United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. TEXAS UNDERGROUND UTILITIES, INC., Respondent.	OSHRC Docket No. 20-1565

Appearances:

Carlton Jackson, Department of Labor, Office of Solicitor, Dallas, Texas,
For Complainant

Wayne Duncan, West Texas Safety Solutions, LLC, Spring, Texas,
For Respondent

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

DECISION AND ORDER

This matter is before the United States Occupational Safety and Health Review Commission (Commission) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (the Act). On October 6, 2020, while driving by a worksite, a Compliance Safety and Health Officer (CSHO) observed two workers inside a trench, which prompted an inspection of the worksite. As a result of that inspection, the Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty (Citation) to Respondent Texas Underground Utilities, Inc. (Texas Underground). The Citation alleges one serious violation, one repeat-serious violation, and one other-than-serious violation, with total proposed penalties of $26,718.00. Texas Underground timely contested the Citation.

The Chief Administrative Law Judge designated this matter for conventional proceedings, and a trial was held on June 27 and July 1, 2022, via Zoom videoconferencing. The following individuals testified: (1) CSHO Keith Thomkins; (2) Zach Draper, Construction Superintendent for the general contractor, Amtex Construction; (3) Julio Lugo, Owner of Texas Underground; and (4) Juan Diaz, Foreman for the project.

After the trial concluded, both parties timely filed post-trial briefs, which were considered by the Court in reaching its decision. Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. For the reasons discussed, Citation 1, Item 1 and Citation 3, Item 1, are vacated. Citation 2, Item 1 is affirmed.

II. Stipulations & Jurisdiction

The parties stipulated to several matters, including the jurisdiction of this Court over this proceeding and the parties before it. *See* Joint Stipulation Statement (J. Stip.) at 1. The parties submitted the Joint Stipulation Statement to the Court prior to trial and entered the stipulations into the record. (Tr. 10). The Court shall incorporate by reference the Joint Stipulations and refer to them as necessary in this decision.

III. Factual Background

On October 6, 2020, CSHO Thomkins drove past a construction site and observed two workers in a trench. (Tr. 20). He pulled over and took photographs from outside the site before entering. (Tr. 21). He presented his credentials to Mr. Draper and held an opening conference with Mr. Diaz. (Tr. 22). Jose Vera, the Superintendent for Texas Underground, was on site that day but did not speak with the CSHO. (Tr. 194, 305). The CSHO then proceeded to the trench, where he took measurements and photographs and conducted employee interviews. (Tr. 23). The excavation

work had started less than an hour before his arrival and was still in progress. (Tr. 338). Mr. Diaz told the CSHO that workers had been in the trench for 5 to 10 minutes before the CSHO arrived, although the CSHO believed they might have been in the trench longer because he saw evidence of ongoing work: a shovel, a hammer, and some busted concrete in the bottom of the excavation near the storm box. (Tr. 30-32).

A. Inspection of the Trench

The CSHO measured the length of the trench as 25 feet. (Tr. 36, Ex. C-6). The width of the trench floor was 3 feet (Tr. 93), and the width of the trench opening was 10 feet 3 inches (Tr. 51). A pipe inside the trench measured 20 feet long. (Tr. 36, 38, 40, Ex. C-6). A ladder rested along the trench's wall on the west end, and the angle of that ladder was approximately 75 degrees. (Tr. 39, 48; Ex. C-2, at 8). Also on the west end of the trench was a concrete box measuring approximately 3 feet long, 3 feet wide, and 3 feet high. (Tr. 38, 48, 299). The wall on the western end of the trench measured 7 feet deep, while other sections of the trench measured 4 ½ to 5 feet deep. (Tr. 35, 43, 47-48).

During his inspection, the CSHO noticed a section of concrete located approximately two feet below grade that protruded from the walls of the excavation. (Tr. 25; Ex. C-2, at 3). The concrete was not supported. (Tr. 25). A piece of metal rebar protruded from the concrete, and a metal trench flagpole rested alongside. (Tr. 29; Ex. 2, at 2; Ex. C-11, at 20). There was also a power saw near the flagpole at the opening of the trench. (Tr. 31). The concrete section was located 25 feet away from the storm box on the opposite end of the trench. (Ex. 2, at 3). When the CSHO asked Mr. Diaz about the concrete, Mr. Diaz explained the crew had discovered it while they were digging. (Tr. 33).

The excavation at issue was dug into Type B soil (J. Stip. at 11), and a "bench" was cut into the trench walls (Tr. 40).[1] Subpart P, Appendix B of 29 C.F.R. § 1926 sets forth the standards for using a benching system in excavations. (Tr. 52-53). Under the regulation, Type B soil should be benched or sloped to 45 degrees. (Tr. 53). Here, the CSHO measured the first wall of the bench (from the floor to the shelf) as 4 ½ feet to 5 feet high, depending on where the measurement was taken along the trench. (Tr. 39-40, 49, 50). At the top of the first wall of the bench was a shelf, which measured 2 feet wide.[2] (Tr. 40). The second wall of the bench (from the shelf to the surface) measured 2 feet high. (Tr. 49).

The CSHO based some of his measurements, such as the width of the trench floor and the dimensions of the storm box, on representations made by Mr. Diaz because the CSHO could not safely access the trench floor. (Tr. 93). The CSHO also admitted that some of his measurements were "approximates," meaning they were not down to the inch because trench walls and soil conditions vary. (Tr. 95-96).

B. Interviews with Employees

Once the CSHO finished measuring the trench, he interviewed Mr. Diaz without the assistance of an interpreter. (Tr. 359). Mr. Diaz shared the following information, which the CSHO documented on a form signed by Mr. Diaz:

1. Mr. Diaz has had trenching and excavation training, but not with Texas Underground.
2. Mr. Diaz did not know whether the other employees had received training.
3. A bench system was used because the trench was not deep enough for a trench box.
4. The concrete section was discovered once the crew started digging.
5. Hector Castillo and Miguel Sevilla were working in the trench for about 10 minutes before the CSHO inspector arrived.

[1] Benching allows sloping of the trench walls to avoid collapsing soil. (Tr. 60).
[2] The CSHO sometimes refers to the shelf as a step. (*See* Tr. 39).

(Tr. 322-28; Ex. C-9, at 1).

At trial, Mr. Diaz confirmed these statements were accurate but explained he did not understand what the form was other than an acknowledgement that the inspection occurred. (Tr. 321-28). He testified that his spoken English "is not perfect" and that he cannot read much English. (Tr. 320). He also stated that he was charged with ensuring the safety of his workers on site. (Tr. 294).

After speaking with Mr. Diaz, the CSHO interviewed Hector Castillo with the assistance of Mr. Fuentes, another worker who served as translator. (Tr. 72). Mr. Castillo stated he had been employed by Texas Underground for about a week and never received training. (Tr. 72).

C. Citation

The day after the inspection, the CSHO asked Texas Underground to provide training documentation or certifications, but Texas Underground did not respond to his request. (Tr. 73). When researching the company, the CSHO discovered that Texas Underground had been previously cited by OSHA for failure to provide its employees with adequate protection from cave-ins during an excavation. (Tr. 65-66; Ex. C-8). That citation, which was issued on June 13, 2017, involved a trench that was a little over 9 feet deep in previously disturbed Class B soil. (Ex. C-8, at 13). One of the walls was improperly benched, and the slope on both walls was steeper than the requisite 45-degrees. (*Id.*). The citation noted that employees were exposed to a crushed-by hazard when working in the trench without adequate cave-in protection. (*Id.* at 8). The citation became a final order on June 27, 2017. (Tr. 69-70; Ex. C-8, at 17-19).

The CSHO ultimately concluded that Texas Underground committed three violations. First, he cited Texas Underground for failing to protect employees working in the trench from surface encumbrances, in violation of 29 C.F.R. § 1926.651(a). Specifically, the CSHO believed

the section of concrete posed a struck-by hazard to employees working inside the trench and Texas Underground should have supported or removed the concrete or installed a trench box. (Tr. 34). Second, he cited Texas Underground for failing to protect employees working in the trench from cave-ins, in violation of 29 C.F.R. § 1926.652(a)(1). He classified the citation as repeat in light of the 2017 citation: both trenches exceeded 5 feet in depth, were improperly sloped, and did not use a trench box. (Tr. 65-70). Lastly, he cited Texas Underground for failing to instruct its employees about recognizing and avoiding unsafe conditions or to control or eliminate hazards, in violation of 29 C.F.R. § 1926.21(b)(2).

IV. Discussion

To establish the violation of a safety standard under the Act, the Secretary must prove: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at *15 (OSHRC, Dec. 5, 1994). The Secretary has the burden of establishing each element by a preponderance of the evidence. *Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498 at *6 (OSHRC, Sept. 15, 1995).

A. Citation 1, Item 1

The CSHO cited Texas Underground for failing to secure a section of concrete located along one of the trench walls. Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1926.651(a), which provides:

> All surface encumbrances that were located so as to create a hazard to employees were not removed or supported, as necessary, to safeguard employees.

The Secretary described the serious violation as follows:

> On or about October 6, 2020, at or near the intersection of Imperial Valley Dr. and Richcrest Dr., where employees were exposed to a struck-by hazard when working in an excavation without protection from surface encumbrances.

Citation at 8. Texas Underground disputes that there was a violation and that employees were exposed to a hazard.

1. The Standard Applies

The work at issue involved a trench. 29 C.F.R. § 1926.650(a) provides: "This subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches." Accordingly, the standard applies.

2. The Secretary Failed to Establish a Violation of the Standard

The Court now turns to whether the Secretary established that the section of concrete was a "surface encumbrance" such that Texas Underground violated the standard. Texas Underground argues the section of concrete was located below grade and along the wall of the excavation, which means it was not a "surface encumbrance." The Secretary did not address the meaning of "surface encumbrance" in her post-trial brief.

The term "surface encumbrance" is not defined in the standard, so the Court must determine what "surface" means. "An Occupational Safety and Health standard must give an employer fair warning of the conduct it prohibits, and it must provide a reasonably clear standard of culpability, to limit the discretion available to the enforcing officers." *Austin Com. v. Occupational Safety and Health Review Comm'n*, 610 F.2d 200, 201 (5th Cir. 1979) (internal citation omitted). "The standard must be construed to give effect to the natural and plain meaning of its words." *Id.* "If the meaning of [regulatory] language is 'sufficiently clear,' the inquiry ends there." *Beverly Healthcare-Hillview*, No. 04-1091, 2006 WL 2781629, at * 2) (OSHRC, Sept. 18, 2006) (consolidated) (citation omitted), *aff'd in relevant part*, 541 F.3d 193 (3d Cir. 2008).

However, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.*; *see also Otis Elevator Co*., No. 09-1278, 2013 WL 3998034, at *6, fn 10) (reviewing language of the cited provision "along with the structure and context of the standard" to determine the scope of the standard).

Here, the word "surface" is not ambiguous. Its plain meaning, when used as an adjective, is normally understood to mean "of, located on, or designated for use at the surface of something" or "situated…on the surface of the earth." *Surface*, Merriam-Webster online, *https://www.merriam-webster.com/dictionary/surface*, (accessed June 2, 2023); *see Asbestos Textile Co*., *Inc*., No. 79-3831, 1984 WL 34962, at *5 (OSHRC, Oct. 31, 1984) (using dictionary definition for unambiguous undefined term). And, even if "surface" was considered ambiguous, this definition is supported within the context of the regulation. *See Superior Masonry Builders, Inc*., No. 96-1043, 2003 WL 21525277, at *2 (OSHRC, July 3, 2003) (a court may look to the text and structure of the standard for guidance).

Although "surface" is undefined, the standard does define the terms "side" or "face" as "the vertical or inclined earth surfaces formed as a result of excavation work." 29 C.F.R. § 1926.650 (B). And the standard sets forth requirements for underground—as opposed to surface—installations, like sewers and other utilities, as well as hazards that might fall from the excavation "face." 29 C.F.R. § 1926.651(b), (j). "Surface" cannot mean the same thing as "side," "face," or "underground." *Cf. Basic Energy Servs. v. Occupational Safety & Health Rev. Comm'n*, 666 F. App'x 364, 367 (5th Cir. 2016) (unpublished) (explaining that a canon of statutory interpretation is that "identical words used in different parts of the same act are intended to have the same meaning") (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). The regulation's use

of the words "surface," "underground," "side," and "face" suggest different locations where hazards might be present.

After careful review, the Court concludes the surface encumbrance standard was intended to target hazards located at ground level or, in other words, the earth's surface. This is consistent with other cases applying the surface encumbrance standard. *See, e.g., Rawson Contractors, Inc.*, No. 99-0018, 2003 WL 1889143, at *4 (OSHRC, May 18, 2017) (tree adjacent to the trench); *Freund & Co.*, No. 89-0640, 1990 WL 122680, at *2 (OSHRC, Apr. 23, 1990) (5,500-pound electrical box adjacent to the trench); *W. L. Cobb Const. Co.*, No. 9157, 1975 WL 21709, at *9 (OSHRC ALJ, Feb. 25, 1979) (brick median near the excavation). This is also consistent with OSHA directives providing compliance guidance for the excavation standard. *See* OSHA Directive Number CPL 02-00-165 (July 1, 2021) (listing "curbs, roads, trees, utility poles and other structures adjoining the excavation" as examples of potential surface encumbrances).

Here, the record demonstrates the section of concrete was located on the trench face, not the surface, so there can be no violation of the surface encumbrance standard. Moreover, the Secretary has not explained how the section of concrete constitutes a surface encumbrance or cited any case law applying the standard in such a way. *See Worcester Steel Erectors, Inc.*, No. 89-1206, 1993 WL 387711, at *12 (OSHRC, Sept. 29, 1993) ("Adoption of a strained interpretation does not serve the purposes of the Act, for the occupational safety and health standards must provide employers sufficient pre-enforcement guidance to conform their conduct to the actual requirements to which they will be held in any enforcement proceeding."). Accordingly, the Secretary failed to establish a violation of the standard.

3. The Secretary Failed to Establish the Existence of a Hazard

Likewise, the Secretary provided insufficient evidence that the section of concrete exposed workers to a hazard. Generally, the existence of a hazard is "presumed in safety standards unless the regulation requires [OSHA] to prove it." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016). However, the language of the surface encumbrance standard by its own terms requires proof of the existence of a hazard before compliance with the standard is required. *Rawson Contractors, Inc.*, No. 99-0018, 2003 WL 1889143, at *4 (OSHRC, Apr. 4, 2003). Here, 29 C.F.R. § 1926.651(a) requires precautions be taken "as necessary" to safeguard employees from surface encumbrances that are located so as to create a hazard. Therefore, the Secretary must prove that the section of concrete was located so as to create a hazard to employees.

The Secretary relies on the CSHO's inspection report and testimony that the concrete posed a crushed-by hazard. At trial, the CSHO pointed to photographs taken at the site to demonstrate that the concrete was overhanging and could injure a worker. However, he does not provide any support for that belief. And, although the Court may rely on photographs depicting a hazard, it can only do so if the testimony supports such reliance. *See Am. Wrecking Corp.*, 351 F.3d 1254, 1262 (D.C. Cir. 2003) ("The ALJ and the Commission were therefore entitled to rely on the photograph as an accurate depiction of the scene of the violation before the accident . . . The photograph, together with the expert testimony based upon it, constitutes substantial evidence in support of the Commission's finding that AWC violated the standard.").

Here, the photographs do not clearly show the section of concrete posed a struck-by hazard. *Cf. Brickfield Builders, Inc.*, No. 93-2801,1995 WL 82302, at *1 (OSHRC, Feb. 24, 1995) (rejecting the ALJ's credibility findings because the photographic evidence supported a different outcome). Moreover, the CSHO's conclusory testimony on this point is insufficient to establish

the existence of a hazard. *See El Paso Crane and Rigging Co.*, No. 90-1106, 1993 WL 393508, at *9 (OSHRC, Sept. 30, 1993) (holding that a compliance officer's unspecific and conclusory opinions, without factual basis or reasoning, is entitled to little weight). There is nothing else in the record showing that the section of concrete could have fallen. Accordingly, the Secretary failed to establish the existence of a hazard.

4. The Secretary Established Exposure

The Court next turns to the element of exposure.[3] Texas Underground argues that workers were not exposed to any hazard posed by the section of concrete because they were working on the opposite side of the trench and had no reason to be near the concrete. The Secretary argues that workers were in the trench and thus were exposed to the hazard.

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

[3] In the previous subsection, the Court concluded the Secretary failed to establish the section of concrete posed a hazard. For purposes of analyzing exposure and knowledge, the Court will assume the section of concrete constituted a hazard.

the standard is intended to prevent." *KS Energy Servs., Inc.*, No. 06-1416, 2008 WL 2846151, at * 4 (OSHRC, July 14, 2008) (internal citations omitted).

Here, the Secretary has not shown actual exposure. The CSHO testified that although he saw workers in the trench when he first approached the site, he was unsure where they were located within the trench. A flagpole had been placed next to the section of concrete, which indicated that workers had been in the vicinity, although it is unclear whether workers had been in the trench or at the opening. Although Mr. Diaz's testimony varied as to whether workers were in the storm box, on the pipe, or on the trench's benching system, he consistently testified that workers were not present throughout the excavation. Thus, the Court must determine whether access to the hazard was reasonably predictable.

The record demonstrates that there was a distance of 25 feet between the storm box, where Mr. Diaz admitted employees were working, and the section of concrete. The excavation was in progress, and a power saw and flagpole were left near the section of concrete. It is foreseeable that an employee would traverse the length of the trench during the excavation, whether inadvertently or intentionally, to perform work. *See Briones Utility Co.*, No. 10-1372, 2016 WL 7424575, at *2 (OSHRC, Dec. 14, 2016) ("We find it was reasonably predictable that the employee could have inadvertently strayed into the adjacent, unprotected area of the trench."). It is also foreseeable that an employee could enter the zone of danger to retrieve the flagpole or the saw. *See Phoenix Roofing, Inc.*, No. 90-2148, 1995 WL 82313, at *3 (OSHRC, Feb. 24, 1995) (holding it was reasonably predictable that a worker would go into an unprotected area when retrieving materials located 12 feet away). And Mr. Diaz's testimony that no worker did in fact enter the opposite end of the trench does not weigh against finding possible exposure. *See Williams Enters., Inc.*, No. 14748, 1979 WL 8408, at *3 (OSHRC, Jan. 16, 1979) ("Such after-the-fact analysis would impede,

rather than further, the congressional goal of accident prevention embodied in the Act."). Accordingly, assuming the section of concrete posed a hazard, the Secretary established exposure.

5. The Secretary Established Employer Knowledge

"Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation." *Phoenix Roofing, Inc*., 1995 WL 82313, at *3. Here, Mr. Diaz testified that the concrete was discovered after digging began. This is supported by the CSHO's inspection report, where he noted Mr. Diaz "discovered the concrete while digging that morning" and that Mr. Diaz did not know where the concrete had originated or where it ended. (Ex. C-2-2). This knowledge may be imputed to Texas Underground. As foreman, Mr. Diaz was charged with ensuring a safe worksite, and he was aware that the section of concrete had not been removed. *See W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety and Health Review Comm'n*, 459 F.3d 604, 607 (5th Cir. 2006) (noting "when a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge, actual or constructive") (internal citations omitted)). Accordingly, the Secretary established knowledge.

6. The Violation was Properly Characterized as Serious

"[A] violation is serious if there is a substantial probability that death or serious physical harm could result. *Conagra Flour Milling Co*., No. 88-2572, 1992 WL 215113, at *7 (OSHRC, Aug. 19, 1992). Texas Underground argues there was no actual injury here and the potential injury is merely hypothetical. However, the occurrence of an accident need not be the substantially probable result of the violative condition; instead, the Secretary must establish that a serious injury is the likely result if an accident does occur. *Id.*; *see also E. Tex. Motor Freight, Inc. v. Occupational Safety and Health Review Comm'n*, 671 F.2d 845, 849 (5th Cir. 1982) (holding

injuries ranging from crushed toes to death supported a finding of a serious violation). Here, Texas Underground does not dispute the Secretary's characterization, and the CSHO credibly testified that if the concrete section were to fall on a worker, it could cause fractures, bruises, contusions, and broken bones. Thus, assuming the Secretary had established the existence of a hazard, the violation would have been properly classified as serious.

In conclusion, the Court holds the Secretary did not meet her burden to show the existence of a hazard or that the standard was violated. Accordingly, Citation 1, Item 1, is vacated.

B. Citation 2, Item 1

Citation 2, Item 2 alleges a repeat-serious violation of 29 C.F.R. § 1926(a)(1), stating that "Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 C.F.R. § 1926.652(b) or (c)." The Secretary describes the repeat-serious violation as follows:

> On or about October 6, 2020, at or near the intersection of Imperial Valley Dr. and Richcrest Dr., where employees were exposed to a crushed-by hazard when working in an excavation without an adequate cave-in protection system.
>
> The Texas Underground Utilities, Inc. was previously cited for a violation of this occupational safety and health standard 29 CFR 1926.652(a)(l), which was contained in OSHA inspection number1216629, citation number 1, item number 3 and was affirmed as a final order on June 27, 2017, with respect to a workplace located at the intersection of Conroe Medical Dr. at Loop 336 South, Conroe, TX 77304.

Citation at 9.

1. The Standard Applies

The parties dispute whether the standard applies to this trench. Texas Underground claims the Secretary cannot establish the trench exceeded 5 feet in depth, so the standard does not apply.

Specifically, Texas Underground takes issue with the measurements taken by the CSHO, arguing they were inaccurate.

Section 1926.652(a)(1) requires that each employee in an excavation be protected from cave-ins unless the excavation is made entirely of stable rock or the excavation is less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in. The parties agreed the trench was dug into Type B soil, but they disagreed whether the trench was 5 feet deep such that the standard applied. *See Trumid Const. Co., Inc.*, No.86-1139, 1990 WL 139883, at *1 (OSHRC, Sept. 12, 1990) (examining whether the standard applied to a trench where depth was disputed.).

The CSHO measured the depth of the trench in multiple places along its length. The west end was the deepest, measuring 7 feet deep, and the CSHO took a photograph of his measuring tool showing the depth as 7 feet. (Ex. C-11-11). Texas Underground believes this measurement is impossible, and it advances a theory that the measuring device fell into a hole or depression in the trench floor. However, Texas Underground presented no evidence that defeats the CSHO's testimony or photographic evidence. Mr. Lugo went to the site the next day, but he could not measure the trench because it had already been backfilled. (Tr. 245). No other employees took measurements of the trench, and Mr. Diaz—who was present while the CSHO was taking measurements—did not object to the CSHO's methodology. Based on the evidence in the record, the Court concludes that portions of the trench exceeded 5 feet such the standard applies.

2. The Secretary Established that the Standard was Violated

The Court next turns to whether the Secretary established that Texas Underground violated the standard. Texas Underground concedes it used a benching system (Resp. Br. 13), although the parties disagree about whether it was a single or multiple benching system. In any event, Texas

Underground argues the CSHO's measurements were approximations, thus rendering them unreliable. It also takes issue with the CSHO's use of the ladder to measure the trench's slope, arguing that the ladder was not placed to accurately reflect the angle of the bench. The Secretary argues that although the CSHO provided a range of measurements for the trench, none of the numbers in the range were in compliance with the regulation; therefore, Texas Underground's grievances about lack of precision are irrelevant.

After reviewing the evidence presented by the parties, the Court accepts the measurements provided by the CSHO. The CSHO credibly testified about his methodology, and the photographs support his testimony. Excavations are generally not level, so the CSHO's method of noting dimensions within a range was reasonable. Moreover, Texas Underground did not offer evidence that would seriously call into question the CSHO's measurements. Texas Underground did not independently measure the trench or provide alternative dimensions. *See L & M Lignos Enters.*, No. 92-1746, 1995 WL 61525, at *2 (OSHRC, Feb. 14,1995) (noting that although employer challenged the compliance officer's measurement of the scaffold, it did not provide contradictory evidence).

Next, the Court concludes that the trench was not in compliance with the standard. Section 1926.652 requires employers to design sloping or benching systems in trenches exceeding 5 feet in depth, and Appendix B applies to excavations made in Type B soil. Under Subpart P of Appendix B, walls of a trench exceeding 4 feet in depth must be sloped or benched at a maximum allowable slope of 1 to 1 (45 degrees). This slope may be achieved with a single bench or a multiple bench system, depending on the depth of the trench. Under both systems, the first bench wall cannot be more than 4 feet high. In a single bench system, the first shelf must equal the height of the bench, which will create a 1:1 ratio. In a multiple bench system, the first shelf wall must double

the height of the bench; every other shelf would have a height and width equal to the first shelf wall to create the 1:1 ratio. To comply with the standard, all sides of a trench must be properly sloped or benched. *See Garney Construction, Inc.*, 2003 WL 21693001, at *5 (OSHRC, July 18, 2003) (observing that to comply with the maximum allowable slope for Type B soil, "all faces of the excavation must be sloped or benched 1:1 or 45 degrees").

Here, the height of the first bench wall was between 4 ½ and 5 feet, but the standard requires the first bench wall to be 4 feet or less. The bench shelf width measured between 2 and 3 feet, but the standard requires the width to be 4 feet (single bench) or 8 feet (multiple benches). No measurement taken by the CSHO would render this trench in compliance with the regulation. (Tr. 183-84, 188); *see Lakeland Enters. of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 747 (7th Cir. 2005) (holding the trench "fell short" of the standards requirements using either party's purported measurements). The trench here was improperly sloped. Accordingly, the Court concludes that Texas Underground violated the standard.

3. The Secretary Established Exposure

Texas Underground argues that the Secretary cannot prove its workers were exposed to a potential cave-in hazard and the fact that the CSHO did not direct Texas Underground to cease work demonstrated that workers would not be exposed to a hazard if work continued. Here, evidence in the record supports a finding that workers were exposed to a hazard. Work on the trench began around 7:30 A.M. The CSHO observed workers in the trench, and it is largely undisputed that workers were in the trench for at least 5 to 10 minutes before the CSHO arrived.

This means workers used the ladder, which was located at the deeper end of the trench near the 7-foot wall, which would have exposed them to a cave-in hazard while entering or exiting the trench.

Mr. Diaz's testimony to the contrary was inconsistent. He initially stated that workers were on top of the pipe in the trench, but then later said they were in the storm box—located on the same end of the trench as the 7-foot wall—to clear some residual concrete in the storm box. On cross-examination, Mr. Diaz again changed his testimony and said that workers had been on the bench and not in the trench.

The Court cannot rely on Mr. Diaz's testimony to shed light on where employees were in the trench before the CSHO arrived. However, there is sufficient evidence in the record, based on the CSHO's observations and the tools located in the trench, that employees were in the trench on the west end near the storm box. Although workers were only in the trench for a short duration, this nevertheless constitutes exposure. *See Flint Eng'g & Const. Co*., No. 90-2873, 1992 WL 394727, at *4 (OSHRC, Dec. 21, 1992) ("even if a hazardous condition exists only briefly, or if employees are exposed to a hazardous condition only briefly, brief duration does not negate the violation or its seriousness"); *see also H. H. Hall Const. Co.*, No. 76-4765, 1981 WL 18913, at *6 (OSHRC, Oct. 7, 1981) (holding five to ten minutes in an unsafe trench results in serious violation and that the duration is not determinative of the seriousness of a violation but rather the penalty assessment) (other grounds superseded by statute). Moreover, standing on a pipe or a storm box in the trench does not negate exposure. *See Ford Dev. Corp.*, No. 90-1505, 1992 WL 381669, at * 9 (OSHRC Dec. 3, 1992), *aff'd*, 16 F.3d 1219 (6th Cir. 1994) (rejecting argument that employees standing on pipe in excavation deeper than five feet established the exception of § 1926.652(a)(1)(ii), observing that "the standard speaks of the depth of the trench, not of the

position of the employees in the trench"). Workers were in the trench where the depth was greater than 5 feet without adequate protection in place. The Secretary has established exposure.

4. The Secretary Established Knowledge

As noted previously, "[e]mployer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation." *Phoenix Roofing, Inc*., 1995 WL 82313, at *3. "To prove knowledge, the Secretary must show that the employer either actually knew of the noncomplying condition, or constructively knew of it—that is, the employer could have known with the exercise of reasonable diligence." *Par Elec. Contractors, Inc.*, No. 99-1520, 2004 WL 334488, at *3 (OSHRC, Feb. 19, 2004). "The knowledge of a supervisory employee may be imputed to his or her employer." *Id.*

Here, Mr. Diaz was aware the trench was dug into Type B soil and required sloping or benching. In fact, he testified he dug the benching system in this trench for employee safety. Mr. Diaz could have known, with the exercise of reasonable diligence, that portions of the trench's walls exceeded 5 feet and that the benching system did not meet the standard's requirements. Although the trenching work was in its early stages, Texas Underground was responsible for ensuring safety throughout the duration of the work. Texas Underground does not argue lack of knowledge or that there was any employee misconduct such that it did not have constructive knowledge. Accordingly, the Secretary established knowledge.

5. The Violation was Properly Characterized as Serious

Texas Underground asks the Court to adjust the classification of this Citation to other-than-serious. In support, it argues the CSHO did not advise anyone on site that there was a violation and did not require the company to make any changes to the excavation after the inspection concluded.

As noted previously, "a violation is serious if there is a substantial probability that death or serious physical harm could result." *Conagra Flour Milling Co*., 1992 WL 215113, at *7. Trench cave-ins pose a substantial probability of death or physical harm, and Texas Underground's failure to comply with the standard posed a cave-in hazard that could have resulted in serious physical injury or death. 29 C.F.R. § 1926.650(b) (defining cave in to mean "separation of a mass of rock or soil material . . . either by falling or sliding, in sufficient quantity so that it could entrap, bury, or otherwise injure and immobilize a person"). The Court concludes the violation was appropriately characterized as serious. *See Mosser Const., Inc.*, No. 08-0631, 2010 WL 711322, at *3 (O.S.H.R.C, Feb. 23, 2010) (trench in Type B soil measuring almost 6 ½ feet deep presented cave-in hazard that could have resulted in physical death or injury and was properly characterized as serious).

6. The Violation was Properly Characterized as Repeat

Under Commission precedent, a violation is considered repeat "if, at the time of the alleged . . . violation, there was a Commission final order against the same employer for a substantially similar violation." *UHS of Westwood Pembroke, Inc., UHS of Del., Inc*., No. 17-0737, 2022 WL 774272, at *12 (OSHRC, Mar. 3, 2022) (internal citations omitted), *aff'd,* No. 22-1845, 2023 WL 3243988 (3d Cir. May 4, 2023). "The principle [sic] factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards." *Lake Erie Const. Co., Inc*., No. 02-0520, 2005 WL 2902315, at *4 (OSHRC, Sept. 25, 2005) (internal citations omitted); *cf. Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 838 (5th Cir. 1981) (holding that where the condition is the violative element, the Secretary's burden must include substantial similarity of the conditions between the citations).

Here, the Secretary properly characterized the violation as repeat. Texas Underground was cited for violating the same standard in 2017, and that prior citation involved a cave-in hazard due to improper sloping of a trench dug in Type B soil. Although the prior violation was abated by implementing the use of a trench box, "[the] similarity of abatement is not the criterion for finding a repeat violation." *Lake Erie*, 2005 WL 2902315, at *4.

In sum, the Court concludes the Secretary met her burden with respect to Citation 2, Item 1. The Citation is affirmed.

C. Citation 3, Item 1

Citation 3 Item 1 alleges an other-than-serious violation of 29 C.F.R. § 1926.21(b)(2), which states:

> 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 describes the violation as follows:

> On or about October 6, 2020, at or near the intersection of Imperial Valley Dr. and Richcrest Dr., where employees performed work in a trench excavation without being trained by the employer in the recognition and avoidance of unsafe conditions and the regulations applicable to his/her environment to control or eliminate any hazards.

Citation at 10. The central issue here is whether the Secretary proved a violation of the standard.

To prove a violation of § 1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on "(1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." *Superior Custom Cabinet Co*., No. 94-200, 1997 WL 603024, at *2 (OSHRC, Sept. 27, 1997) (citing § 1926.21(b)(2)). "This command is so general and potentially subjective that the Commission and courts have seen fit to read into it a reasonableness standard." *El Paso Crane and*

Rigging Co., No. 90-1106, 1993 WL 393508, at *7 (OSHRC, Sept. 30, 1993). "That is, to establish noncompliance, the Secretary must establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *Id*. And, "[a]n employer's instructions and training must be specific enough to advise employees of the hazards associated with their work and the ways to avoid them, and modeled on the applicable OSHA requirements." *O'Brien Concrete Pumping, Inc*., No. 98-0471, 2000 WL 235285, at *2 (OSHRC, Feb. 16, 2000) (internal citation omitted).

Here, there is minimal evidence in the record regarding training. Mr. Castillo told the CSHO he had been employed with the company for a week and received no training. However, the Secretary did not call Mr. Castillo as a witness at trial, and the record shows his interview was conducted with the assistance of another worker, who was translating. On this record, the Court cannot conclude whether the statements made by Mr. Castillo were reliable.

Mr. Diaz testified at trial, and he was assisted by an interpreter. However, his testimony was inconsistent. He explained he had 40 years of experience in the industry and underwent training with a previous employer. He testified that he was "in training" with Texas Underground (Tr. 319) but then admitted Texas Underground never provided him with any training (Tr. 322). Thus, it is unclear whether Mr. Diaz received training or was in training at the time of the inspection. Notably, the Secretary did not make any inquiries about other forms of training Mr. Diaz may have received, like on-the-job training or printed materials. Similarly, the Secretary did not at trial ask Mr. Vera, who owned the company, any questions related to training Texas Underground provided to its employees. Although the Secretary admitted into the record a certificate reflecting that Jose Vera completed training on GHS-HazCom (Ex. C-10-19), this

evidence is irrelevant as to whether Mr. Diaz or Mr. Castillo underwent training.[4]

Although the Secretary is not required to prove a negative, she carries the burden of proving a violation by a preponderance of the evidence. Based on this record, the Court cannot determine by a preponderance of the evidence whether the training was adequate under the standard. *See Caterpillar Tractor Co*., No. 80-4061, 1986 WL 53446, at *3 (OSHRC, Apr. 16, 1986) ("Normally, where the record in a case lacks sufficient evidence on a disputed issue, we would resolve that issue against the party having the burden of proof."). Therefore, because the Secretary did not carry her burden, she failed to establish a violation by the preponderance of the evidence.

D. Penalty

"Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations." *J. A. Jones Const. Co*., No. 87-2059, 1993 WL 61950, at *15 (OSHRC, Feb. 19, 1993). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *Id.* (citations omitted). "The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Id*. (citation omitted). The Court is vacating Citation 1, Item 1 and Citation 3, Item 3, so it will only consider the assessment of the penalty for Citation 2, Item 1.

The CSHO assessed a penalty of $20,781.00 for this repeat-serious citation. (Ex. C2-6). He gave Texas Underground a size reduction and noted the gravity of the violation as "high" because injuries associated with the cave-in hazard are those that can cause permanent disability or death.

[4] The Court notes that only page 19 of Exhibit C-10 was admitted into evidence. (Tr. 193). The rest was not admitted and will not be considered by the Court.

Because the violation was characterized as repeat, the CSHO did not give the company a reduction for good faith and instead assessed a 10% increase. He noted, however, that the duration and frequency of exposure was limited: 12 times for 10 minutes on one day.

Texas Underground asks that the Court reduce the penalty by 75% and, as noted previously, change the citation to other-than-serious. However, the Court finds the evidence in the record sufficient to support the penalty as assessed. Although the duration of exposure was limited, the hazard to which the workers were exposed carries significant weight because it could have resulted in serious injury or death. *See Calang Corp.*, No. 85-319, 1990 WL 140086, at *6 (OSHRC, Sept. 12, 1990) ("The likely consequences of a cave-in would have been death or serious physical harm for three or four employees. Trench cave-ins, which are frequently caused by failure to comply with the Secretary's trenching standards, have been for many years one of the most severe problems in occupational safety."). And it is undisputed this is a repeat violation in which Texas Underground exposed its workers to a similar hazard. Based on the evidence in the record, the Court affirms the penalty assessment for Citation 2, Item 1.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.651(a) is VACATED.
2. Citation 2, Item 1, alleging a repeat-serious violation of 29 C.F.R. § 1926.652(a) is AFFIRMED, and a penalty of $20,781 is ASSESSED.
3. Citation 3, Item 1, alleging an other-than-serious violation of 29 C.F.R. § 1926.21(b)(2) is VACATED.

SO ORDERED.

/s/ Christopher D. Helms

Dated: August 4, 2023
Denver, Colorado

Christopher D. Helms
Judge, OSHRC