



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, :
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 Complainant, :
 :
 v. :
 :
 P. GIOIOSO & SONS, INC., :
 :
 Respondent. :

OSHRC DOCKET NO. 09-2018

Appearances: Paul J. Katz, Esquire
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Matthew Watsky, Esquire
Dedham, Massachusetts
For the Respondent.

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On July 10, 2009, the Occupational Safety & Health Administration (“OSHA”) inspected a work site of Respondent, P. Gioioso & Sons, Inc. (“PGS”). The job site was located in Boston, Massachusetts, and PGS employees were performing excavation work in order to install water service lines. As a result, on November 4, 2009, OSHA issued PGS a two-item “serious” citation and a one-item “repeat” citation. The citation items allege, respectively, that PGS did not provide a ladder or other suitable means of egress in an excavation 68 inches deep, that the excavation was not inspected by a competent person prior to employee entry, and that employees in the excavation were not protected from the hazard of cave-ins. Respondent contested the citations and the proposed penalties. The hearing in this matter was held in Boston, Massachusetts, on June 2, 2010. Both parties have filed post-hearing briefs, and PGS has filed a reply brief.

The OSHA Inspection

Sean Henrikson is the OSHA compliance officer (“CO”) who inspected the work site.¹ On July 10, 2009, as he was walking to work, he observed some trenches with employees in them. He went to his office and told his supervisor what he had seen. His supervisor told him to call the OSHA office in Braintree, Massachusetts, which had jurisdiction over the site. The CO did so and was told that that office had no one available. The CO’s supervisor asked the CO to perform the inspection himself.² Upon returning to the site, CO Henrikson saw an employee climbing out of a trench. The trench appeared to be about 6 feet deep, and there was no protection in it. No one else was in the trench, and, as it was around noon, the CO concluded everyone was at lunch. The CO went to lunch himself and then returned to the site. He went back to the same trench, and no one was in it. He saw a second trench nearby, and he observed an employee climb out of the east end of that trench. The employee then got into an orange PGS dump truck and drove away. There was no one else in the second trench, so the CO walked around the area. He saw two other trenches without employees in them. The CO then went back to the second trench. He saw one employee standing alongside the trench and another digging with a shovel in the east end of the trench. The trench was up to the top of the employee’s head. The walls were vertical, and there was no protection in the trench.³ The CO identified himself and then asked the employee to exit the trench. The employee did so by stepping onto an electrical duct bank near the east end. The employee identified himself as Jose Ourique. He told the CO he was the foreman at the site. (Tr. 55-67, 70, 76-80).

Joseph Zenga, the superintendent for PGS at the site, arrived about five minutes later, and the CO held an opening conference with him. Mr. Zenga told the CO he had not inspected the trench or measured it before employees entered it. The CO spoke to Mr. Ourique, who said he had been looking for the water line in the trench. Mr. Ourique told the CO he was not the “competent person”

¹The CO is currently a health and safety specialist in the regional office. July 10, 2009, was his first day in that job. Before then, he had been an OSHA CO for three years. (Tr. 55-62).

²Under OSHA’s National Emphasis Program on trenches, an OSHA CO who observes an excavation site is required to advise his office, and, if assigned, to inspect the site. (Tr. 60-61).

³The CO took one photo of the employee in the trench. He took two more photos of the trench after the employee had climbed out. (Tr. 77-78, 81-83; C-1-3).

at the site and that he had not measured the trench. The CO also spoke to Gregory Perreira, the PGS equipment operator who had been standing alongside the trench when the CO first saw him. Mr. Perreira said Mr. Zenga came by the trench about every 20 to 30 minutes, or six to eight times a day. He also said that Mr. Zenga had been by the trench at lunchtime, that Mr. Ourique had been in the trench then, and that Mr. Zenga had said nothing to Mr. Ourique or anyone else about trench protection. Mr. Perreira stated that Robert Bruni was the employee the CO had seen exiting the trench and that Mr. Bruni had been in the trench “helping out.” Mr. Perreira further stated that he himself had been in the shallow end of the trench. (Tr. 66-67, 80-88).

The CO measured the trench to be 20 feet, 6 inches long, and 68 inches deep in the east end, which was the deepest end. The width of the trench was 51 inches. The CO saw a trench box at the site, but it would not have fit due to the various utility lines in the trench. The trench could have been shored, but there were no shoring materials at the site. The CO determined the soil in the trench was a gravelly sand type of soil that had been previously disturbed. He also saw evidence the soil had been sloughing from the side walls of the east end. He concluded that all of these conditions, plus the vibrations caused by the construction and other vehicles in the area, made the trench more susceptible to cave-ins. He recommended the issuance of the citations. (Tr. 67-74, 81).

The Parties’ Stipulations

The parties’ stipulations were received in evidence as Exhibit J-1. The stipulations are summarized as follows:

The parties agree that the Commission has jurisdiction in this matter, that PGS is an employer within the meaning of the Act, and that PGS employees were performing trenching work at the subject site. The east end of the cited trench was 68 inches deep, and Mr. Ourique was hand-digging to find the “corporation valve” to which the new water service pipe was to be attached. The soil in the trench had been previously disturbed, and it was Type C soil. There was no protection in the trench. A trench box was on site but would not fit in the trench. Shoring materials were available nearby but were not used at the site. Mr. Ourique told the CO that he knew the rule that required the use of shoring in such a trench. PGS had been cited previously for violations of 29 C.F.R. 1926.652(a)(1) on several occasions. These citations had become final orders before January 1, 2009. PGS employed an average of about 130 employees in the years 2008 and 2009.

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must demonstrate: (1) that the cited standard applies, (2) that there was a failure to comply with the standard, (3) that employees had access to the violative condition, and (4) that the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The Secretary contends she has met her burden of proof with respect to all three of the citation items. PGS, however, contends the Secretary has not met her burden of proof as to any of the items. It asserts the repeat citation was improper as it was not issued in accordance with OSHA's Field Operations Manual ("FOM"). It further asserts that any violations of the cited standards were due to unpreventable employee misconduct.

Whether the Repeat Citation was Improper

PGS asserts the repeat citation was improper because, contrary to the FOM, it did not inform PGS of the predicate violation that formed the basis of the repeat classification. PGS is correct that the FOM states that a repeat citation should "ensure that the cited employer is fully informed of the previous violations setting a basis for the repeated citation" by containing certain information about the prior violation. *See* FOM, Chapter 4, § VII, ¶ G.5, pp. 4-35 and 4-36. PGS contends that, as the citation was not issued as required, it should be dismissed. R. Brief, pp. 22-23. I disagree.

As the Secretary notes, the Commission has long held that the FOM does not create rights for employers. *See FMC Corp.*, 5 BNA OSHC 1707, 1710 (No. 13155, 1977). *See also Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009-10 (No. 89-1366, 1993). As she also notes, it is clear that PGS has not been prejudiced by the failure to set out the previous violation that formed the basis of the citation's repeat classification. S. Brief, p. 29. The CO testified he ran a check of PGS's history in OSHA's IMIS system to develop C-4, a list of all of PGS's prior violations of 29 C.F.R. 1926.652(a), the same standard cited here. He further testified that a 2006 inspection was the basis of the repeat citation here.⁴ (Tr. 88-103). C-4 includes the 2006 inspection. C-4 is also the same list

⁴According to the CO, the 2006 citation resulted from an inspection on October 30, 2006. That citation, which alleged a violation 29 C.F.R. 1926.652(a), was itself a repeat citation. The 2006 citation was resolved by an informal settlement agreement and is a final order. (Tr. 100-03). PGS acknowledged this was so in its response to the Secretary's Interrogatory No. 20, noting it had agreed to an "other" classification and a reduced penalty in order to avoid litigation. *See* C-6,

of violations that is referred to as “Attachment #1” in J-1, ¶ 8. In J-1, ¶ 8, PGS stipulated it had been cited and had paid penalties by settlement agreement for violations of 29 C.F.R. 1926.652(a)(1) on several occasions. Attachment #1 shows PGS had committed 17 prior violations of the cited standard from 1990 to 2006. The prior violations became final orders before 2009. The parties signed J-1 on May 18, 2010, two weeks before the hearing in this case. PGS’s assertion is rejected.

PGS also asserts that the repeat citation is invalid as it states that three rather than two employees were exposed to the hazard of cave-ins in the unprotected trench. It notes that the FOM mandates the amendment to or withdrawal of a citation when information is presented to OSHA indicating the need for such action, such as an incorrect description of the alleged violation. *See R. Brief*, p. 23. The CO agreed the number of employees was incorrect, and he did not know why the citation referred to three and not two employees. He said that it could have been a “typo” made by the office that issued the citation. (Tr. 127-28). As noted in the preceding paragraph, the FOM does not create rights for employers. Further, the error in the citation is plainly not significant enough to justify a finding that the citation is invalid. The CO clearly testified at the hearing that the citation was based upon two employees, Mr. Bruni and Mr. Ourique, being in the deep end of the cited trench without protection. (Tr. 63-67, 80). In addition, PGS had notice of the Secretary’s allegation that two employees were exposed to the cited hazard before the hearing.⁵ PGS’s assertion is rejected.

Repeat Citation 2, Item 1

This item alleges a violation of 29 C.F.R. 1926.652(a)(1), which provides as follows:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system ... except when: ... [e]xcavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The CO’s testimony, which is summarized above, was that two employees were in the 68-inch-deep end of the trench without any protection on July 10, 2009. The CO saw Mr. Bruni exit that end of the trench shortly before 1 p.m., and he saw Mr. Ourique working in that end of the trench at

Respondent’s Answers to Complainant’s Interrogatories, dated February 16, 2010.

⁵*See* Secretary’s motion to amend the parties’ stipulations; it is dated May 26, 2010, and is attached to J-1. PGS did not oppose the motion, and it was granted at the hearing. (Tr. 9-12).

about 1:00 p.m. (Tr. 63-70, 80, 139; C-1). It is undisputed that the east end of the trench was 68 inches deep, that Mr. Ourique was hand-digging in that end of the trench, and that the trench was unprotected. It is also undisputed that the soil in the trench was Type C soil that had been previously disturbed. *See* J-1. PGS does dispute, however, that Mr. Bruni worked in the deep end of the trench. It also disputes that it violated the cited standard, in that Mr. Ourique's actions that day were due to unpreventable employee misconduct ("UEM").

In regard to Mr. Bruni, the CO testified that he saw him climb out of the east end of the trench from about 50 yards away. (Tr. 119-20). PGS suggests that the CO could not tell from that distance from which end an employee exited the trench. R. Brief, p. 4. I agree with the Secretary that, from 50 yards away, the CO could in fact have seen from which end an employee exited a 20-foot trench. S. Brief, p. 11. PGS also suggests that the trench was dug deeper between the time the CO saw Mr. Bruni and when he saw Mr. Ourique in the trench, which was about ten minutes later. (Tr. 140-42). The CO testified, however, that the excavator was in the same place when he came back and that there was no spoils pile by the trench to indicate further digging.⁶ (Tr. 141).

The CO further testified that Mr. Perreira told him that Mr. Bruni was the person the CO had seen exiting the trench and that Mr. Bruni had been in the trench "helping out." (Tr. 65, 80). Both Mr. Perreira and Mr. Ourique testified that Mr. Bruni had not been in the deep end of the trench. (Tr. 21, 42, 48). I observed the demeanor of these two witnesses, including their facial expressions and their body language. It was apparent from their demeanor, and from their testimony, that these two witnesses were less than reliable and that their statements were intended to help their employer.

Mr. Perreira, for example, testified he never spoke with PGS about what happened on July 10, 2009. He also testified he thought the trench was right around 5 feet deep and that he did not believe it was over Mr. Ourique's head. He did not recall telling the CO the trench was about 60 inches deep. He also did not recall what he said when the CO asked how often Mr. Zenga came to the site. He then stated that he "may have" told the CO that Mr. Zenga came by every 20 to 30 minutes, but that if he did, it wasn't true. Finally, he did not recall the CO asking about Mr. Zenga

⁶Mr. Perreira and Mr. Ourique both indicated that the trench was dug deeper between the time that Mr. Bruni was in it and when Mr. Ourique was in it. Their testimony in this regard is not credited, for the reasons set out below. (Tr. 32-33, 47-48).

being at the site when Mr. Ourique was in the trench. (Tr. 19-20, 23-28). Similarly, Mr. Ourique testified he was a competent person and that he recalled the CO asking if he was a competent person; he did not recall his response to the CO, however. He also testified that he did not know the trench's depth or realize it was over 5 feet deep, even with his ten years of experience in trenching work. Mr. Ourique agreed that he knew that Mr. Zenga could have come by at any time to check on the work. He denied that Mr. Zenga had come by when he was in the trench. (Tr. 38-42, 53-54).

I also observed the demeanor of CO Henrikson on the witness stand, and I found him to be a credible and convincing witness. For this reason, and based on my finding above that Mr. Perreira and Mr. Ourique were not reliable witnesses, the CO's testimony is credited to the extent that their testimony conflicts with his.⁷ I find, accordingly, that Mr. Bruni was in the deep end of the trench and that the CO observed him exiting the trench from that end.

As to Mr. Ourique, there is no dispute, as noted above, that he was working in the deep end of the trench when the CO observed him. As also noted above, PGS contends that it did not violate the cited standard because Mr. Ourique's actions that day were due to UEM. As the Secretary points out, the First Circuit has set out the elements the employer must show to prove an asserted UEM defense. That is, the employer must show that it: (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring; (2) adequately communicated the rule to its employees; (3) took steps to discover incidents of noncompliance; and (4) effectively enforced the rule whenever employees transgressed it. *P. Gioioso & Sons v. OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997). *See also Modern Cont'l, Inc., v. OSHRC*, 305 F.3d 43, 51 (1st Cir. 2002). PGS's asserted UEM defense fails, for a number of reasons.

⁷Two other employees of PGS testified in this case, that is, John Condlin, PGS's safety director, and Joseph Zenga, PGS's superintendent at the site. I observed the demeanor of these two witnesses as they testified. Some of their testimony was believable, but, in other respects, I found them to be less than trustworthy witnesses. It was evident that many of their statements were made to assist PGS in this matter. To the extent their testimony is contrary to that of the CO, the CO's testimony will be credited.

PGS presented evidence that it had established rules to prevent the cited conditions; the record, however, shows that two employees at the site had violated the rules.⁸ Specifically, Mr. Bruni and Mr. Ourique were working in the 68-inch-deep end of the trench without any protection, there was no access ladder in the trench, and no one had measured the trench's depth. That two employees were working in violation of PGS's trenching rules, and that one of them was a foreman at the site, supports a conclusion that PGS has not met its burden of proof in regard to its asserted UEM defense.⁹ (Tr. 37, 66).

PGS also presented evidence that it had communicated the rules to its employees. Mr. Condlin, PGS's safety director, testified about the tool box talks that are held at job sites and the safety meetings that are held in the office for foremen and supervisors. He identified R-6 as a copy of a tool box talk he held at the subject site on July 2, 2009, and R-5 as a copy of a safety meeting he and Frank Gioioso, PGS's CEO, held in the office on June 4, 2009. According to Mr. Condlin's testimony, Mr. Ourique attended both of the meetings, and both meetings addressed trenching safety. (Tr. 156-58, 172-75, 181-85, 188-91). Despite attending the meetings, however, Mr. Ourique did not follow PGS's rules on July 10, 2009.

In regard to taking steps to discover incidents of noncompliance, Mr. Condlin testified he makes visits to sites to ensure the crews are complying with OSHA requirements. Some of his visits are unannounced, and some of the unannounced visits are with a representative of PGS's insurer. (Tr. 156-57, 171). Mr. Zenga indicated he visited the subject site twice on July 10, 2009. (Tr. 213-14). Based on what Mr. Perreira told the CO, Mr. Zenga came by the subject site and saw Mr. Ourique working in the trench at lunchtime on July 10, 2009. Mr. Zenga said nothing to Mr. Ourique or anyone else about trench protection. (Tr. 87-88). Although Mr. Ourique and Mr. Zenga denied this had occurred, the CO's testimony about what Mr. Perreira said is credited. (Tr. 41-42, 211-12).

⁸PGS presented R-1, a single page captioned "Excavation Procedures and Accident Investigation." Under the excavation procedures section, No. 4 states: "Trench boxes/shoring shall be used in all excavations 5 feet and over deep regardless of conditions. * Access ladders will be placed inside trench boxes and within 25 feet of employee working in the trench."

⁹Mr. Ourique and Mr. Condlin, PGS's safety director, testified that Mr. Ourique was a competent person. (Tr. 38, 158-59). The CO's testimony, that Mr. Ourique told him he was not, is credited; the CO learned Mr. Zenga was the competent person at the site. (Tr. 81, 86,145).

As to effectively enforcing the rules when employees transgress them, Mr. Condlin testified about R-2, PGS's discipline policy. He said that when he observes an employee violating a work rule, the employee is held accountable. He issues a verbal warning for a first offense and a written warning for a second offense.¹⁰ Records are kept of the warnings. Mr. Condlin noted that Mr. Ourique was suspended for five days without pay after the cited incident and that since then, his performance has improved. Mr. Condlin described a recent incident in which Mr. Ourique got his crew out of a trench until it could be shored. Mr. Condlin also noted another recent incident, in which three employees who had received prior verbal and written warnings for not wearing their hard hats were sent home for half a day without pay for a third infraction. Since then, those employees have worn their hard hats. Finally, Mr. Condlin described the annual safety award that is given to the crew with the best safety record for that year. (Tr. 162-70). Mr. Condlin agreed, however, that Mr. Ourique had violated three rules on July 10, 2009, that is, he did not measure the trench, there was no ladder in the trench, and the trench was unprotected. He also agreed that Mr. Ourique was aware Mr. Zenga could have shown up at any time. Mr. Condlin conceded that Mr. Zenga was not disciplined for the cited incident or for another incident that occurred on April 24, 2009.¹¹ There, two OSHA CO's saw PGS employees working outside of a trench box that was in a 6-foot-deep trench. Mr. Zenga was the superintendent at that site. (Tr. 193-96).

Although the foregoing is sufficient to dispose of PGS's defense, one further issue should be addressed. As the Secretary notes, the First Circuit examined PGS's UEM defense over ten years ago in *P. Gioioso & Sons v. OSHRC*, 115 F.3d 100 (1st Cir. 1997). After setting out the four elements that PGS had to prove, the Court indicated that presenting documentary evidence was crucial. As to the second element, the Court noted that while testimony about distributing safety manuals and holding tool box talks and safety meetings was some evidence, it should have been supported by documentation. The Court also noted that without documentation showing the contents of safety talks and

¹⁰R-2, a one-page document, sets out the following: a verbal warning for a first offense, warning letters for second and third offenses (with possible suspension or termination for the third offense), and immediate termination for a fourth offense. R-2 indicates that records are kept of all disciplinary actions.

¹¹There was no evidence that Mr. Bruni, who did not testify in this case, was disciplined.

attendance records, “[PGS] cannot persuasively argue that it effectively communicated the rules to its employees.” *Id* at 110. As to the third and fourth elements, the Court stated that:

The ALJ found most compelling the lack of any substantial evidence in the record that the petitioner effectively enforced its safety program. It provided no evidence of unscheduled safety audits or mandatory safety checklists, and no documentation that it ever executed its four-tiered disciplinary policy. This lacuna in the proof undermines its attempt to mount a viable UEM defense. *Id.* (Citations omitted).

The Court accordingly dismissed PGS’s petition for review.

PGS presented some documentary evidence in support of its UEM defense in this case. It presented R-1 as evidence of its trenching rules, and R-6 and R-5 as evidence of a tool box talk and a safety meeting, respectively, that took place. R-6 is captioned “Trenches/Excavation/Shoring,” and it sets out various items for discussion. R-6 shows 19 employees, including Mr. Ourique, as having signed the list of attendees. R-6 is not dated, but Mr. Condlin testified he held that meeting on July 2, 2010. R-5 is captioned “Safety Committee Meeting,” and the subject for discussion was “Back to Work Safety – OSHA Priorities: Fall Protection & Trenching.” R-5 is dated June 4, 2009, and it has a list of employees with checkmarks by the names of those who in fact attended; Mr. Ourique was one of the attendees. Mr. Condlin testified in some detail about what the meeting covered, including trenching matters.¹² (Tr. 172-75, 181-85). Mr. Condlin admitted, however, that he did not have with him copies of other tool box talks held at PGS work sites or copies of agendas of other safety meetings held in PGS’s office. (Tr. 196-97). I find that the evidence presented is insufficient to meet what the First Circuit has stated is required to show the second element of PGM’s UEM defense, that is, that PGS effectively communicated its trenching safety rules to employees.

I also find that the evidence presented is insufficient to show the third and fourth elements of the UEM defense. PGS did present R-2, a copy of its discipline policy. It did not present, however, any documentary evidence of the site visits that Mr. Condlin testified about. It also presented no documentary evidence of enforcement of its discipline policy, even though Mr. Condlin testified, and the policy itself indicates, that records of all disciplinary actions are maintained. *See* R-2. Mr. Condlin

¹²Mr. Condlin testified that Mr. Gioioso made the notations on R-5, but he did not know when Mr. Gioioso made the notations. R-5 was thus admitted to show only that the meeting was held, how attendance was taken, and who had actually attended. (Tr. 180-81).

admitted that he did not have with him any copies of the enforcement actions PGS had taken in the last year or two. (Tr. 191). I find, therefore, that the evidence presented is inadequate to meet what the First Circuit has set out as necessary to show that PGS took steps to discover incidents of noncompliance and that it effectively enforced the work rules when employees violated them.

Based on the record, PGS's UEM defense is rejected, and the alleged violation is affirmed.¹³ In addition, it is affirmed as a repeat violation. A violation is repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The record in this case shows that PGS committed 17 prior violations of the cited standard from 1990 to 2006 and that all of those violations were final orders before 2009. *See* J-1 and C-4. The record also shows that a 2006 repeat citation formed the specific basis of the subject citation. *See* footnote 4. The parties have stipulated to the previous violations of the cited standard. *See* J-1, C-4, and C-6.¹⁴

The Secretary has proposed a penalty of \$28,000.00 for this item. In assessing penalties, the Commission is to consider the gravity of the condition and the size, history and good faith of the employer. *See* section 17(j) of the Act. CO Henrikson testified that this item had high gravity, in that the condition could have resulted in death, and greater probability, in that cave-ins are common occurrences in excavation work. He noted that the trench was dug in a gravelly sand type of soil, that the soil had been previously disturbed, and that vibrations from the construction and other vehicles in the area made the trench more susceptible to a cave-in. The CO also testified that while PGS was given a 40 percent reduction in penalty due to its size, no reduction was given for history because it had had other serious violations within the previous three years. He noted that no credit was given for good faith; he asked Mr. Zenga for the company's safety program, and he never received it. He

¹³In rejecting PGS's UEM defense, I have considered all of the company's arguments. In particular, I have considered the Fifth Circuit case that PGS has cited in support of its claim that it has met its UEM defense. *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006). *See* R. Brief, p. 19. I do not agree that that case assists PGM in this matter. Regardless, Fifth Circuit precedent does not apply in this case, which arose in the First Circuit.

¹⁴PGS objects to C-4. R. Reply Brief, pp. 2-4. In doing so, it apparently overlooks J-1, the parties' stipulations. It also apparently overlooks its response to the Secretary's Interrogatory No. 20, set out in C-6. *See* footnote 4, *supra*.

further noted that this citation item was a “double repeat,” in that the previous 2006 citation had also been a repeat, which added a multiplication factor to the penalty. (Tr. 72-73, 100-03, 108-11). I find the proposed penalty appropriate. That penalty is accordingly assessed.

Serious Citation 1, Items 1 and 2

Item 1 of Citation 1 alleges a violation of 29 C.F.R. 651(c)(2), which states that:

A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

Item 2 of Citation 1 alleges a violation of 29 C.F.R. 1926.651(k)(1), which states that:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift....These inspections are only required when employee exposure can be reasonably anticipated.

The record in this case clearly shows that there was no ladder or other safe means of access or egress in the trench when the CO inspected it. (Tr. 84-85, 124-25). The record also shows that Mr. Zenga, the competent person at the site, had not inspected the trench prior to employee entry. (Tr. 85-86, 145). The employees exposed to these conditions were Mr. Bruni and Mr. Ourique. Mr. Zenga had actual knowledge of both conditions. He told the CO that he had not inspected the trench, and Mr. Perreira told the CO that Mr. Zenga had visited the site at lunchtime, when Mr. Ourique was in the trench. (Tr. 86-88). PGS’s UEM defense has been rejected, and it presented no other evidence to rebut the Secretary’s evidence. The alleged violations are therefore affirmed. They are affirmed as serious in light of the CO’s testimony. The CO testified that without a ladder or other safe means to enter or exit a trench, an employee could slip, fall, and be injured. He further testified that without an inspection by a competent person, an employee could be exposed to an unstable trench susceptible to a cave-in, which could cause serious injury or death. (Tr. 72-77, 81-86).

The Secretary has proposed a penalty of \$4,200.00 and \$1,500.00, respectively, for Items 1 and 2 of Serious Citation 1. The CO testified that Item 1 had high gravity and greater probability and that Item 2 had high gravity and lesser probability. PGS received a 40 reduction in penalty for its size,

but no reductions for history or good faith. (Tr. 107-10). I find that the proposed penalties are appropriate. Those penalties are accordingly assessed.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.651(c)(2), is AFFIRMED, and a penalty of \$4,200.00 is assessed.
2. Item 2 of Serious Citation 2, alleging a violation of 29 C.F.R. 1926.651(k)(1), is AFFIRMED, and a penalty of \$1,500.00 is assessed.
3. Item 1 of Repeat Citation 2, alleging a violation of 29 C.F.R. 1926.652(a)(1), is AFFIRMED, and a penalty of \$28,000.00 is assessed.

/s/

Covette Rooney
Judge, OSHRC

Date: September 7, 2010
Washington, D.C.