he believed the three employees were exposed to the hazard of falling from the front-end loader and being struck by a second vehicle. Trapasso took no action to stop the front-end loader or to remove the three employees (Tr. 355, 925-926). Trapasso told Zapken that the employees were"going from one job location to another" (Tr. 363). When Zapken interviewed Martin, he was told that Catapano's employees routinely rode the loader to get from one job location to another (Tr. 923).

John Ruggiero, the chief engineer and vice-president of Catapano, admitted that Catapano's employees routinely rode the front-end loader as a means of transportation (Tr. 1690-1691): "Customarily, the employees do ride on the side boards of equipment. . . . [W]e have a policy not to do that at present. It's difficult to enforce, but it is common practice, not only for us, but for most other contractors."

Catapano argues that the Secretary has failed to establish any of the four required elements of a § 5(a)(1) violation.

(1) <u>A condition in the workplace presented a hazard to employees</u>.

Catapano contends that the Secretary failed to show that its employees were exposed to the hazard of falling from the front-end loader. Catapano dismisses the Secretary's concerns as "sheer speculation."

Based upon the evidence and common sense, Catapano's argument is without merit. A review of the photographs (Exh. C-4, photographs 9a and 9b) shows the precariousness of the three employees' positions on the loader. Without designated seats or seat belts, the employees were unable to maintain a secure position on the loader. The loader was moving through traffic and was bouncing "considerably" (Tr. 943). The Secretary has established

that riding on a front-end loader's back and side, as Catapano's employees were doing, is a hazardous condition that exposes the employees to a fall hazard.

(2) The construction industry recognizes the hazard.

The Operation and Maintenance Manual for the Caterpillar 1-936 states, "Do not allow riders on the machine, unless additional seats, seat belts, and rollover protection are provided" (Secretary's response to interrogatory No. 2, p. 2). The Construction Industry Manufacturers Association (CIMA) Safety Manual for Operating and Maintenance Personnel of Wheel Tractor/loaders provides, "Say NO! to riders. This is a one person machine" (Exh. C-23, p. 17). The Society of Automotive Engineers stated in its "Operator Precautions," SAE J153 May 1987, "Do not permit riders on the machine if there is no manufacturer's designated place for a rider" (Exh. C-19, § 4.3, p.2).

The Secretary adduced documentary evidence that the construction industry recognizes the fall hazard associated with riding on moving construction equipment not equipped for such riders. Catapano argues that because it was "customary" for its employees to ride the loader, there was no recognition that the practice is unsafe. The mere fact, however, that an employer customarily allows its employees to commit an unsafe practice does not render the practice acceptable. The Secretary proved that the construction industry recognizes the cited condition as hazardous.

(3) The hazard was likely to cause death or serious physical harm

The Secretary established that the hazard presented by the employees riding on the loader without designated seats is that the employees could fall from the moving vehicle, sustaining serious injuries. An additional hazard was presented by the presence of other vehicular traffic, exposing employees to the risk of being struck by another vehicle should they fall. The likely result of such an occurrence would be death or serious physical injuries, including broken bones (Tr. 379).

Catapano argues that the violation lasted for only "a couple of minutes" and thus there was no significant risk of injury. The duration of exposure to a hazard may affect the amount of the penalty assessed for a violation, but it does not alter the fact that a violation

exists. Zapken estimated that the employees were exposed for five minutes, and he factored this in to his recommended penalty (Tr. 380).

(4) Feasible means existed to eliminate or materially reduce the hazard.

Zapken testified that Catapano could have feasibly eliminated or reduced the cited hazard by providing its employees with safe transportation from one location to another and by enforcing a well-communicated work rule that prohibited riding on the loader (Tr. 377-378). Zapken's recommendations are eminently practicable.

Catapano likens this issue to that in *National Realty & Construction Co. v. OSHRC,* 489 F.2d 1257 (D.C. Cir. 1973), where the D.C. Circuit reversed the Review Commission's decision for the Secretary, finding that "the Commissioners attempted to serve as expert witnesses for the Secretary." *Id.* at 1257, footnote 40. The difference in the present case is that the Secretary did present evidence at the hearing level in support of its case. Zapken's testimony is sufficient to meet the Secretary's burden of proof. This is not like *National Realty,* where a higher court expounded its own theories without any record evidence to support it. The Secretary has established the four required elements and thus has established that Catapano violated § 5(a)(1). The Secretary has also established that the cited hazard was serious.

Item 2: Alleged Serious Violation of § 1926.21(b)(2)

Section 1926.21(b)(2) provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The Secretary alleges that Catapano committed a serious violation of this standard. Zapken interviewed several employees, including Frank Guardavaccaro, George Stratton, and Nathan Martin. All of them told Zapken that they had received no training from Catapano, despite being exposed to hazardous conditions (Tr. 382-389). Catapano did not hold weekly safety meetings (Tr. 384). Guardavaccaro had been with Catapano for about a year and a half at the time of Zapken's inspection (Tr. 383). He had received no safety

training. Guardavaccaro was required to work in an unshored trench with its spoil pile placed at an unsafe distance from the trench's edge. He also used a cutoff saw without wearing eye protection (Tr. 387). Stratton had been with Catapano for 10 months. He received no safety training. He was also required to work in unsafe trenches, and worked close to a jack hammer without wearing eye protection (Tr. 385, 389). Martin had worked for Catapano for five years and had never received any training. Martin was one of the employees riding unsafely on the front-end loader (Tr. 386).

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

The Secretary has established that § 1926.21(b)(2) applies to Catapano's worksite, that Catapano failed to instruct its employees in the recognition and avoidance of unsafe conditions, that its employees were exposed to unsafe conditions, and that Catapano knew of the violation. It was up to Catapano's supervisory personnel to instruct the employees. They would be in the best position to know whether or not Catapano's employees were receiving safety instructions.

Catapano does not dispute the substance of the employees' interviews, but quibbles over semantics. The standard requires the employer to "instruct" its employees, while Zapken spoke in terms of "training." Catapano cites *Dravo Engineers and Constructors*, 11 BNA OSHC 20010, 1984 CCH OSHD ¶ 26,930 (No. 81-748, 1984) in support of its argument that the Secretary failed to establish a violation of § 1926.21(b)(2). *Dravo* is inapposite to the present case. In *Dravo,* the employer held regular toolbox meetings and instructed its employees in the recognition and avoidance of hazardous conditions. The employer did not, however, enforce its safety rules.

The Review Commission reversed the administrative law judge's finding of a violation of a § 1926.21(b)(2) holding that the standard "requires only that an employer instruct its

employees." *Id.* at 1984 CCH OSHD at p. 34,507. The Review Commission concluded that Dravo complied with the standard, and that the Secretary was attempting to read into the standard the additional duty of enforcing the safety instructions it provided to its employees. Such is not the case here.

Unlike *Dravo,* Catapano failed to provide its employees with any safety instruction. Catapano failed to carry out the initial step which brought Dravo into compliance with § 1926.21(b)(2). Whether it is called instruction or training, Catapano failed to address any of the hazards which could be encountered at the worksite or to advise its employees of the means and methods to avoid such hazards. This constitutes a serious violation of the cited standards. The violation was serious.

Item 3: Alleged Serious Violation of § 1926.28(a)

Section 1926.28(a) provides:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

Zapken noted four occasions during his inspection where Catapano's employees were using a heavy duty cutoff saw to cut water main pipes, but were not wearing any eye protection. Sparks were visibly flying off of the pipes as they were being cut (Exh. C-4, photographs 1a, 2a, 3a, 3b, 4a, 4b and 5a). Photograph 3 of Exhibit C-4 shows Catapano employee John Silva bending over the pipe he is cutting. Silva's face is close to the point of contact between the saw blade and the pipe being cut (Tr. 397-398). Silva and the other employees using the cutoff saw were exposed to the hazard of being struck in the eyes by flying metal shards produced by the cutting of the pipe (Tr. 399-400). Trapasso was present while the employees were so engaged but made no move to stop the employees or to require them to wear safety glasses (Tr. 402-405).

Section 1926.28(a):

> mandates that an employer shall require the wearing of appropriate personal protective equipment in all situations where an employee is *both* exposed to

> a hazardous condition *and* the need for such protective equipment is indicated elsewhere in part 1926. Although the current version of the standard uses the disjunctive "or" with respect to these separate clauses, its original version used the conjunctive "and" to indicate that both conditions must be satisfied. The Commission held that the change to "or" was invalidly promulgated by the Secretary and required reinstatement of the prior interpretation mandating that both conditions be met . . .

Brock v. L. E. Myers Co., 818 F.2d 1270, 1275 (6th Cir., 1987).

The Secretary has shown that the employees using the cutoff saw were exposed to a hazardous condition. The standard in Part 1926 that indicates a need for using safety glasses while operating a saw is § 1926.102(a) which provides:

> Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

The Secretary has carried the burden to establish a violation of § 1926.28(a). Catapano's employees were exposed to the hazard of being struck in the eye with a metal shard, which carries the potential of serious injury or loss of sight. The violation is properly characterized as serious.

Item 4: Alleged Serious Violation of § 1926.152(a)(1)

Section 1926.152(a)(1) provides:

> Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids. Approved metal safety cans shall be used for the handling and use of flammable liquids in quantities greater than one gallon, except that this shall not apply to those flammable liquid materials which are highly viscid (extremely hard to pour), which may be used and handled in original shipping containers. For quantities of one gallon or less, only the original container or approved metal safety cans shall be used for storage, use, and handling of flammable liquids.

Zapken testified that he observed three 5-gallon plastic containers of gasoline (Exh. C-4, photographs 17a and 17b; Tr. 975). Zapken believed the containers violated the standard because they were not metal. The standard requires metal safety cans to be used for flammable liquids "in quantities greater than one gallon." Zapken estimated that there

was ½ gallon to 1 gallon of gasoline in each container (Tr. 977). Therefore, metal containers were not required for the gasoline.

For quantities of flammable liquids less than a gallon, § 1926.152(a)(1) requires that the container be either "the original container or approved metal safety cans." The three 5-gallon plastic containers that Zapken observed may not have been the original containers for the gasoline, but there is no such indication anywhere in the record. Zapken's entire testimony on this item fails to address whether or not these were the original containers (Tr. 407-425, 974-978). Without proof on this element, the Secretary has failed to establish a violation of § 1926.152(a)(1). Item 4 will be vacated.

Item 5: Alleged Serious Violation of § 1926.202

Section 1926.202 provides:

> Barricades for protection of employees shall conform to the portions of the American National Standards Institute D6.1-1971, Manual on Uniform Traffic Control Devices for Streets and Highways, relating to barricades.

The citation identified four areas where Zapken believed that the barricades used by Catapano were inadequate. Catapano was using barrels (or drums), cones, and sawhorses to direct traffic away from the trenching area (Tr. 427). Zapken testified that these devices are Type I and Type II barricades, not the Type III barricades that Catapano's contract called for (Tr. 428).

Zapken testified that the purpose of the barricades was to protect employees from vehicular traffic (Tr. 429). The hazard that Zapken identified was that Catapano's employees were exposed to being struck by vehicles while working in the trenches (Tr. 447). The Manual on Uniform Traffic Control Devices for Streets and Highways (Manual), referenced in § 1926.202, does not support Zapken's interpretation of the purpose of barricades.

Section 6C-1 of the Manual states:

> The functions of barricades and channeling devices are to warn and alert drivers of hazards created by construction or maintenance activities in or near the traveled way, and to guide and direct drivers safely past the hazards.

The verbs used to describe the function of the barricades, "warn," "alert," "guide," and "direct," all emphasize the visual aspect of the barricades. The emphasis is not on the capability of the barricades to actually withstand impact with a vehicle.

Even though Zapken stated at the hearing that the barrels (or drums), cones, and sawhorses met the requirements of Type I and Type II barricades, the Secretary shifts his focus in his post-hearing brief and argues that Catapano improperly used channeling devices instead of barricades.

Sections 6C-3 and 6C-4 of the Manual address cone design and drum design respectively. There is no claim that the drums and cones used by Catapano did not conform to the requirements set out in the Manual. The Secretary is apparently faulting Catapano because the "channeling" devices are not barricades. But § 1926.202 does not impose any use requirements on the employer. It requires only that when barricades are used, they should conform with the specifications in the Manual. If the employer uses channeling devices instead of barricades, it is then under no obligation to comply with § 1926.202. Only if the employer chooses to use barricades are the requirements of § 1926.202 triggered.

The Secretary has failed to establish a violation of § 1926.202. Item 5 will be vacated.

Item 6: Alleged Serious Violation of § 1926.350(a)(1)

Section 1926.350(a)(1) provides:

> (a) Transporting, moving, and storing compressed gas cylinders. (1) Valve protection caps shall be in place and secured.

Item 6 of the citation alleges that an oxygen cylinder at the intersection of Eighth Avenue and Fifty-third Street, "was in storage in a horizontal position without a valve protection in place." Zapken testified that it is OSHA policy to consider a cylinder not in use at any given time to be in storage: "OSHA, I think, looks at these cylinders if a regulator is not in place, and the hose is [not] connected, then they are in storage" (Tr. 464). With regard to the oxygen cylinder at issue, Zapken noted that in photograph 16b of Exhibit C-4, "I observed the fact that I can see the valve, and the caps are in the foreground, and there is just the valve that's there" (Tr. 464). Zapken observed the cylinder on September 20, 1989, at approximately 1:35 p.m. (Tr. 990) but had no idea how long the

cylinder had been at this location or whether it had been or was intended for use (Tr. 992).

Catapano contends that the cylinder was being used periodically on September 20 and was stored elsewhere overnight (Tr. 1714). Cylinders were never stored overnight on the jobsite (Tr. 1711).

The Review Commission has consistently held that "cylinders are not 'in storage' if they are located in an area where they are used intermittently." *MCC of Florida, Inc.*, 9 BNA OSHC 1895, 1981 CCH OSHD ¶ 25,420, p. 31,681 (No. 15757, 1981); *See also, Grossman Steel & Aluminum Corp.*, 6 BNA OSHC 2020, 1978 CCH OSHD ¶ 23,097 (No. 76-234, 1978), *Armour Food Co.*, 14 BNA OSHC 1817, 1990 CCH OSHD ¶ 29,088 (No. 86-247, 1990). The Secretary has failed to establish that the oxygen cylinder was in storage at the time he observed it. The Secretary's citation for the violation of § 1926.350(a)(1) is based on a policy position of OSHA's, not on facts observed by Zapken. Accordingly, Item 6 of the citation will be vacated.

Item 7: Alleged Serious Violation of § 1926.350(a)(7)

Section 1926.350(a)(7) provides:

> A suitable cylinder truck, chain, or other steadying device shall be used to keep cylinders from being knocked over while in use.

Item 7 alleges that on three separate days at three different locations, "One (1) oxygen and one (1) acetylene cylinder were free-standing while in use, on or about September 18, September 20, September 27." In instance (c), Zapken observed the cylinders "free-standing in the back of the truck" (Exh. C-4, photograph 24; Tr. 1000). Zapken testified that the cylinders were in use, and that they were hooked up to a cutting tool being used by an employee (Tr. 1001). The employee was cutting a 20-inch main pipe (Tr. 1002). No steadying device was used to keep the cylinder from being knocked over (Tr. 1004).

In instances (a) and (b), the cylinders were sitting on the street (Exh. C-4, photograph 25(a); Tr. 1006). The cylinders were free-standing, with no steadying device used to secure them (Tr. 1007). The cylinders were in plain view. With the exercise of

reasonable diligence, Catapano should have known that the cylinders were not secured by steadying devices (Exh. C-4, pp. 24 and 25).

The hazard presented by a cylinder being knocked over is that the cylinder could act as a rocket, being propelled by the compressed gas escaping. Such a hazard presents the risk of death or serious physical injury (Tr. 466-467).

The Secretary has established that Catapano was in serious violation of § 1926.350(a)(7).

Item 8: Alleged Serious Violation of § 1926.350(a)(9)

Section 1926.350(a)(9) provides:

> Compressed gas cylinders shall be secured in an upright position at all times except, if necessary, for short periods of time, while cylinders are actually being hoisted or carried.

Zapken observed an oxygen and an acetylene cylinder lying in horizontal positions on the sidewalk at Eight Avenue near Fifty-fourth Street on September 18, 1989 (Exh. C-4, photograph 17b; Tr. 474). He observed an oxygen cylinder lying horizontally at the intersection of Eight Avenue and Fifty-third Street on September 20, 1989 (Exh. C-4, photograph 16b; Tr. 485). Acetylene cylinders contain acetone which can eat away at the cylinder's rubber gaskets if the cylinder is lying on its side (Tr. 479). This could cause the acetylene gas to leak, creating a fire hazard. If a fire did break out, the oxygen cylinder could feed the fire, aggravating the seriousness of the blaze (Tr. 482-483). The oxygen cylinder lying by itself in instance (b) presented the hazard of rocketing into an employee if its compressed gas escaped.

The Secretary has established a serious violation of § 1926.350(a)(9).

Item 9: Alleged Serious Violation of § 1926.350(f)(7)

Section 1926.350(f)(7) provides:

> Hoses, cables, and other equipment shall be kept clear of passageways, ladders and stairs.

Item 9 alleges that Catapano had "[o]ne oxygen and one acetylene cylinder in use and stored in the passageway for cutting existing water main pipe on or about September 20, 1989." Photographs 16a and 16b of exhibit C-4 show the two cylinders in an area adjacent to the trench (Tr. 1018). Zapken testified the cylinders were between the barricades and the trench. Traffic was flowing on the other side of the barricades along Eighth Avenue. Employees were walking between the barricades and the trench, making that area a passageway (Tr. 1019-1020). Zapken observed employees walking through the area (Tr. 1026). The hazard created by the cylinder lying in the passageway is that of tripping, which could result in a serious injury.

The Secretary has established a serious violation of § 1926.350(f)(7).

Item 10: Alleged Serious Violation of § 1926.350(j)

Section 1926.350(j) provides:

> For additional details not covered in this subpart, applicable technical portions of American National Standards Institute, Z49.1-1967, Safety in Welding and Cutting, shall apply.

In the citation for this item, the Secretary references ANSI Z49.1-1967, which provides:

> Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet or by a noncombustible barrier at least 5 feet high having a fire-resistance rating of at least ½ hour.

Item 10 involves the same oxygen and acetylene cylinder at issue in item 8 that were lying on the sidewalk (Exh. C-4, photograph 17b; Tr. 1051).

The Secretary has failed to meet his burden of proof on this item for the same reason he failed on item 6. ANSI Z49.1-1967 applies to cylinders that are "in storage." As previously noted, cylinders are not considered to be in storage if they are in an area where they are used intermittently. *MCC of Florida, Inc.*, 1981 CCH OSHD at p. 31,681. The cylinders were lying on a sidewalk at a construction site, available for use. They were not stored at the site overnight (Tr. 1711, 1714).

The cylinders were not in storage. ANSI Z49.1-1967, as incorporated into § 1926.350(j), is inapplicable to the cited conditions. Item 10 will be vacated.

Item 11: Alleged Serious Violation of § 1926.650(f)

Section 1926.650(f) appears in Subpart P - Excavations, Trenching, and Shoring. The § 1926.650 standard is headed "General protection requirements." The cited standard provides:

> Employees exposed to vehicular traffic shall be provided with and shall be instructed to wear warning vests marked with or made of reflectorized or high visibility material.

Item 11 cited three instances where it alleges Catapano's employees "walking and working in traffic (directing traffic) were not provided with reflective vests for visibility, on or about September 18, September 20, September 27, 1989." Zapken observed several of Catapano's employees "walking in traffic, directing traffic, around the trenches, around the locations on Eighth Avenue in the course of their work day without being provided these vests. The employees were wearing normal work clothes" (Tr. 512-513).

Zapken made these observations on September 18 at 11:20 a.m., September 20 at 10:30 a.m., and September 27 at 9:30 a.m. (Tr. 513). The employees he observed were George Stratton, Foster Rogers, John Silva, Mario Silva, and Frank Guardavaccaro (Tr. 514). The employees were not provided with warning vests (Tr. 520).

The hazard created by the failure of the employees to wear warning vests while working traffic was that of "being struck by a moving vehicle" (Tr. 517). The result of being struck by a vehicle could be "anything from broken bones to death" (Tr. 518).

Zapken told Trapasso the first day of the inspection that warning vests were required when employees were exposed to vehicular traffic (Tr. 514-515). When Zapken returned on subsequent days, he never saw any employees wearing warning vests, even though they continued to be exposed to traffic (Tr. 532-533).

The Secretary has established a serious violation of § 1926.650(f).

Item 12: Alleged Serious Violation of § 1926.651(i)(1)

Section 1926.651(i)(1) provides:

> In excavations which employees may be required to enter, excavated or other material shall be effectively stored and retained at least 2 feet or more from the edge of the excavation.

The citation alleges that in two instances Catapano failed to keep spoil piles at least 2 feet from the edges of trenches. In instance (a), on September 18, 1989, Zapken observed a trench on Eighth Avenue between Fifty-third and Fifty-fourth Street with the spoil pile directly to the right of the trench (Exh. C-4, photograph 13b; Tr. 534-535). In instance (b), Zapken observed a spoil pile directly at the edge of a trench on September 20, 1989, at the intersection of Eight Avenue and Fifty-third Street (Exh. C-4, photographs 5a, 13b; Tr. 544, 1068, 1082). Employees were in both trenches (Tr. 538, 545).[6]

Zapken testified that storing a spoil pile directly at the edge of a trench creates two hazards. First, material from the spoil pile could fall off and hit employees working in the trench (Tr. 537). There were chunks of broken asphalt and concrete in the spoil pile (Tr. 537, 1080). Second, Zapken testified that the weight of the spoil pile at the edge of the unshored trench could lead to a cave-in (Tr. 537).

The likelihood of this second hazard occurring, under the circumstances disclosed in the record, is dubious. The spoil piles were resting on top of the unexcavated asphalt (Tr. 1081). Zapken failed to take this fact into account when he stated that the weight of the spoil pile "is forming a vertical pressure on the ground. As that pressure is transmitted

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[6] Catapano was inspected on May 8, 1989, at a site in NYC where its employees were engaged in trenching operations similar to those involved in the instant cases. John G. Ruggiero, Catapano's chief engineer and vice-president, was aware of this inspection and participated in the development of the case on behalf of Catapano. As a result of the inspection, Catapano was charged with serious violations of the Act's personal protective equipment standards at §§ 1926.650(e) and 1926.650(f) and serious violations of the trenching standards requiring spoil piles to be retained a minimum of 2 feet from the edge of the trench (§ 1926.651(i)(1)). Catapano was also charged with a willful violation of § 1926.652(b) for its failure to shore, sheet, brace or slope trench walls greater than 5 feet in depths which consisted of unstable or soft material. After contest and hearing, Judge David G. Oringer vacated the charge relating to serious infractions of the personal protection standard for failure by the Secretary to carry the burden of proof. Judge Oringer affirmed the serious and willful violations of the Act's trenching standards and assessed substantial penalties for both. That case is presently on review by the Commission. It does, however, confirm the corporate Catapano's knowledge of the Act's trenching requirements at a time prior to the inspections conducted in the instant case.

into the ground it turns into a horizontal pressure. So, it will be forming more pressure on those unshored walls of the trench" (Tr. 537-538).

The Secretary did establish, however, that Catapano's employees working in the trenches were exposed to the hazard of being struck by pieces of falling soil, asphalt, or concrete. The likely result from such an occurrence would be death or serious physical injury. Catapano was in serious violation of § 1926.651(i)(1).

Item 13: Alleged Serious Violation of § 1926.652(h)

Section 1926.652(h) provides:

> When employees are required to be in trenches 4 feet deep or more, an adequate means of exit, such as a ladder or steps, shall be provided and located so as to require no more than 25 feet of lateral travel.

Zapken observed four instances where trenches over 4 feet deep were not provided with ladders or other adequate means of exit. In instance (a), Zapken noted a trench on Eighth Avenue between Fifty-third and Fifty-fourth Street on September 18, 1989, that was 40 feet long and 5 feet deep (Exh. C-4, photographs 5b, 13b, 14b; Tr. 548-551). Employees would enter the trench by jumping into it, and would exit the trench by climbing up its west wall (Tr. 551).

Instance (b), which Zapken observed on September 20, 1989, occurred at a 20-foot long trench at the intersection of Eighth Avenue and Fifty-fifth Street (Exh. C-4, photographs 20b, 21a, 21b; Tr. 552). Zapken observed instance (c) on September 20, 1989, at the intersection of Eighth Avenue and Fifty-fourth Street. The trench was 20 feet long. Employees were working under a steel plate in the trench. Their routine method of entering the trench was to jump in and exiting by climbing the trench walls (Exh. C-4, photographs 8a, 9a; Tr. 557).

Instance (d) which Zapken observed on September 27, 1989, at the intersection of Eighth Avenue and Fifty-fifth Street, occurred in a 7½ foot deep trench that was 15 feet long. Employees were climbing conduit pipes in order to exit the trench.

The hazard to which the employees were exposed in each of the four instances was that the trench could cave in and they would have no quick means of exiting the trench.

The likely result of such an occurrence would be death by crushing or suffocation (Tr. 551-552).

Catapano argues that ladders were not required if some other adequate means of exit was provided. Catapano is correct in this assertion provided the evidence supports a finding that "some other adequate means of exit was provided." Zapken's testimony and the photographic exhibits demonstrate, however, that no other adequate means of exit existed in any of the four trenches.

The Secretary has established that Catapano was in serious violation of § 1926.652(h).

Citation No. 2

Item 1: Alleged Willful Violation of § 1926.100(a)

Section 1926.100(a) 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.

On September 18, 1989, Zapken observed Catapano employees George Stratton and Foster Rogers using a jack hammer to excavate material from a trench on Eighth Avenue near Fifty-third Street. The spoil pile, which was immediately to the right of the trench, rose 5 or 6 feet above the street surface. The slope of the spoil pile was approximately 45° (Exhs. C-4, photographs 1b, 2b, 3b, 5b, 6b, 13b, 14b, 15b; Tr. 115-128). The spoil pile contained dirt, gravel, rock, and pieces of asphalt and concrete (Tr. 120). Large chunks of concrete 1½ to 2 feet long, were visible near the top of the spoil pile (Exh. C-4, photograph 2b; Tr. 129).

Zapken observed soil sloughing off the spoil pile into the trench (Tr. 122). The employees in the trench were not wearing hard hats, which exposed them to the hazard of being struck by objects falling from the spoil pile. The risk of injury was exacerbated by the use of the jack hammer in the trench, which caused vibrations in the trench. Likely injuries would range from a concussion to death (Tr. 130-133).

Zapken brought the absence of hard hats to Trapasso's attention. Trapasso agreed that the employees should be wearing hard hats and told Zapken that Catapano had hard hats in the company truck (Tr. 139-140).

On September 20, 1989, Zapken observed employees working in a trench on Eighth Avenue near Fifty-fourth Street. One employee was underneath a steel plate laid over an opening in the street so that vehicular traffic could travel across the excavation. The employee, John Silva, was not wearing a hard hat (Exh. C-4, photographs 8a, 9a; Tr. 141-142). When Zapken pointed out that Silva was not wearing a hard hat, Trapasso told Zapken that he had ordered hard hats. Zapken asked Trapasso what happened to the hard hats Trapasso had said he had in the company truck on September 20; Trapasso walked away and refused to talk with Zapken any longer (Tr. 151).

On September 27, 1989, at approximately 8:30 a.m., Zapken observed employees working in a trench on Eighth Avenue at Fifty-fifth Street. The employees were removing the existing water main and replacing it with a 20-inch water main. They were wearing no head protection (Tr. 152-153). The trench was 7 feet 6 inches deep (Tr. 165). The employees were working in a bent-over or crouched position with several feet of the dirt wall above them (Tr. 165). The employees working in the trench who were not wearing hard hats were Foster Rogers, John and Mario Silva, and George Stratton (Tr. 167).

Zapken asked Trapasso about the absence of hard hats and, as before, Trapasso walked away. Zapken testified, "I would talk to him and he would just walk away. I got absolutely no feedback from him. I got no response from him" (Tr. 156). Zapken instead spoke with Catapano's assistant superintendent Don Brandinelle, who told Zapken that he had ordered hard hats for the employees (Tr. 154, 157-158). Later that morning, the hard hats arrived and Brandinelle ordered the employees to wear them (Tr. 159).

Catapano argues that the spoil pile in instance (a) and the dirt wall in instance (c) were not directly overhead, so hard hats were not required. Section 1926.100(a) does not, however, require that employees be protected from hazards which are directly overhead. It requires that employees be protected from "impact or from falling or flying objects." A chunk of concrete rolling down from the top of a spoil pile sloped at 45° or falling from the top of a trench wall will fall into the trench the same as if they were held directly overhead

and dropped. As long as the employees' heads are below the level from which the object falls, there is a possibility that they will be struck and sustain head injuries. The employees in instances (a) and (b) were engaged in hand excavating, removing the existing water main and installing a new one. These activities required them to bend over or crouch down, which brought their heads into the zone of danger from falling objects.

Catapano presented testimony of Ruggiero explaining why he believes the conditions in instances (a) and (c) posed no hazard to the employees. Ruggiero was not present at the time of the inspection and his opinions are based on speculation and guesswork, not the eyewitness observations made by Zapken. Ruggiero's testimony is rejected. The Secretary has proven a violation of § 1926.100(a) with regard to instances (a) and (c).

The Secretary has failed to establish a violation with regard to instance (b). Zapken was concerned that the steel plate under which the employee was working could dislodge and fall on top of the employee. The steel plate was more than an inch thick, 20 feet long, and weighed 3500 pounds (Tr. 1605, 1612). Zapken gave no plausible reason why he believed there was a possibility that the steel plate would dislodge. If the 3500-pound plate did dislodge and strike the employee, wearing a protective helmet would afford the employee little protection against such a catastrophic occurrence.

The Secretary charged Catapano with a willful violation of § 1926.100(a).

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *E.G., Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). It is differentiated from other types of violations by a "heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference." *Id.*
>
> A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete. *Id.* Also, a violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one--whether the employer's belief concerning a factual matter, or concerning the interpretation of a standard, was

reasonable under the circumstances. *Id.* 13 BNA OSHC at 1259, 1986-87 CCH OSHD at p. 36,591.

Calang Corp., 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶ 29,531 (No. 85-319, 1990).

The Secretary has established that Catapano willfully violated § 1926.100(a). The violation of this standard was characterized by Trapasso's direct refusal to comply with the requirements of the standard despite previous warnings from the compliance officer that hats were required. On September 18, 1989, the first day of the inspection, Zapken informed Trapasso that his employees needed to be wearing hard hats. Trapasso agreed, then said their hard hats were in the truck. Zapken gave Trapasso a copy of the 1926 construction standards as well as a copy of OSHA publication 2226, "Excavating and Trenching Operations" both of which address head protection (Tr. 172-173). Zapken supplied these documents to Trapasso because Trapasso claimed that he was unfamiliar with the OSHA standards. This later proved untrue, as evidenced by an April 10, 1989, OSHA inspection of Catapano where Trapasso was also the superintendent and Catapano was subsequently cited for violating § 1926.100(a).[7]

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[7] Zapken later learned that Trapasso, upon his initial contact in September, 1989, had deliberately mislead Zapken concerning his familiarity with OSHA. A subsequent review of Catapano's OSHA inspection and citation history revealed that Trapasso had served as a foreman for Catapano in April, 1989, during an OSHA inspection of pipe laying construction in a trench at Hollers Avenue near Hutchinson Avenue, Bronx, New York, conducted by the Bayside New York OSHA Area Office. Trapasso was the representative of Catapano on the work site and was the management official to whom the OSHA inspector presented his credentials, and with whom OSHA conducted the opening conference, walkaround inspection, and closing conference. As a result of this inspection, citations were issued to this respondent for violations of numerous sections of Subpart P of Part 1926 which are the subject of present inspections of Catapano including, a willful violation of 29 C.F.R. § 1926.652(b). The violation stated the following:

> 29 C.F.R. § 1926.652(b): The side(s) of the trench(es) in unstable or soft material which were more than 5 feet in depth, were not shored, sheeted, braced, sloped or otherwise supported in accordance with Tables P-1 and P-2:
>
> On April 10, 1989, Hollers Avenue near Hutchinson Avenue
>
> The 7-ft. long, 5-ft. wide 6-6½ ft. deep trench in unstable/loose soil running from East to West was not sheeted, shored, or sloped to prevent collapsing of the unprotected sides. Employees working in the trench breaking up a boulder were exposed to hazard of being buried by collapsing soil.

(continued...)

Furthermore, Catapano's own safety program provides:

> Hard Hats
>
> Hard hats must be worn by employees where there is a danger of head injury from impact from falling objects or from electrical shock.
>
> Supervisor will wear hard hat at all times to set a good example for employees.
>
> Catapano will provide one hard hat free of charge to each employee required to wear hard hat at a project. A charge for each additional hard hat will be deducted from an employees [sic] pay if a new hard hat is issued.

(Exh. C-6).

Trapasso and Brandinelle could not claim they were ignorant of the requirement that hard hats be worn when there was a danger of being struck by falling objects. On September 20, 1989, Trapasso told Zapken that he had ordered hard hats, which suggests that Trapasso had either lied to Zapken on the 18th about the hard hats being in the truck, or that he was mistaken about their existence. A deliberate lie would indicate an intentional disregard of § 1926.100(a), while a mistake demonstrates plain indifference. Either way, the record establishes that Trapasso recognized that hard hats were required, but deliberately decided not to take corrective measures. Thus, on September 27, 1989, nine

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[7](...continued)
(Exh. C-10, Willful Citation No. 2, Item 1a). Additionally, this inspection participated in by Trapasso resulted in the issuance of a citation for a willful violation of 29 C.F.R. § 1926.652(c) for exposing employees to the hazard of trench collapse in an area of a trench greater than 5 feet in depth composed of hard or compact soil (Willful Citation No. 2, Item 1b); a serious citation for violation of 29 C.F.R. § 1926.650(e) for not protecting employees laying pipe in a trench and chipping rocks with personal protective equipment including hard hats, and eye and face protection (Serious Citation No. 1, Item 1); a serious citation for violation of 29 C.F.R. § 1926.650(f) for not providing employees engaged in directing traffic with reflectorized warning vests (Serious Citation No. 1, Item 2); and, a repeat citation for violation of 29 C.F.R. § 1926.652(h) for not providing employees working in the trench with an adequate means of exit, such as a ladder (Repeat Citation No. 3, Item 1).

These citations were affirmed by stipulated settlement agreement which modified the citations only by reclassifying the willful citation to serious, and reducing the proposed penalty. The citations, as modified, became a final order of the Commission on December 3, 1990.

days after Zapken first mentioned hard hats to Trapasso and gave him documents addressing their use, Catapano's employees were still not wearing hard hats.

The Secretary has established that Catapano, through Trapasso, consciously disregarded the requirements of § 1926.100(a), and thereby committed, intentionally and/or voluntarily, a willful violation of the cited standard.

Item 2: Alleged Willful Violation of § 1926.652(a)

Section 1926.652(a) provides:

> Banks more than 5 feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. Refer to Table P-1 as a guide in sloping of banks. Trenches less than 5 feet in depth shall also be effectively protected when examination of the ground indicates hazardous ground movement may be expected.

On September 20, 1989, Zapken observed a trench at the intersection of Eighth Avenue and Fifty-fourth Street (Exh. C-4, photographs 19a, 19b). An employee, John Silva, was working underneath a steel plate. The citation states:

> The sides of the trench in unstable or soft material, were not shored, sheeted, braced or sloped. Employee was directed to work under a one-inch steel plate while traffic was permitted to move over head of employee on or about September 20, 1989.

The area of the trench where Silva was working was 4 feet deep, 6 feet wide, and 20 feet long (Tr. 216). The sides of the trench were vertical and not sloped. Zapken asked Trapasso to remove Silva from the trench. Trapasso refused, saying that Silva would only be in there for a short time (Tr. 192). Zapken left to call his office because he believed the situation presented an imminent danger to Silva. When he returned approximately 5 minutes later, Zapken observed Silva emerging from the trench (Tr. 222-225).

Zapken asked Catapano's backhoe operator, Lenny Digangi, if the spoil pile sitting above the east wall of the trench was taken from the trench. Digangi confirmed that it had, and Zapken took a soil sample from the spoil pile (Tr. 197-200). This sample was submitted

to OSHA's Salt Lake City Laboratory where it was analyzed and found it to be 47.73% gravel, 40.78% sand, and 11.49% silt and clay (Tr. 209).

Photographs 19a and 19b of C-4 show the east wall of the trench. Zapken noted, correctly, that "It appears to be concrete" (Tr. 1223). The west wall of the trench contained a 24-inch steam main (Tr. 1624).

Silva was working under a steel plate which overlapped the east side of the trench by approximately 13½ feet, and the west side by approximately 6 inches. The steel plate was not secured. Zapken was concerned that vibrations caused by traffic passing over the steel plates could cause the trench walls to collapse (Tr. 191).

The standard requires that for trenches under 4 feet, protection is required "when examination of the ground indicates hazardous ground movement may be expected." Zapken explained why he believed that hazardous ground movement could be expected (Tr. 213-214):

> I observed the fact that the one-inch steel plate was over the trench resting on approximately six inches of asphalt . . .. [T]he employee was hand excavating under this one-inch steel plate, the fact that there was ground movement. You have the vibration of the steel plate bouncing on the vertical walls of the trench.
>
> You have a subway underneath this area causing vibrations. You have other vehicular traffic.

Zapken testified that a backhoe was operating north of the trench that would cause further vibrations (Tr. 214). Later Zapken recapped the reasons for his determination that hazardous ground movement could be expected (Tr. 236):

> [T]he fact that the walls of the trench were vertical; they were not shored, braced, sloped in any manner; they weren't secured from movement; the determination that the characteristics of the soil, its angle of repose, is 43 degrees; hence, the fact that we would not be able to depend on that soil standing in a vertical position.

Despite Zapken's testimony regarding the vibrations caused by the traffic, the subway, and the backhoe, he did not conduct any type of test or attempt to measure the effect of the vibrations on the trench walls. The Secretary presented no expert testimony regarding the

effect of vibrations on trenches in urban environments. The soil sample that Zapken took does not appear to be representative of the trench walls. The east wall appears to be made of concrete. A layer of asphalt is at the top of the trench wall. Given the 4-foot depth of the trench and the fact that much of the trench walls were composed of concrete, it does not appear that hazardous ground movement might be expected. Zapken's testimony amounts to speculation regarding the possibility of hazardous ground movement. The Secretary has failed to establish a violation of § 1926.652(a) and this item will be vacated.

Item 3: Alleged Willful Violation of § 1926.652(b)

Section 1926.652(b) provides:

> Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section).

Zapken observed three instances where he believed Catapano was in violation of § 1926.652(b). Instance (a) occurred on September 18, 1989, on the east side of Eighth Avenue between Fifty-third and Fifty-fourth Street (Exh. C-4, photographs 3b, 5b, 6, 10a, 10b, 11, 12, 13b, 14b, 15b; Tr. 259). Zapken observed two employees, George Stratton and Mario Silva, working in an area of the trench that was 5 feet 4 inches deep (Tr. 261, 263, 270). The walls of the trench were vertical and there was no sloping or shoring, or any other form of employee protection provided by Catapano (Tr. 271).

Zapken testified that the hazard presented by the condition of the trench was the possibility of a cave-in. Zapken saw evidence of the instability of the walls (Tr. 272):

> On the same day, I observed sections of the excavated wall sloughing downward. Furthermore, I observed pieces of the asphalt that again the soil underneath those sections of the asphalt also fell into the trench . . . . [J]ust the sheer weight of the asphalt being unsupported due to the fact that the soil sloughed away, gravity caused it to fall into the trench.

Trapasso was present at the time that Zapken made his observations (Tr. 278). This is the same day that Zapken gave Trapasso the documents pertaining to the trenching and excavation requirements (Tr. 278-279).

Instance (b) occurred on September 20, 1989. Zapken observed Frank Guardavaccaro cutting away the old pipe in a trench at the intersection of Eight Avenue and Fifty-third Street (Exh. C-4, photograph 4a; Tr. 280-284). The trench was 20 feet long and varied in depth from 3 feet to 5 feet 5 inches (Exh. C-3; Tr. 281). The trench walls were vertical and composed of soft soil, most of it sandy (Tr. 285). Zapken called Trapasso's attention to Guardavaccaro working in the trench with no kind of shoring or other employee protection. Trapasso refused to discuss the matter with Zapken and walked away from him (Tr. 288-289).

Instance (c) occurred on September 27, 1989. Zapken observed employees working in a trench on Eight Avenue near Fifty-fifth Street (Exh. C-4, photographs 20a, 20b, 21a, 21b, 22, 23; Tr. 291). The trench was 7 feet 6 inches deep, with vertical walls. No protective system was provided. The walls of the trench were soil "determined to be of a soft and unstable material, primarily of a sandy material" (Tr. 292, 295). Zapken observed soil sloughing off the walls (Tr. 295). A backhoe was operating nearby at that time (Tr. 300).

In each of the three instances, the Secretary has established that Catapano's employees were working in trenches 5 feet or more deep, and that the trench walls were composed of soft and unstable soil. The Secretary has proven that the trench walls were not shored, sheeted, braced, sloped, or otherwise supported. A violation of § 1926.652(b) is, therefore, established.

The Secretary characterized the violation as willful. Trapasso was told the first day of the inspection that trenches over 5 feet deep in which employees worked needed some form of protective system. Zapken gave Trapasso documents pertaining to safety in trenches. Trapasso ignored Zapken's warnings and eventually refused to even listen to him. Catapano was well aware of the requirements of § 1926.652(b)

On April 4, 1989, Catapano was issued Citation No. 1, Item 2, for a serious violation of 29 C.F.R. § 1926.652(b), arising out of an inspection by the Secretary of a worksite of Catapano located at 155th Street and 121st Avenue, Jamaica, New York (Exh. C-9). Catapano did not contest the citation and it became a final order by operation of law pursuant to Section 10(a) of the Act. On May 16, 1989, Catapano was issued Citation No. 2, Item 1a, again for violating 29 C.F.R. § 1926.652(b), arising out of an inspection by the

Secretary of a worksite of Catapano located at Hollers Avenue near Hutchinson Avenue, Bronx, New York (Exh. C-10). Catapano contested this alleged violation; however, the violation was affirmed by way of a stipulated settlement in OSHRC Docket No. 89-1678. On June 12, 1989, Catapano was issued Citation No. 2, Item 2, for a third cited willful violation of 29 C.F.R. § 1926.652(b), arising out of an inspection by the Secretary of a worksite of Catapano located at the corner of Prince Street and Roosevelt Avenue, Flushing, New York (Exh. C-22). Catapano contested this alleged violation, and a hearing was had before Judge David Oringer in OSHRC Docket No. 89-1981. (*See* footnote 4 *supra*.) Thus, Catapano had extensive experience with the requirements of § 1926.652(b) including a contested case before an administrative law judge wherein a willful violation of the cited standard was affirmed.

Furthermore, Catapano knew through its contract with WPC that it was required to use a protective system in the trench. As early as January 9, 1989, when Catapano entered into the subcontract with WPC, Catapano was on notice that the specifications for its work required the sheeting of its water main trenches in conformance with 29 C.F.R. § 1926.652 (Exh. C-14). On April 4, 1989, at the preconstruction meetings conducted by the NYC Bureau of Water Supply, Catapano was again put on notice that the work it would be performing required the sheeting of its trenches in compliance with OSHA's requirements (Exh. C-16). Then, beginning with the first inspection by the Secretary of Catapano's trenches on Eighth Avenue, commencing on September 18, 1989, and continuing on September 20 and 27, 1989, Catapano was notified that its failure to support the sides of its trenches constituted violations of 29 C.F.R. § 1926.652(b).

Despite Catapano's awareness of the requirements of the standard, its awareness of the conditions at its worksites which exposed its employees to possible trench collapse and its later awareness that OSHA considered such conduct violative of the standard, Catapano continued to violate the cited standard. This conduct which persisted over a substantial length of time constituted willful violations of 29 C.F.R. § 1926.652(b).

Citation No. 3

Items 1, 2, and 3: Alleged "Other" Violations of §§ 1926.59(e)(1),(g)(1), and (h)

Catapano was charged with "other" violations of the following sections of § 1926.59, the hazard communication standard:

Item 1: (e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their work places which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met[.]

. . . .

Item 2: (g) *Material safety data sheets* (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical they use.

. . . .

Item 3: (h) Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

Zapken asked Trapasso on the first day of the inspection if Catapano had a written hazard communication program. Trapasso replied that Catapano did not have such a program, nor did it have material safety data sheets available for the hazardous substances to which its employees were exposed. Zapken ascertained through employee interviews that Catapano had not trained its employees in the use of hazardous chemicals (Tr. 561-567).

In its brief, Catapano concedes that it was in violation of the three cited provisions from the hazard communication standard. Items 1, 2, and 3 are affirmed as "other" violations.

Docket No. 90-0191

On October 18, 1989, while conducting a closing conference regarding the items for Docket No. 90-0050 with Trapasso at Catapano's field office, Zapken learned from Trapasso that Catapano was engaged in another trenching operation on Eighth Avenue at Fifty-sixth Street. When Zapken concluded the closing conference with Trapasso, he telephoned the Manhattan Area OSHA Office and received instructions to proceed to the worksite he had just learned about and to conduct an inspection. Zapken did so (Tr. 2091-2094).

When Zapken got to Catapano's worksite at Eighth Avenue and Fifty-sixth Street, he observed Catapano's employees working in a trench on Fifty-sixth Street, east of Eight Avenue. The trench had vertical sides and was not shored, sheeted, braced or sloped. Zapken estimated the trench was at least 5 feet deep, 7 to 9 feet long and 5 to 6 feet wide. Zapken observed two employees in the trench using shovels to excavate the trench. It was raining and the employees were wearing rain gear. Zapken observed that the trench walls appeared to be of sandy material and he saw the sandy soil sloughing off in the rain. Trapasso was present at the site when Zapken arrived. Zapken considered working in the trench to be a hazardous condition and asked Trapasso if he would voluntarily remove the employees from the trench. Trapasso refused, saying that Catapano had to get the water back on line to customers. Zapken again phoned the Manhattan Area Office for instructions. He was told to return to the site the next day, October 19, to continue his inspection (Tr. 2094-2100).

Citation No. 1

Item 1: Alleged Willful Violation of § 1926.100(a)

On October 19, 1989, Zapken returned to Catapano's worksite. Zapken, who was accompanied by Brandinelle, observed Catapano employee Americo Mazzo working in the trench. Mazzo was not wearing a hard hat. He was using a cut-off saw. Mazzo needed to bend over at times to perform his work (Exh. C-30, photographs 3b, 4a, 5b, 6a; Tr. 2128-2138). The spoil pile rose 5 feet above the top of the trench and was stored directly at the

edge of the trench (Tr. 2235-2236). Mazzo was exposed to the hazard of being struck in the head by the rock and asphalt falling from the spoil pile (Tr. 2130, 2132).

The Secretary charged Catapano with a willful violation of § 1926.100(a) for failing to require employees working in areas where they are exposed to head injury from falling objects to wear protective helmets. This is the same standard for which Catapano was found in willful violation in Docket No. 90-0050 (Citation No. 2, Item 1).

The Secretary has established a violation of § 1926.100(a) with regard to the instant item. Mazzo was exposed to the hazard of a head injury from falling rocks or pieces of asphalt from the spoil pile. He was not wearing a protective helmet in the presence of Catapano's assistant superintendent, Brandinelle.

The Secretary charged that the violation was willful. For the reasons stated earlier with regard to the violation of § 1926.100(a) in Docket No. 90-0050, which are incorporated into this section of the decision, Catapano's violation of § 1926.100(a) in the present item is willful.

Item 2: Alleged Willful Violation of § 1926.652(b)

In addition to Mazzo, another Catapano employee was working in the trench that Zapken observed on October 19 (Exh. C-30, photograph 3b; Tr. 2138). The trench had vertical walls which were unsupported. Brandinelle was present at the time. The trench was 6 feet deep, 6 feet 6 inches wide, and 9 feet long (Tr. 2259-2260). Zapken took a soil sample from the spoil pile, which was analyzed as being 94.22% sand (Tr. 2253).

The Secretary charged Catapano with a willful violation of § 1926.652(b), which requires that the sides of trenches, 5 feet or more in depth, dug in unstable or soft soil be supported (see Item 3 of Citation No. 2, Docket No. 90-0050). The Secretary has established that a violation occurred. For the reasons set out in the discussion of the first allegation of a violation of § 1926.652(b) the present item is affirmed as willful.

Citation No. 2

Item 1: Alleged Serious Violation of § 1926.21(b)(2)

The Secretary charged Catapano with a serious violation of § 1926.21(b)(2) for failure to instruct each employee in the recognition and avoidance of unsafe conditions (see Item 2 of Citation No. 1, Docket No. 90-0050). Zapken explained how his basis for recommending the issuance of a citation for a violation of § 1926.21(b)(2) in the instant case differed from the one issued in Docket No. 90-0050 (Tr. 2295-2296):

> The difference being the employees I interviewed at this time, I specifically asked them if since the initial inspection, the first time they saw me and I had a chance to talk to them, had they received any training in regard to safety and health with the work that they were doing.
>
> The response was "no" as well as the fact that there was a new employee at this location, Mr. Jose Pedroaza, who I identified earlier, who has only worked for this company approximately two months at the time that I interviewed him, and he also stated that he received no training from the respondent in regards to safety and health.

The other employee that Zapken interviewed was Sal Zonetti (Tr. 2296). Trapasso told Zapken that Catapano's employees were not given copies of Catapano's written safety program (Tr. 2298). The result of employees not being instructed in the recognition and avoidance of unsafe conditions could be death or serious physical injury (Tr. 2298-2299).

Catapano's arguments in contesting this item are the same as it put forth in Docket No. 90-0050. For the reasons previously stated in that section, Catapano's arguments are rejected. The Secretary has established a serious violation of § 1926.21(b)(2).

Item 2: Alleged Serious Violation of § 1926.28(a)

The Secretary alleges that Catapano failed to require its employees to use appropriate personal protective equipment in violation of § 1926.28(a). As in Docket No. 90-0050 (Item 3 of Citation No. 1), Zapken observed employees using cutoff saws without the benefit of eye protection. In one instance, on October 19, an employee was cutting reinforcing bar; the other instance, on October 23, an employee was cutting timber

planking (Tr. 2301, 2303). Zapken brought both instances to the attention of Trapasso and Brandinelle. No action was taken by the supervisory personnel (Tr. 2301).

The hazard to which the employees were exposed was being struck in the eyes by "the flying material that they were cutting, the sparks the chips of wood" Tr. 2301). The potential eye injury was serious. The Secretary has established a serious violation of § 1926.28(a).

Item 3a: Alleged Serious Violation of § 1926.202

Section 1926.202 requires that barricades conform to the provisions of ANSI's Manual on Uniform Traffic Control Devices for Streets and Highways. The item cited for the violation of this standard was dismissed in Docket No. 90-0050 (item 5 of Citation No. 1). For the reasons set out in that section, the present item is also dismissed.

Item 3b: Alleged Serious Violation of § 1926.651(s)

Section 1926.651(s) provides:

> When mobile equipment is utilized or allowed adjacent to excavations, substantial stop logs or barricades shall be installed. If possible, the grade should be away from the excavation.

Zapken observed a 490 backhoe adjacent to Catapano's trench at Fifty-sixth Street and Eighth Avenue (Tr. 2307). The backhoe "was in close proximity to the edge of the trench" (Tr. 2308). Zapken observed this situation on October 18, 19, and 23. He testified, "The backhoe would relocate itself in order to get to a certain section that it needed to dig in, so it wasn't a specifically stationary piece of equipment that never moved" (Tr. 2308-2309). Zapken believed that "[s]ubstantial stop blocks or some sort of barricades should have been provided to prevent the inadvertent rolling of the piece of equipment" (Tr. 2308). The hazard created by the backhoe's proximity to the trench and the absence of stop logs or barricades was that the backhoe could roll into the trench. The likely result of such an event would be death (Tr. 2310).

Catapano argues that § 1926.651(s) is inapplicable to the cited condition. In support of this argument, Catapano cited *Lloyd C. Lockrem, Inc. v. United States,* 609 F.2d 940

(9th Cir., 1979). At the hearing level, the administrative law judge in that case had ruled that § 1926.651(s) did not apply to the employer's trenching operation. He based this ruling on the semantic difference between "excavations" and "trenches." The Review Commission explained the problem:

> The standards involved are found in Subpart P, Part 1926 of the Code of Federal Regulations. This subpart contains occupational safety and health standards applicable to: "Excavations, trenching and shoring." It is subdivided into the following subsections:
>
> Sec. 1926.650 *General Protection Requirements.*
>
> . . . .
>
> Sec. 1926.651 *Specific Excavation Requirements.*
>
> . . . .
>
> *Sec. 1926.652* Definitions Applicable to this Subpart.
>
> The standards in this Subpart distinguished between ground cavities that are "excavations" and those that are "trenches"

Lloyd C. Lockrem, Inc., 3 BNA OSHC 2045, 2046, 1976 CCH OSHD ¶ 19,046 (No. 4553, 1976). The Review Commission went on to reverse the administrative law judge's dismissal of the violations, holding that "Sec. 1926.651(s) is entirely applicable to those excavations otherwise classified as "trenches."" *Id.* at 2047.

Catapano relies on the Ninth Circuit's opinion, which reversed the Review Commission's decision and held that "the regulations and definitions as presently drafted are ambiguous to an extent that it is impossible for an employer to interpret them with any degree of certainty . . ." *Lockrem*, 609 F.2d at 944. It must be noted that the present case arose out of the Second Circuit, where a Ninth Circuit opinion carries no precedential value. Under this circumstance, precedence must be given to the Review Commission's decision, which reasoned as follows in finding § 1926.651(s) applicable to trenching operations:

> Section 1926.653(f) defines "excavation" as:
>
> *Any manmade cavity or depression in the earth's surface,* including its sides, walls, or faces, formed by earth removal and producing unsupported earth conditions by reasons of the excavation. If installed forms or similar structures reduce the depth-to-width relationship, an *excavation may become a trench* (emphasis added).

Section 1926.653(n) defines "trench" as:

> *A narrow excavation made below the surface of the ground.* In general, the depth is greater than the width, but the width of a trench is not greater than 15 feet (emphasis added).

Reading the two definitions together, the conclusion is inescapable that the term "excavation" is used in the broad sense and as such includes "trenches" within its scope as a specific type of excavation, or a sub-class thereof.

> Where a particular type of hazard is addressed by a standard applying to the broad class of "excavations" and no corollary standard addressing such hazard specifically applied to "trenches," the protective provisions of the former will be extended to the latter. *See Armor Constr. & Paving Co.,* No. 10198, BNA 3 OSHC 1204, CCH OSHD para. 19,642 (May 16, 1975) (Cleary, concurring). Indeed, a contrary interpretation would ignore the declared purpose and policy of Congress in passing the Act, *i.e.,* "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. Sec. 651.
>
> The particular hazard that Sec. 1926.651(s) is designed to eliminate is that of mobile equipment falling into excavations and causing injury not only to workers in and around the excavation, but also to the operators of such equipment. There is no corollary standard specifically applicable to trenches although it is patently clear that the same dangers exist. We therefore hold that Sec. 1926.651(s) is entirely applicable to those excavations otherwise classified as "trenches."

Lloyd C. Lockrem, Inc., 3 BNA OSHC at 2046-2047.

Section 1926.651(s) applies to Catapano's trenching operation. The Secretary has established a serious violation of the standard.

Item 4: Alleged Serious Violation of § 1926.650(f)

The Secretary charged Catapano with a serious violation of § 1926.650(f) which requires employees exposed to vehicular traffic to wear warning vests (see Item 11 of Citation No. 1, Docket No. 90-0050). Zapken testified that on October 18 and 19, employees were wearing rain gear due to the inclement weather. This gear met the requirements of the standard. On October 23, however, they were wearing "their flannel shirts, work clothes" (Tr. 2313). The spoil pile cut off access from the north side of the

trench. The employees "gained access to their work zone . . . from the south side." On the south side of this trench was where the vehicular traffic moved and employees were exposed to this traffic whenever they entered or exited the trench (Tr. 2315). Trapasso was on the site at the time. Zapken had previously spoken with him regarding this issue (Tr. 2316-2317).

The Secretary has established that Catapano's employees were exposed to vehicular traffic and were not wearing warning vests. The hazard created was that of being struck by vehicular traffic, which could result in death or serious physical injury (Tr. 2316). The violation was serious.

Item 5: Alleged Serious Violation of § 1926.651(i)(1)

Zapken observed the spoil bank of the trench at Fifty-sixth Street and Eighth Avenue on October 18, 19, and 23. On each of these days, the spoil bank was located directly at the edge of the trench. It was not stored at least 2 feet from the edge as required by § 1926.651(i)(1) (see Item 12 of Citation No. 1, Docket No. 90-0050) (Tr. 2317-2318). The spoil bank was 5 feet high and contained soil, loose asphalt and rocks (Exh. C-30, photographs 6a, 6b, 7a, 7b, 8a, 8b, 9; Tr. 2319).

Based on the foregoing evidence and for the reasons set forth under Docket No. 90-0050 regarding the violation of § 1926.651(i)(1), it is determined that the Secretary has established a serious violation of § 1926.651(i)(1).

Item 6: Alleged Serious Violation of § 1926.652(h)

The Secretary alleged that Catapano committed a serious violation of § 1926.652(h) by failing to have a ladder or other adequate means of exit in a trench 4 feet deep or more, (see Item 13 of Citation No. 1, Docket No. 90-0050). Zapken observed that there was no ladder in the trench at Fifty-sixth Street and Eighth Avenue. Employees "would either climb up the soil on the edge of the trench or they would climb on the pipe and shimmy themselves up to grade" (Tr. 2320). Employee Sal Zonetti exited the trench by using his hands and feet to climb out of the trench where the trench was 5 feet 8 inches deep (Tr. 2321-2322).

The Secretary has established a serious violation of § 1926.652(h).

Citation No. 3

Items 1, 2, and 3: Alleged "Other" Violations of §§ 1926.59(e)(1),(g)(i), and (h)

Catapano still did not have a written hazard communication program at the time of Zapken's inspection. Employees were using gasoline, for which Catapano had no available MSDS. Zapken interviewed employees Pedroza, Mazzo, and Zonetti and determined that they had received no hazardous communication training (Tr. 2326). This was in violation of §§ 1926.59(e)(1), (g)(91), and (h) as set out in the section under Docket No. 90-0050. Items 1, 2, and 3 are affirmed as "other" violations.

The Other Cases

As previously noted, the parties submitted the remaining seven cases for decision upon an "Agreed Statement of Facts" pursuant to the provisions of Commission Rule 61 (*See* Exh. J-1;). Paragraph 3(a) of the Agreed Statement of Facts provides that the items in the remaining seven cases shall be decided "upon the evidence in the 2 cases already tried [Docket Nos. 90-0050 and 90-0191] plus the stipulations of the parties and the matters admitted into evidence by agreement of the parties in open court on March 23, 1993." Therefore, items in the remaining cases that allege violations of standards addressed in Docket Nos. 90-0050 and 90-0191 will be decided in accordance with their disposition in these two cases.

Catapano does raise the argument that the citations for violations of standards cited in the first two docket numbers are duplicative and should, therefore, be dismissed. Catapano's argument is rejected. In *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172, 1993 CCH OSHD ¶ 29,962 (No. 87-0922, 1993), the Review Commission concluded "that the Commission has the authority to assess separate penalties for separate violations of a single standard or regulation. The test of whether the Act and the cited regulation permit multiple or single units of prosecution is whether they prohibit individual acts, or a single course of action."

In the present case each item cited represents a separate, discrete instance of activity. Different employees, areas, and dates were involved. The various citations for the same standards are not duplicative.

(1) Docket No. 90-0189

Docket No. 90-0189 contains three citations, all relating to conditions observed at the intersection of Eighth Avenue and Fifty-eight Street on October 25, 1989. The citations allege violations of twelve standards, ten of which were addressed previously in this decision. The ten previously addressed standards will be disposed of by referencing them to the citation and item numbers in Docket Nos. 90-0050 and 90-0191.

Citation No. 1 (Willful)

Item	Standard	Disposition	Reference
1	§ 1926.652(b)	Affirmed	Docket No. 90-0050: Item 3 of Citation No. 2 Docket No. 90-0191: Item 2 of Citation No. 1

Citation No. 2 (Serious)

Item	Standard	Disposition	Reference
1	§ 5(a)(1)	Affirmed	Docket No. 90-0050: Item 1 of Citation No. 1
2	§ 1926.21(b)(2)	Affirmed	Docket No. 90-0050: Item 2 of Citation No. 1
3a	§ 1926.202	Vacated	Docket No. 90-0050: Item 5 of Citation No. 1 Docket No. 90-0191: Item 3a of Citation No. 2
3b	§ 1926.651(s)	Affirmed	Docket No. 90-0191: Item 3b of Citation No. 2
4	§ 1926.651(i)(1)	Affirmed	Docket No. 90-0050: Item 12 of Citation No. 1 Docket No. 90-0191: Item 5 of Citation No. 1
5	§ 1926.652(h)	Affirmed	Docket No. 90-0050: Item 13 of Citation No. 1 Docket No. 90-0191: Item 6 of Citation No. 2

Citation No. 3 ("Other")

Item	Standard	Disposition	Reference
1	§ 1926.59(e)(1)	Affirmed	Docket Nos. 90-0050 & 90-0191: Item 1 of Citation No. 3
2	§ 1926.59(g)(1)	Affirmed	Docket Nos. 90-0050 & 90-0191: Item 2 of Citation No. 3
3	§ 1926.59(h)	Affirmed	Docket Nos. 90-0050 & 90-0191: Item 3 of Citation No. 3
4[8]	§ 1926.450(a)(9)	Affirmed	Docket No. 90-0050: Item 13 of Citation No. 1 Docket No. 90-0191: Item 6 of Citation No. 2
5	§ 1926.450(a)(10)	Affirmed	Docket No. 90-0050: Item 13 of Citation No. 1 Docket No. 90-0191: Item 6 of Citation No. 2

(2) Docket No. 90-0190

All of the cited conditions affirmed in Docket No. 90-0190 occurred on Eighth Avenue between Fifty-seventh and Fifty-eighth Streets on October 19 and 23, 1989.

Citation No. 1 (Willful)

Item	Standard	Disposition	Reference
1	§ 1926.100(a)	Affirmed	Docket No. 90-0050: Item 1 of Citation No. 2 Docket No. 90-0191: Item 1 of Citation No. 1

[8] Items 4 and 5 of Citation No. 3 allege "other" violations of §§ 1926.450(a)(9) and (10) respectively. These items are addressed in paragraph 4(b) of the Agreed Statement of Facts, which provides:

> 29 C.F.R. §§ 1926.450(a)(9), 1926.450(a)(10) and 1926.651(y). Each of these 3 standards regulate ladders or the use thereof. The parties agree that the Factual evidence relevant to each allegation of noncompliance with those 3 standards shall be deemed to be the same as that for the § 1926.652(h) allegations in Docket Nos. 90-0050 and 90-0191.

The violations of § 1926.652(h) were affirmed in the two litigated cases.

2[9]	§ 1926.651(c)	Vacated	Docket No. 90-0050: Item 2 of Citation No. 2

Citation No. 2 (Serious)

Item	Standard	Disposition	Reference
1	§ 1926.21(b)(2)	Affirmed	Docket No. 90-0050: Item 2 of Citation No. 1 Docket No. 90-0191: Item 1 of Citation No. 2
2	§ 1926.350(j)	Vacated	Docket No. 90-0050: Item 10 of Citation No. 1
3	§ 1926.651(i)(1)	Affirmed	Docket No. 90-0050: Item 12 of Citation No. 1 Docket No. 90-0191: Item 5 of Citation No. 2
4[10]	§ 1926.651(y)	Affirmed	Docket No. 90-0050: Item 13 of Citation No. 1 Docket No. 90-0191: Item 6 of Citation No. 2

Citation No. 3

Item	Standard	Disposition	Reference
1	§ 1926.59(e)(1)	Affirmed	Docket Nos. 90-00050 & 90-0191: Items, 1, 2, and 3 of Citation No. 3
2	§ 1926.59(g)(1)	Affirmed	
3	§ 1926.69(h)	Affirmed	

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[9] Item 2 is addressed by paragraph 4(a) of the Agreed Statement of Facts, which provides:

> 29 C.F.R. § 1926.651(c). That standard is part of Subpart P "specific excavation requirements" as opposed to its "specific trenching requirements." Respondent waives any defence that the cavity in the ground at issue in any § 1926.651(c) allegation is a trench rather than an excavation, and the parties agree that the factual evidence relevant to each § 1926.651(c) allegation shall be deemed to be the same as that for the § 1926.652(a) allegation in Docket No. 90-0050.

[10] Paragraph 4(9b) of the Agreed Statement of Facts provides that the evidence for this item shall be deemed the same as that for the § 1926.652(h) allegation in Docket Nos. 90-0050 and 90-0191, which were affirmed.

(3) Docket No. 90-0192

The conditions constituting the alleged violations under this docket number were observed at the intersection of Eighth Avenue and Fifty-seventh Street on October 26 and 30, 1989.

Citation No. 1 (Willful)

Item	Standard	Disposition	Reference
1	§ 1926.100(a)	Affirmed	Docket No. 90-0050: Item 1 of Citation No. 2 Docket No. 90-0191: Item 1 of Citation No. 1
2	§ 1926.652(a)	Vacated	Docket No. 90-0050: Item 2 of Citation No. 2

Citation No. 2 (Serious)

Item	Standard	Disposition	Reference
1	§ 1926.21(b)(2)	Affirmed	Docket No. 90-0050: Item 2 of Citation No. 1 Docket No. 90-0191: Item 1 of Citation No. 2
2	§ 1926.28(a)	Affirmed	Docket No. 90-0050: Item 3 of Citation No. 1 Docket No. 90-0191: Item 2 of Citation No. 2
3	§ 1926.152(a)(1)	Vacated	Docket No. 90-0050: Item 4 of Citation No. 1
4a	§ 1926.202	Vacated	Docket No. 90-0050: Item 5 of Citation No. 1 Docket No. 90-0191: Item 3a of Citation No. 2
4b	§ 1926.651(s)	Affirmed	Docket No. 90-0191: Item 3b of Citation No. 2
5	§ 1926.651(i)(1)	Affirmed	Docket No. 90-0050: Item 12 of Citation No. 1 Docket No. 90-0191: Item 5 of Citation No. 2

6	§ 1926.652(h)	Affirmed	Docket No. 90-0050: Item 13 of Citation No. 1 Docket No. 90-0191: Item 6 of Citation No. 2

Citation No. 3 ("Other"

Item	Standard	Disposition	Reference
1	§ 1926.59(e)(1)	Affirmed	((Docket Nos. 90-0050 and
2	§ 1926.59(g)(1)	Affirmed	(90-0191: Items 1, 2 & 3 (of Citation No. 3
3	§ 1926.59(h)	Affirmed	(----------
4[11]	§ 1926.4500(a)(9)	Affirmed	(Docket No. 90-0050: (Item 13 of Citation No. 1
5	§ 1926.450(a)(10)	Affirmed	(Docket No. 90-0191: (Item 6 of Citation No. 2

(4) Docket No. 90-0193

The alleged violations under this docket number occurred on October 26, 1989, at the intersection of Eighth Avenue and Fifty-eighth Street.

Citation No. 1 (Willful)

Item	Standard	Disposition	Reference
1	§ 1926.652(b)	Affirmed	Docket No. 90-0050: Item 3 of Citation No. 2 Docket No. 90-0191: Item 2 of Citation No. 1

Citation No. 2 (Serious)

Item	Standard	Disposition	Reference
1	§ 1926.21(b)(2)	Affirmed	Docket No. 90-0050: Item 2 of Citation No. 1 Docket No. 90-0191: Item 1 of Citation No. 2

[11] See paragraph 4(b) of the Agreed Statement of Facts.

2	§ 1926.28(a)	Affirmed	Docket No. 90-0050: Item 3 of Citation No. 1 Docket No. 90-0191: Item 2 of Citation No. 2
3a	§ 1926.202	Vacated	Docket No. 90-0050: Item 5 of Citation No. 1 Docket No. 90-0191: Item 3a of Citation No. 2
3b	§ 1926.651(s)	Affirmed	Docket No. 90-0191: Item 3b of Citation No. 2
4[12]	§ 1926.302(b)(1)	Vacated	See Footnote
5	§ 1926.650(f)	Affirmed	Docket No. 90-0050: Item 11 of Citation No. 1 Docket No. 90-0191: Item 4 of Citation No. 2
6	§ 1926.651(i)(1)	Affirmed	Docket No. 90-0050: Item 12 of Citation No. 1 Docket No. 90-0191: Item 5 of Citation No. 2
7	§ 1926.652(h)	Affirmed	Docket No. 90-0050: Item 13 of Citation No. 1 Docket No. 90-0191: Item 6 of Citation No. 2

(5) Docket No. 90-0771

The citations in this case arose from an inspection of Catapano's worksite at the intersection of Eighth Avenue and Forty-third Street on November 3, 1989.

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12 This alleged violation has not been previously addressed. Section 302(b)(1) provides:

> Pneumatic power tools shall be secured to the hose or whip by some positive means to prevent the tool from coming accidentally disconnected.

The Secretary charged that employees using a jackhammer to break up concrete did not have the hose secured to prevent its accidental disconnection on October 20, 1989. Ruggiero testified that all of Catapano's small tools are equipped with a quick disconnect fitting that serves as a whip check. The whip check prevents air from coming out of the hose. If there were a disconnect, the hose would not cause a whipping effect (Oringer Tr. 2570-2572). The Secretary has failed to establish a violation.

Citation No. 1 (Serious)

Item	Standard	Disposition	Reference
1	§ 1926.302(b)(1)	Vacated	Docket No. 90-0193: Item 4 of Citation No. 2
2[13]	§ 1926.450(a)(1)	Affirmed	Docket No. 90-0050: Item 13 of Citation No. 1 Docket No. 90-0191: Item 6 of Citation No. 2
3	§ 1926.651(i)(1)	Affirmed	Docket No. 90-0050: Item 12 of Citation No. 1 Docket No. 90-0191: Item 5 of Citation No. 2

Citation No. 2 (Willful)

Item	Standard	Disposition	Reference
1[14]	§ 1926.651(c)	Vacated	Docket No. 90-0050: Item 2 of Citation No. 2
2	§ 1926.652(b)	Affirmed	Docket No. 90-0050 Item 3 of Citation No. 2 Docket No. 90-0191: Item 2 of Citation No. 1

(6) Docket No. 90-0772

The inspection that gave rise to the citations under this docket number occurred on November 6, 1989, at the intersection of Eighth Avenue and Fifty-seventh Street.

Citation No. 1 (Serious)

Item	Standard	Disposition	Reference
1[15]	§ 1926.20(b)(1)	Affirmed	(Docket No. 90-0050:

[13] See paragraph 4(b) of Agreed Statement of Facts.

[14] See Footnote at Docket No. 90-0190, item 2 of Citation No. 1

[15] Items 1 and 2 are addressed by paragraph 4(c) of the Agreed Statement of Facts, which provides:

> 29 C.F.R. §§ 1926.20(b)(1) and 1926.20(b)(2). An alleged violation of each of those standards appears in the Docket No. 90-0772 case and no others. That case also includes a citation alleging a violation of a similar standard, § 1926.21(b)(2), which was also tried in the

(continued...)

2	§ 1926.20(b)(2)	Affirmed	(Item 2 of Citation No. 1 (Docket No. 90-0191: (Item 1 of Citation No. 2
3	§ 1926.21(b)(2)	Affirmed	(
4	§ 1926.28(a)	Affirmed	Docket No. 90-0050: Item 3 of Citation No. 1 Docket No. 90-0191: Item 2 of Citation No. 2
5	§ 1926.100(a)	Affirmed	Docket No. 90-0050: Item 1 of Citation No. 2 Docket No. 90-0191: Item 1 of Citation No. 1
6[16]	§ 1926.450(a)(9)	Affirmed	Docket No. 90-0050: Item 13 of Citation No. 1 Docket No. 90-0191: Item 6 of Citation No. 2
7	§ 1926.650(f)	Affirmed	Docket No. 90-0050: Item 11 of Citation No. 1 Docket No. 90-0191: Item 4 of Citation No. 2
8	§ 1926.651(s)	Affirmed	Docket No. 90-0191: Item 3b of Citation No. 2

Citation No. 2 (Willful)

Item	Standard	Disposition	Reference
1	§ 1926.652(b)	Affirmed	Docket No. 90-0050: Item 3 of Citation No. 2 Docket No. 90-0191: Item 2 of Citation No. 1

Citation No. 3 ("Other")

Items 1 and 2 of this citation are addressed by paragraph 4(d) of the Agreed Statement of Facts, which provides:

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[15](...continued)
Docket Nos. 90-0050 and 90-0191 cases. The parties agree that the same evidence as that heard by the Commission for the § 1926.21(b)(2) allegations in the said two cases shall also be considered for the § 1926.20(b)(1) and § 1926.20(b)(2) allegations.

[16] See paragraph 4(b) of the Agreed Statement of Facts.

29 C.F.R. § 1904.2(a) and § 1904.4. Those regulations at issue in Docket Nos. 90-0772 and 91-0026 require the keeping of records on recordable occupational injuries and illnesses. Respondent supplied records in response to an administrative subpoena (reference: exhibits C-24 and C-25, Docket No. 90-0050). The parties agree that the decision on these allegations shall be based upon exhibit C-32 in Docket No. 90-0772 together with the testimony of record in Docket No. 90-0772.

Sections 1904.2(a) and (b) provide:

(a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensive to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

(b) Any employer may maintain the log of occupational injuries and illnesses at a place other than the establishment or by means of data-processing equipment, or both, under the following circumstances:

(1) There is available at the place where the log is maintained sufficient information to complete the log to a date within 6 working days after receiving information that a recordable case has occurred, as required by paragraph (a) of this section.

(2) At each of the employer's establishments, there is available a copy of the log which reflects separately the injury and illness experience of that establishment complete and current to a date within 45 calendar days.

Section 1904.4 provides:

In addition to the log of occupational injuries and illnesses provided for under § 1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and

Health Administration Form OSHA No. 101. Workmen's compensation, insurance, or other reports are acceptable alternative records if they contain the information required by Form OSHA No. 101. If no acceptable alternative record is maintained for other purposes, Form OSHA No. 101 shall be used or the necessary information shall be otherwise maintained.

Exhibit C-32 of Docket No. 90-0772 is a computer print-out of Catapano's injury and illness and worker compensation records. This document appears to contain all the data required by the cited standards. The Secretary has failed to establish a violation of either of the cited recordkeeping standards.

Item	Standard	Disposition
1	§ 1904.2(a)	Vacated
2	§ 1904.4	Vacated

(7) Docket No. 91-0026

The citations issued under this docket number arose out of an inspection conducted on October 25, 1990, at the intersection of Eighth Avenue and Forty-third Street.

Citation No. 1 (Serious)

Item	Standard	Disposition	Reference
1	§ 5(a)(1)	Affirmed	Docket No. 90-0050: Item 1 of Citation No. 1
2	§ 1926.100(a)	Affirmed	Docket No. 90-0050: Item 1 of Citation No. 2 Docket No. 90-0191: Item 1 of Citation No. 1

The alleged violations in Docket No. 91-0026 occurred after the standards in Subpart P were revised. This revision changed the wording of the following three § 1926.651 standards. Revised § 1926.651(c)(2) is the same as § 1926.652(h) allegations in the previous case. Paragraph 3(c) of the Agreed Statement of Facts provides that the revised § 1926.652(a)(1) standard shall be treated the same as the § 1926.652(b) allegations in the two litigated cases.

With regard to item 4 of Docket No. 91-0026, § 1926.651(c)(2) is designed to protect employees working in excavations from hazards associated with water accumulation. No

comparable citation was at issue in Docket Nos. 90-0050 and 90-0191, and no provision was made for this item in the Agreed Statement of Facts. There is no basis for finding a violation of this standard. Therefore, it must be vacated.

Item	Standard	Disposition	Reference
3	§ 1926.651(c)(2)	Affirmed	Docket No. 90-0050: Item 13 of Citation No. 1 Docket No. 90-0191: Item 6 of Citation No. 2
4	§ 1926.651(h)(1)	Vacated	
5	§ 1926.652(a)(1)	Affirmed	Docket No. 90-0050: Item 3 of Citation No. 2 Docket No. 90-0191: Item 2 of Citation No. 1

Citation No. 2 ("Other")

Item	Standard	Disposition	Reference
1	§ 1904.2(a)	Vacated	Docket No. 90-0772: Item 1 of Citation No. 3

PENALTY DETERMINATION

> Section 17(j) of the Act, 29 U.S.C. § 666(j), requires the Commission when assessing penalties, to 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.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*. 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation 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. *J. A. Jones,* 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

Hern Iron Works, Inc., 16 CCH OSHC 1297, 1994 CCH OSHD ¶ 30,155 (No. 88-1962, 1994).

Based on the extensive record and upon consideration of the relevant factors, it is the court's opinion that maximum penalties should be imposed in these cases. There can be no doubt that the gravity factor was high with regard to the serious and willful charges. Many

of respondent's employees were exposed to serious injury and/or life threatening hazards on frequent occasions and for extensive periods of time. Likewise, Catapano does not qualify for penalty reductions due to size, good faith or previous history. Accordingly, a penalty of $1,000.00 will be assessed for each item affirmed as serious and a penalty of $10,000.00 will imposed for each item affirmed as willful. Respondent is fortunate that the violations occurred before the effective date of amendments to the Act which increased penalties sevenfold. *See* 29 U.S.C. § 666(a) and (c) as amended, Pub. Law 101-508, Title III, § 3101, 104 Stat. 1388-29 (1990). The Secretary seeks no penalties for the "other" violations which were affirmed and none will be imposed.[17] The penalties for each specific case are set forth in the following order.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that the items of the citations of the nine docket numbers be disposed of as follows:

Docket No. 90-0050

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 5(a)(1)	Affirmed	$ 1,000.00
2	§ 1926.21(b)(2)	Affirmed	$ 1,000.00
3	§ 1926.28(a)	Affirmed	$ 1,000.00
4	§ 1926.152(9a)(1)	Vacated	--
5	§ 1926.202	Vacated	--
6	§ 1926.350(a)(1)	Vacated	--
7	§ 1926.350(a)(7)	Affirmed	$ 1,000.00
8	§ 1926.351(a)(9)	Affirmed	$ 1,000.00
9	§ 1926.350(f)(7)	Affirmed	$ 1,000.00
10	§ 1926.350(j)	Vacated	---
11	§ 1926.650(f)	Affirmed	$ 1,000.00
12	§ 1926.651(i)(1)	Affirmed	$ 1,000.00
13	§ 1926.652(h)	Affirmed	$ 1,000.00

[17] Nominal penalties were proposed in Docket Nos. 90-0772 and 91-0026 relative to alleged violations of 29 C.F.R. § 1904 (recordkeeping). These charges, however, were vacated for failure of proof.

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.100(a)	Affirmed	$10,000.00
2	§ 1926.652(a)	Vacated	---
3	§ 1926.652(b)	Affirmed	$10,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	$ - 0 -
2	§ 1926.59(g)(1)	Affirmed	$ - 0 -
3	§ 1926.59(h)	Affirmed	$ - 0 -

Docket No. 90-0191

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.100(a)	Affirmed	$10,000.00
2	§ 1926.652(b)	Affirmed	$10,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.21(b)(2)	Affirmed	$ 1,000.00
2	§ 1926.28(a)	Affirmed	$ 1,000.00
3a	§ 1926.202	Vacated	---
3b	§ 1926.651(s)	Affirmed	$ 1,000.00
4	§ 1926.650(f)	Affirmed	$ 1,000.00
5	§ 1926.651(i)(1)	Affirmed	$ 1,000.00
6	§ 1926.652(h)	Affirmed	$ 1,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	$ - 0 -
2	§ 1926.59(g)(1)	Affirmed	$ - 0 -
3	§ 1926.59(h)	Affirmed	$ - 0 -

Docket No. 90-0189

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.652(h)	Affirmed	$10,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 5(a)(1)	Affirmed	$ 1,000.00
2	§ 1926.21(b)(2)	Affirmed	$ 1,000.00
3a	§ 1926.202	Vacated	---
3b	§ 1926.651(s)	Affirmed	$ 1,000.00
4	§ 1926.651(i)(1)	Affirmed	$ 1,000.00
5	§ 1926.652(h)	Affirmed	$ 1,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	$ - 0 -
2	§ 1926.59(g)(1)	Affirmed	$ - 0 -
3	§ 1926.59(h)	Affirmed	$ - 0 -
4	§ 1926.450(a)(9)	Affirmed	$ - 0 -
5	§ 1926.450(a)(10)	Affirmed	$ - 0 -

Docket No. 90-0190

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.100(a)	Affirmed	$10,000.00
2	§ 1926.651(c)	Vacated	---

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.21(b)(2)	Affirmed	$ 1,000.00
2	§ 1926.350(j)	Vacated	---
3	§ 1926.651(i)(1)	Affirmed	$ 1,000.00
4	§ 1926.651(y)	Affirmed	$ 1,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	$ - 0 -
2	§ 1926.59(g)(1)	Affirmed	$ - 0 -
3	§ 1926.59(h)	Affirmed	$ - 0 -

Docket No. 90-0192

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.100(a)	Affirmed	$10,000.00
2	§ 1926.652(a)	Vacated	---

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.21(b)(2)	Affirmed	$ 1,000.00
2	§ 1926.28(a)	Affirmed	$ 1,000.00
3	§ 1926.152(a)(1)	Vacated	---
4a	§ 1926.202	Vacated	---
4b	§ 1926.651(s)	Affirmed	$ 1,000.00
5	§ 1926.651(i)(1)	Affirmed	$ 1,000.00
6	§ 1926.652(h)	Affirmed	$ 1,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1926.59(e)(1)	Affirmed	$ - 0 -
2	§ 1926.59(g)(1)	Affirmed	$ - 0 -
3	§ 1926.59(h)	Affirmed	$ - 0 -
4	§ 1926.450(a)(9)	Affirmed	$ - 0 -
5	§ 1926.450(a)(10)	Affirmed	$ - 0 -

Docket No. 90-0193

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.652(b)	Affirmed	$10,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.21(b)(2)	Affirmed	$ 1,000.00
2	§ 1926.28(a)	Affirmed	$ 1,000.00

3a	§ 1926.202	Vacated	---
3b	§ 1926.651(s)	Affirmed	$ 1,000.00
4	§ 1926.302(b)(1)	Vacated	---
5	§ 1926.650(f)	Affirmed	$ 1,000.00
6	§ 1926.651(i)(1)	Affirmed	$ 1,000.00
7	§ 1926.652(h)	Affirmed	$ 1,000.00

Docket No. 90-0771

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.302(b)(1)	Vacated	---
2	§ 1926.450(a)(10)	Affirmed	$ 1,000.00
3	§ 1926.651(i)(1)	Affirmed	$ 1,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.651(c)	Vacated	---
2	§ 1926.652(b)	Affirmed	$10,000.00

Docket No. 90-0772

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.20(b)(1)	Affirmed	$ 1,000.00
2	§ 1926.20(b)(2)	Affirmed	$ 1,000.00
3	§ 1926.21(b)(2)	Affirmed	$ 1,000.00
4	§ 1926.28(a)	Affirmed	$ 1,000.00
5	§ 1926.100(a)	Affirmed	$ 1,000.00
6	§ 1926.450(a)(9)	Affirmed	$ 1,000.00
7	§ 1926.650(f)	Affirmed	$ 1,000.00
8	§ 1926.651(s)	Affirmed	$ 1,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.652(b)	Affirmed	$10,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1904.2(a)	Vacated	---
2	§ 1904.4	Vacated	---

Docket No. 91-0026

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 5(a)(1)	Affirmed	$ 1,000.00
2	§ 1926.100(a)	Affirmed	$ 1,000.00
3	§ 1926.651(c)(2)	Affirmed	$ 1,000.00
4	§ 1926.651(h)(1)	Vacated	---
5	§ 1926.652(a)(91)	Affirmed	$ 1,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1904.2(a)	Vacated	---

TOTAL PENALTIES ASSESSED: $ 148,000.00

EDWIN G. SALYERS
Judge

Date: May 26, 1994