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

SECRETARY OF LABOR, Complainant, v. CASALE CONSTRUCTION SERVICES, INC., d/b/a CASALE, Respondent.	OSHRC Docket No. 17-0734

Appearances: Kate S. O'Scannlain, Solicitor of Labor
Jeffrey S. Rogoff, Regional Solicitor
Matthew M. Sullivan, Senior Trial Attorney
Rosemary Almonte, Attorney
U.S. Department of Labor, Office of the Regional Solicitor, New York, New York
For the Secretary

Charles Casale, *pro se*
Casale Construction Services, Inc.
Averill Park, New York
For the Respondent

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

On February 23, 2017, in Champlain, New York, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Andrew M. Reed and CO Daniel Corvalan noticed Casale Construction Services, Inc., d/b/a Casale's (Casale or Respondent) open trench as they drove by it while on their way down Elm Street headed to another pre-assigned worksite "just down the street from the Casale Worksite." (Tr. 25-26). The trench was

unsupported, and CO Corvalan noticed a worker, James W. Bowen, inside it.[1] (Tr. 71-72; J. Ex. II; Ex. 8 at 2). Consistent with OSHA's national emphasis program on trenching, OSHA performed an on-the-spot inspection of the trench. As a result of the investigation, OSHA issued Respondent on March 31, 2017, a citation alleging a repeat violation of 29 C.F.R. § 1926.651(j)(2)[2] with a proposed $10,140 penalty, and a repeat violation of 29 C.F.R. § 1926.652(a)(1)[3] with a proposed $12,676 penalty. Respondent filed a timely Notice of Contest (NOC), bringing this matter before the Occupational Safety and Health Review Commission (Commission) pursuant to sections 2-33 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act).

In its Answer to the Secretary's Complaint, Respondent "disagreed" with the citations and "deemed this employee misconduct. We cannot stand by each employee every hour of every day. We direct the employees to the best of our ability." (Answer at 2). The trial was

[1] CO Reed did not see anyone working in the trench. (Tr. 71). When he and CO Corvalan arrived at the Worksite, workers were backfilling at the east end of the trench. (Tr. 78-79, 87; Ex. 11).

[2] Section 1926.651(j)(2) states:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations or by a combination of both if necessary.

29 C.F.R. § 1926.651(j)(2).

[3] Section 1926.652(a)(1) states:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i) excavations are made entirely in stable rock; or (ii) excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

29 C.F.R. § 1926.652(a)(1).

held on June 12, 2018 in Syracuse, New York.[4] Both parties filed post-trial briefs.[5] For the reasons set forth below, the Court affirms both repeat Citation 1, Item 1, and repeat Citation 1, Item 2.

STIPULATIONS OF FACTS

The following statements were stipulated to by the parties before trial and entered into the record at the request of the parties at the trial:

1) On February 23, 2017, Casale Construction Services, Inc., ("Casale" or the "Respondent"), was constructing a pipeline for the Town of Champlain ("the Contract") in front of 37 Elm Street. As part of the contract, Respondent was digging a trench in front of 37 Elm Street ("[ ] Worksite").

2) Adam Bielawa was a foreman and competent person at the Worksite on February 23, 2017.

3) James Bowen was a Laborer at the Worksite on February 23, 2017.

4) Foreman Bielawa supervised and gave instructions to Mr. Bowen on February 23, 2017.

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[4] Charles Casale, appearing without counsel, testified on behalf of Respondent. At Mr. Casale's request, and as agreed to by both parties, Mr. Casale was questioned under direct examination by the Court using questions previously supplied to the Court by Mr. Casale. (Tr. 151-152). The Secretary was then given the opportunity to cross-examine the witness. (Tr. 164). Mr. Casale was then provided the opportunity to testify on redirect examination but declined. (Tr. 170). *See* 29 C.F.R. § 2200.67(j)(Commission judges have duty and authority to "call and examine witnesses" in order "to conduct a fair and impartial hearing," and "to assure that the facts are fully elicited"). *See also S.C. Stevedoring Corp*., No. 77-161, 1977 WL 6476, at *5 (O.S.H.R.C.A.L.J., Oct. 19, 1977) ("When a witness appears Pro Se, he cannot question himself …. Questions from the bench must be asked ….).

[5] In its brief, Respondent states the following:

> It's unfortunate, but the Respondent prepared this brief without the benefit of having the transcript to be used as a reference. With the cost of the transcript being $997.00, the purchase the transcript was not a possible by the Respondent. As the Court is aware, the Respondent has represented themselves to present this case before the Court, with the intention being to conserve funds but at the same time proving its position that Casale Construction Services, Inc. should not be liable for violations outside their control.

(Resp't Br. at 1-2). The Court notified Respondent three weeks before briefs were due that the Commission mandates that "Each party is responsible for securing and paying for its copy of the transcript." 29 C.F.R. § 2200.66(b); *see also* Order Re: Due Date for Submission of Post Hearing Briefs at 2 n. 3 (Jul. 31, 2018). Respondent did not respond to the Court's July 31st Order regarding Respondent's responsibility to secure and pay for a copy of the transcript in this matter.

5) Employees at the Worksite were operating construction equipment that included a Bobcat S850 skid-steer loader, a Caterpillar 321C LCR excavator, a Caterpillar 307 excavator, and a Wacker Neuson WP 1550 vibratory compactor.

6) The Wacker Neuson WP 1550 requires manual operation inside of the excavation.

7) The Caterpillar 321C LCR excavator was digging the trench.

8) The Caterpillar 307 excavator was backfilling the trench.

9) The Worksite was located within 15 feet of an active roadway.

(Joint Pre-Hearing Statement (Jt. Pre-Hr'g St.), at 6-7; Tr. 15-16); Stipulation(s) (Stip.).

JURISDICTION

Respondent filed a timely NOC and admits that, as of the date of the alleged violations, it was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. (Answer at 1-2; Jt. Pre-Hr'g St. at 7-8; Tr. 16-17). Based upon the record, the Court finds that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the OSH Act. The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case, and Respondent is covered under the OSH Act.

OSHA CITATION

Citation 1, Item 1 alleges a repeat violation of 29 C.F.R. § 1926.651(j)(2) and proposes a $10,140 penalty. The Secretary claims that Respondent violated the cited standard because:

> Protection was not provided by placing and keeping excavated or other materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.
>
> (a) 37 Elm Street, during installation of an 8" water main: Employee(s) were working in an unprotected excavation approximately 6 to 7 feet

> deep; spoil banks were not kept back at least two feet from the edge of the excavation and/or a shield system was not used, exposing employees to struck by and collapse hazards. [C]asale Construction Services, Inc. was previously cited for a violation of this occupational safety and health standard or its equivalent standard 1926.651(j)(2), which was contained in OSHA inspection number 1052453, citation number 1, item number 1 and was affirmed as final order on 5/21/15, with respect to a workplace located at New Salem South and Route 85, Voorheeesville, NY 12186.

(Citation at 6). Section 1926.651(j)(2) requires that employees be protected from excavated material or equipment that could pose a hazard by falling or rolling into excavations by "placing and keeping such materials or equipment at least 2 feet [] from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations or by a combination of both if necessary…." 29 C.F.R. § 1926.651(j)(2).

Citation 1, Item 2 alleges a repeat violation of 29 C.F.R. § 1926.652(a)(1) and proposes a $12,676 penalty. The Secretary claims that Respondent violated the cited standard because:

> Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c).
>
> (a) 37 Elm Street, during installation of an 8" water main: Employee(s) were working in an unprotected trench approximately 6 to 7 feet deep, 3 to 4 feet wide, and 30 to 40 feet long; no sloping/benching and/or a shield system was used, exposing employees to struck by and collapse hazards. [C]asale Construction Services, Inc. was previously cited for a violation of this occupational safety and health standard or its equivalent standard 1926.652(a)(1), which was contained in OSHA inspection number 1052453, citation number 1, item number 3 and was affirmed as a final order on 5/21/15, with respect to a workplace located at New Salem South and Route 85, Voorheesville, NY 12186.

(Citation at 7). Section 1926.652(a)(1) requires that employees in an excavation be protected from cave-ins by an adequate protective system "except when: (i) excavations are made

entirely in stable rock; or (ii) excavations are less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in…." 29 C.F.R. § 1926.652(a)(1).

PREVIOUS OSHA CITATIONS

Approximately 2 years prior to the OSHA inspection in this case, at another one of its worksites in Voorheesville, New York, Respondent was cited by OSHA for alleged violations of the same two standards involved in this matter. (Tr. 60-61; Exs. 2-4). The citation resulted in a May 21, 2015 informal settlement agreement between Respondent and OSHA wherein Respondent waived its right to contest the citation of those same standards and agreed to correct the violations of those same standards at its worksite in Voorheesville, New York. (Exs. 2-4, 67, at 2, ¶ 17).

The alleged violation description for the violation of section 1926.651(j)(2) was: "On or about April 8, 2015 – Employees were exposed to cave-in and struck by hazards from a spoil pile that was at the edge of an excavation." (Ex. 3 at 1). The alleged violation description for the violation of section 1926.652(a)(1) was: "On or about April 8, 2015 – Employees were exposed to cave-in hazards while in an unprotected excavation that was 7 feet 2 inches to 8 feet in depth." (Ex. 4 at 1).

BACKGROUND

Beginning at 7:00 A.M. on the day of the inspection, Respondent was engaged in construction work installing pipe at the bottom of a trench alongside Elm Street pursuant to the Town of Champlain, Clinton County, New York's Shared Water Improvement Project No. 2013-040. (Stip. 1; Tr. 135; Exs. 31, 58). The trench was estimated to be 3-4 feet wide, 30-40 feet long, and 6-7 feet deep where equipment used by Respondent's laborer, Mr. Bowen, was

located. (Citation at 7; Tr. 12, 46-48, 55, 72-73, 76-78, 125; Ex. 54 at "C"). The walls of the trench were vertical. (Tr. 52-53). Remnants of soil were sluffing from the wall of the excavation into the trench. (Tr. 43-44; Ex. 19).

CO Reed saw a crew of four or five employees when he first arrived at the Worksite.[6] (Tr. 28). The spoil piles that had been removed from the trench were "a couple feet high" and located right next to the trench edge.[7] (Tr. 32; Joint Exhibit. (J. Ex.) I, Ex. 10). The trench was not benched or shored, and a trench shield was not being used. (Tr. 54; 137-138). The trench itself was approximately 15 feet from the active roadway of Elm Street. (Tr. 42, 139; Stip. 9, Ex. 67, at 2, ¶ 16). CO Reed testified that these spoil piles that were too close to the edge of the excavation presented two hazards. He said, "One is that the material can fall or roll into the trench, striking an employee working inside. And the second hazard is that it increases the surcharge load along the edge of the excavation, which can contribute to instability of the excavation wall." (Tr. 32).

The heavy equipment that Respondent used in or near the trench included a Bobcat loader, a Caterpillar 321C LCR excavator, a Caterpillar 307 excavator and a vibratory compactor (also referred to herein as a "plate tamper").[8] (Stip. 5; Tr. 15-16, 46, 126, 129-132; J. Ex. I, at "C" (vibratory compactor); Ex. 22 at "G" and "H"; Ex. 54 at "A"). Mr. Bowen said

[6] CO Reed has been employed at OSHA for twenty-one years. He has a degree in Environmental Health and Occupational Safety from Indiana University of Pennsylvania. His primary duties at OSHA are to conduct inspections of general industry construction worksites to determine whether or not employers are in compliance with federal safety and health regulations. He has conducted about 150 – 200 OSHA inspections involving excavations. (Tr. 22-24).

[7] CO Reed testified that he watched, later during his investigation, Respondent move the spoil piles back using the larger CAT excavator, knocking some material into the trench. (Tr. 48-52; Ex. 37, at "D").

[8] A plate tamper "vibrates the sand to compaction." (Tr. 132).

that the Caterpillar 321C LCR excavator was located as shown in the photograph at Exhibit 22 at point "A" when he was working in the trench. (Tr. 131-32; Ex. 22 at "A").

The task of installing the pipeline was described by Mr. Casale at the hearing.[9]

> Q In your own words, can you tell us the procedure?
>
> A The guys are told you get your first pipe in, it's a 6 foot bury. The 6 foot buried varies. That is a guideline. It's for frost protection. If it's a little high, if it's a little low, it's not a sewer line. It doesn't have to go in a straight line, so it can go with the road. So at maximum, we only have to be as a 6 foot bury. You put your pipe in. You put a 2 foot lift of sand on top of it.
>
> Now, everybody can say the specifications say to put a 1 lift foot lift or a half a foot lift or whatever. You run that small tamper over it after a 2 foot lift is put in and that whole pack right in back of it. The whole pack is what compacts it to a difference. You're making it possible not to only put it in, in a 1 foot lift. So you use this different type -- it's a different mechanical way to compact the dirt. And it also saves a man from going into the hole because a guy can go in with the hoe.
>
> Well, once that pipe is in, that 2 foot of sand is supposed to go on it. The man is -- he's told to stand on the 2 foot of sand, like this, for the next pipe. And all he's got to do is grab a hold of it. Then go over and put it in. That's his job. That's the -- there's -- he's got no more to his job then to just do that, guide it home. The guy in the machine will put it down and push it home. You can't do it by hand. All right? Once it's pushed home, 2 foot of sand and you keep walking down the trench with your plate tamper. And it's done. It's not rocket science. I'm doing it. It's not hard.

(Tr. 156-57).

That morning, Mr. Bowen had to bend or crouch down at the bottom of the trench every half hour to "bag" or sheath pipe. (Tr. 115, 133-35; J. Ex. I at "west of letter F"; Ex. 22 at "E"). When installing the pipe, according to Bowen, "[y]ou kind of straddle the pipe and fold the bag over. And once you fold the bag over, you get your tape, wrap it completely around the bag, cut it and seal it." (Tr. 133-35; Ex. 56). Bowen testified that it was "not really" possible for him to look out for falling soil or other materials during his time in the

[9] Mr. Casale was not present at the Worksite on February 23, 2017. (Tr. 164-65).

trench that morning because he was focused on running the plate tamper and installing pipe. (Tr. 135). From the location where he worked, Bowen estimated that the walls of the trench were "between 5 foot 8 and 6 feet," using his own height of 6 feet as a measuring tool. (Tr. 136; J. Ex. I, at "F"). He also testified that the trench was deeper than 5 foot 8 inches where the plate tamper was located. (Tr. 136-37; J. Ex. 1 at "C" (where plate tamper located) and "G" (deepest spot of trench)). Bowen testified that the spoil piles were at the edge of the trench while he worked in the trench before OSHA arrived. (Tr. 129; J. Ex. I spoil piles at "Points D" while Bowen worked at "Point F").

Mr. Bowen was in the trench, having worked on the pipe and just finishing compacting a layer of soil using the vibratory plate tamper, when OSHA arrived. He had worked in the trench beginning at 7:00 A.M. through to the time the OSHA COs showed up at the Worksite.[10] (Tr. 127-135; J. Ex. I at "C" and "F"; Ex. 8 at 2-3). According to Bowen, Respondent's foreman and competent person at the Worksite, Adam Bielawa, directed Bowen to leave the trench immediately after OSHA arrived at the Worksite. (Tr. 29-30, 128; Stip. 2; Ex. 67, at 1, ¶¶5a, 11).

CO Corvalan took photographs of the Worksite when he arrived. (Tr. 26-30; J. Ex. I; Ex. 10). The photograph at Exhibit 10 depicts what the trench looked like when OSHA first arrived. (Tr. 29; Ex. 10). The photograph at Joint Exhibit I also shows what the trench looked like when OSHA first arrived. (Tr. 30; J. Ex. I). Footprints and equipment in Joint Exhibit I indicate that someone had been standing in the trench before OSHA arrived.[11] (Tr. 30-31; J.

[10] OSHA's Violation Worksheet indicates that Mr. Bowen had been exposed to the hazard for three hours. (Ex. 8, at 2; Ex. 67, at 1, ¶ 5c).

[11] CO Reed testified that it was not possible to operate the plate tamper without having a person inside of the trench at the location shown at Joint Exhibit I, at "C"). (Tr. 41, 115; J. Ex. I, at "C").

Ex. I, at "A" (footprint), "B" (shovel), and "C" (plate tamper)). Spoil banks two feet high are piled on both edges of the trench. (Tr. 31-32; J. Ex. I at "D").

When the compliance officers first arrived at the Worksite, the larger Caterpillar 321C LCR excavator was located "within one foot" of the west side of the trench. A smaller excavator used for backfilling with a vibratory compactor attachment was located and being operated about one to two feet from the east side of the trench. (Tr. 36-42, 126; Ex. 22, at "A" (Caterpillar 321C LCR excavator), at "G" (the smaller excavator); J. Ex. I (Caterpillar 321C LCR excavator)). Mr. Bowen was in the trench standing "to the right of the plate tamper, right next to where [he] had actually placed the shovel." He was "plate tamping the sand that covers the pipe." (Tr, 127-28, 132, 136; J. Ex. I, at "F"; Ex. 8, at 2). Mr. Bowen testified that the soil piles were located as shown in Joint Exhibit I, at "D", when he was working inside the trench. (Tr. 129; J. Ex. I, at "D"). The spoil piles consisted of a "clay type soil, partially frozen as well. It had clumps of soil."[12] (Tr. 32). CO Reed testified that he saw seeping water and pieces of soil beginning to fall from the north wall of the excavation because it was a warm day in February with a temperature at about 50 degrees. He said melting or thawing frost can decrease the stability of the soil. (Tr. 43-44; Ex. 19). CO Reed testified that OSHA regulations require spoil piles to be moved back two feet from the edge of an excavation that was six to seven and a half feet deep. He saw that this was not done at the Worksite. He said that the presence of heavy equipment, vibratory compacting equipment and nearby truck traffic

[12] Soil analysis performed by OSHA's Salt Lake Technical Center laboratory of a soil sample taken from Respondent's spoil bank indicated that the soil was "a sandy clay, it was structurally cohesive, and it was soil type B." (Tr. 44-45; Ex. 1). According to CO Reed, the significance of a type B soil means that "the material tends to be heavier. It has [] an intermediate type of stability, but you have cohesive, … clumps of material that can … fall or roll, and if they were to strike somebody working in a trench, they could be injured." (Tr. 45-46).

increased the risk. (Tr. 46-47, 55). During OSHA's investigation, CO Reed watched as Respondent moved the spoil piles back from the edge of the trench.[13] (Tr. 51-52).

CO Reed interviewed Respondent's employees Adam Bielewa, Gino Bielewa (Adam's brother), and James Bowen (who worked out of a union hall).[14] (Tr. 29, 105, 140, 155; Ex. 8 at 2). CO Reed testified that Adam Bielewa explained the condition of the trench that morning as "there was about four feet of frost in the ground and he thought that they were okay."[15] (Tr. 55-56). Mr. Casale testified that Adam Bielewa and his brother Gino both "emphasized to Mr. Casale after they got off the phone with OSHA, prior to our hearing, that they were working in a safe trench."[16] (Tr. 156).

Mr. Casale questioned Bowen at the hearing. He asked:

> Q: [] So you went in to a 6 foot deep trench, not forcibly. Nobody forced you, I mean, no – you got a stick or something and said, get in there?
> A: No
> Q: Okay, you knew enough not to do it because you had the OSHA 10 card, you had the training not to do it?
> A: Absolutely.

(Tr. 142-43).

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[13] CO Reed took a picture of the trench after Respondent moved the spoil piles back from the edge of the trench. (Tr. 48-52); *compare* J. Ex. I at "D" to Ex. 37 at "E" (pictures of same location taken "sometime later, after the spoil banks had been moved back").

[14] CO Reed also interviewed Brad Duquette who, according to CO Reed and Mr. Casale, was the inspector on the project for the Town of Champlain. (Tr. 27, 105, 108, 153-54). Mr. Casale testified that Duquette was employed by the inspecting engineer firm, Bernier, Carr & Associates, Engineers, Architects and Land Surveyors, P.C. and that he told Mr. Casale that "he would shut the job down if proper safety protocol was not followed." (Tr. 153; Ex. C, at 1, Ex. 58). Bowen testified that Duquette "might have mentioned [using a trench box] that day [February 23, 2017]. I don't recall it because I'm in the hole." (Tr. 145). Later, Mr. Casale testified that Duquette "would always want a trench box, always. He would always force a trench box." (Tr. 169).

[15] CO Reed testified at the hearing that the cited regulation does not recognize frost "as a method of protecting a trench from a cave-in." (Tr. 55-56).

[16] Mr. Casale also testified that Adam Bielewa told him [Mr. Casale] that Duquette did not insist on using a trench box that morning. (Tr. 155).

Mr. Casale then questioned Bowen as to why he entered the unprotected trench that morning. In response, Mr. Bowen said:

> A: My foreman instructed me to go in there. And, yes, I am trained. But we also know how it works on jobsites. What do we do?
> Q: What do we do?
> A: We get laid off.
> Q: Okay.
> A: It works –
> Q: Let me ask you a question.
> A: -- with everybody and I've seen this many a times. I've seen it in my history. People go down in the hole. Well, no, I ain't going to go down there. You won't give me a trench box to work in. Two days later, laid off. Next day later, oh, work's slowing down. You're laid off. I have kids to feed, bills to pay.
> (Tr. 143-44).

Mr. Bowen further testified, "Adam [Bielewa] told me to go down in the hole, which is my -- basically my boss. He's my foreman on the jobsite." (Tr. 143-44). "What Adam tells me to do, I do. He's my boss. You guys sign my paycheck. You tell me to get in that hole, I get in the hole. I don't get in the hole. I'll probably be getting laid off within a day or two." (Tr. 143-46). Bowen also testified:

> A I've seen it almost happen on your jobsite.
>
> BY MR. CASALE:
>
> Q On my job because of me?
>
> A Yes. Not because of you. Really, this don't deal with you. Adam is in charge of us. Adam was going to lay off Todd because Todd was going back to inspectors and the word used was ratting out. So he was going to lay Todd off. That's how it works. That's how it works. And then I don't have a paycheck. I cannot pay my bills. I cannot feed my children. I've seen other things happen on jobsites too. And you wonder, how do we live? No health insurance.

(Tr. 146-47). Mr. Bowen also said that inspecting engineer Brad Duquette mentioned to Foreman Adam Bielewa at different times during the project the need to get a trench box in the

ground. (Tr. 144-45). Based upon the Court's direct observation of Mr. Bowen's demeanor while testifying, the Court finds Mr. Bowen's testimony to be forthright and entirely credible.

DISCUSSION

In the Second Circuit, to which this case could be appealed, the Secretary has the following burden to establish his *prima facie* case of a violation of an OSHA standard under the Act:

> the Secretary must prove that (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition[,] and (5) "there is a substantial probability that death or serious physical harm could result" from the violative condition.

D.A. Collins Const. Co. v. Sec'y of Labor, 117 F.3d 691, 694 (2d Cir. 1997) (citations omitted); *see also Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of the circuit where it is probable a case will be appealed).

Citation 1, Item 1: Protection from Excavated Materials

The Secretary alleges that Respondent violated 29 C.F.R. § 1926.651(j)(2) by exposing its employees to struck-by and collapse hazards due to spoil piles located along the edges of the Elm Street trench. The cited provision states:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations or by a combination of both if necessary.

29 C.F.R. § 1926.651(j)(2).

The construction standards set forth in 29 C.F.R. Part 1926 apply to Respondent's construction work at the Elm Street trench. (Stip. 1). OSHA defines a trench as a type of

excavation that falls under the cited provision. *See* 29 C.F.R. § 1926.650(b) (defining "excavation" to mean "any man-made cut, cavity, trench, or depression in an earth surface formed by earth removal" and "trench" to mean "a narrow excavation (in relation to its length) made below the surface of the ground"). Here, the depth of the trench (at least 6 feet) was twice as great as its width (3 feet), and the width was less than 15 feet, satisfying OSHA's requirements for the definition of a trench. 29 C.F.R. § 1926.650(b) ("Trench"). From the trench on Elm Street, Respondent excavated soil and then deposited and piled up the excavated soil next to the trench. The Court finds that the cited standard applies in this case.

The Secretary has also shown that Respondent failed to comply with the terms of the standard. It is undisputed that Respondent's spoil piles were located along the edge of the trench (i.e., within 2 feet of the edge of the excavation), piled at least 2 feet high, when OSHA arrived at the Worksite. (Tr. 46). The record does not show that Respondent provided any retaining devices at all to prevent the spoil piles from falling or rolling into the trench. CO Reed testified that since the soil was type B, it had clumpy and heavy characteristics, and the clumps could fall from the spoil pile and strike and injure a worker in the trench below. (Tr. 46-47). Indeed, in *Fla. Gas Contractors, Inc.*, No. 14-0948, 2019 WL 995716, (O.S.H.R.C. Feb. 21, 2019), the Commission held that "[n]othing in the cited provision requires the Secretary to prove that material had fallen into the excavation to establish noncompliance," and that even "the potential that the spoil pile will fall into the excavation as a result of a collapse of the excavation's wall beneath it" poses a hazard covered by this standard. *Id*., at *5 (citing Excavations Final Rule, 54 Fed. Reg. 45,894, 45,925 (Oct. 31, 1989) ("[M]aterial such as excavated soil … also place a superimposed load on the edge of the excavation. Such loads can be the cause of cave-ins and must be considered when determining what protection is

necessary to safeguard employees")). The Court finds that Respondent did not comply with the cited standard.

The Secretary also established exposure for this citation item. Respondent's worker, James Bowen, testified that he was in the trench, working, while the spoil piles were located at the edge of the trench above him. He testified that Respondent did not move the spoil piles while he was working in the trench. He also testified that it was impossible for him to look out for falling soil or other materials while he worked in the trench that morning because he had to stay focused on running the plate tamper and installing the pipe. CO Reed testified that he saw the spoil piles on the edge of the trench when he arrived to inspect the Worksite. The Court finds that Respondent exposed its employee to struck-by and collapse hazards in violation of the cited standard.

The Secretary has also established that Respondent had actual knowledge of the violative conditions on its Worksite. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation"), *aff'd,* 79 F.3d 1146 (5th Cir. 1996) (unpublished). Respondent's Foreman, Adam Bielewa, knew that Mr. Bowen worked in the trench while the spoil piles were located at the trench edges. It is well-settled that the supervisory knowledge of violative conditions on a worksite is imputed to the employer. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095-96 (No. 10-0359, 2012) (knowledge is imputed to the employer "through its supervisory employee"); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[A]n employee . . . empowered to direct that corrective measures be taken is a supervisor[]"); *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999)

(imputing knowledge of even a temporary employee who has been delegated authority over other employees).

Respondent argues that it did not have knowledge of the violative conditions on its Worksite. Respondent claims:

> Question: Did the Respondent (Employer) have knowledge that the cited standard was being ignored by the employees onsite?
>
> The answer to this question is "No". During Mr. Bowen's testimony, Mr. Bowen stated that Mr. Casale did not threaten nor encourage employees to enter an unsafe trench. Without being personally onsite, Mr. Casale would not have expected for any of his employees to violate the rules and standards of the "Act". Mr. Casale would have relied on the training and expertise of the onsite staff to perform the work pursuant to the plans, specifications and OSHA guidelines, and not perform "illegal or unallowed" actions during the construction of this project.

(Resp't Br. at 4-5). The parties have stipulated that Adam Bielawa was Respondent's foreman and competent person at the Worksite on February 23, 2017, where and when Adam Bielewa supervised Mr. Bowen, Respondent's laborer.[17] (Stips. 2-4; Exs. 10, 67 at 1, ¶¶ 5a, c, 11; Tr. 26, 126). Bowen testified that Adam Bielewa directed him to get in the trench, starting at 7:00 A.M. that morning, and directed him to get out of the trench only when OSHA arrived. And only then, during OSHA's investigation, did Respondent remove the spoil piles from the edge of the trench. Actual knowledge of the violative conditions is established. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC at 2095-2096 (imputing knowledge to the employer "through its supervisory employee").

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser*

[17] As a laborer, Mr. Bowen installed pipeline. He was employed by Respondent for about a year and a half. (Tr. 126). When he testified, Respondent no longer employed him. (Tr. 147). Adam Bielawa was employed intermittently by Respondent from October 2014 to September 2017. (Ex. 69, at 1, ¶ 8).

Constr., Inc., 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see also Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Trinity Indus., Inc.*, 504 F.3d 397, 401 (3d Cir. 2007).

CO Reed testified that OSHA considered that the level of severity of the injury that would occur due to material falling from the spoil pile was "medium," in that the worker would be injured but would likely recover from that particular injury. (Tr. 62-63; J. Ex. II, at 1). The Court also notes that the preamble to this specific standard contemplates the potential hazard of a cave-in caused by the increased load on the trench wall by spoil piles.[18] CO Reed also testified that nearby vibration can increase the possibility of cave-ins. (Tr. 46-47). It is undisputed that Mr. Bowen used a vibratory compactor inside the trench, and CO Reed testified that there was active "truck traffic" 10-15 feet away on Elm Street causing vibrations that increased the risk of a cave-in. CO Reed testified that "cave-ins can be very serious. People can be killed or severely injured if a trench wall collapses." (Tr. 26, 65; Ex. 10). The Court finds that "there is a substantial probability that death or serious physical harm could result" from the violative condition of spoil piles located on the edge of the Elm Street trench. *D.A. Collins Const. Co.*, 117 F.3d at 694.

This Court affirms Citation 1, Item 1.

Citation 1, Item 2: Protective Systems Requirements; Cave-In Protection

The Secretary alleges that Respondent violated 29 C.F.R. § 1926.652(a)(1) by exposing its employees to struck-by and collapse hazards associated with the unprotected Elm Street

[18] Respondent's own "Health & Safety Plan for Construction Services" (Safety Plan) recognizes that death and "[b]roken bones and internal injuries are also likely" in the event of a trench collapse. (Ex. 5, at 2, ¶ B2).

trench. Section 1926.652(a)(1) requires that employees in an excavation be protected from cave-ins by an adequate protective system "except when: (i) excavations are made entirely in stable rock; or (ii) excavations are less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in…."

The Court finds that the Secretary has established that the cited standard is applicable here. As found for the prior citation item, Respondent's Worksite on Elm Street falls under OSHA's construction standards and consisted of a trench, a type of excavation. The trench was dug into type B soil, not stable rock, and was estimated to be 6 – 7 feet deep.[19] (Tr. 32, 48; Ex. 54, at "C"). The cited standard applies.

The Secretary has also established non-compliance with the cited standard. The record establishes that the trench had no adequate protective system, like sloping, benching, trench box,[20] shoring or utilizing a trench shield, and the walls were vertical. (Tr. 30, 52-55, 108-10, 137-42). The trench was not made entirely in stable rock, and, even if a competent person examined the ground and determined that the ground provided no indication of a potential cave-in, the trench was greater than 5 feet in depth;[21] therefore, an adequate protective system was required here. Respondent violated the cited standard.

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[19] CO Reed testified that the photograph at Exhibit 54 shows CO Corvalan holding a grade rod that is in the trench about six feet deep. (Tr. 104-05, 116, 122; Ex. 54, at "C"). CO Reed also testified that: 1) the project specifications showed that the covered depth on the eight-inch water line was six feet to the top of the pipe, 2) the Town's Worksite inspector told him that the trench was about seven to seven-and-a-half feet deep, and 3) one of Respondent's operators told him that the top of the pipe was at six feet. (Tr. 105; Ex. C, at 3 ("6'O" MIN. BURY DEPTH")). The Site Details drawing also states at TRENCH AND PIPE BEDDING DETAIL: "NOTE: CONTRACTOR IS RESPONSIBLE FOR MEETING ALL APPLICABLE SAFETY STANDARDS FOR PROVIDING SAFE WORKING CONDITIONS." The TRENCH SHORING DETAIL further states: Excavated material is as restricted by OSHA requirements. (Ex. C, at 3; Ex. 60). Respondent has admitted that it was required to comply with the contract drawings, specifications, and Notes found at Exhibits C and 60. (Ex. 67, at ¶¶ 7-9).

[20] CO Reed testified that a trench box was later brought to the Worksite. (Tr. 111-14; Ex. 8, at 2, Ex. 23).

[21] CO Reed testified that OSHA issued Citation 1, Item 2 to Respondent because its "employees were working in an unprotected trench that was deeper than five feet." (Tr. 96-101, 116).

As discussed with the previous citation item, Respondent's laborer, Mr. Bowen, worked at the bottom of the unprotected trench during the morning of the investigation before OSHA arrived. Respondent therefore exposed Bowen to the struck-by and collapse hazards in violation of the cited standard. Similarly, Respondent had actual knowledge, imputed from foreman Adam Bielewa, that Bowen worked in the unprotected trench because he directed Bowen to enter the trench that morning. Even though Adam Bielewa might have incorrectly thought that frost provided adequate protection, awareness of the unprotected 6-7-foot-deep trench in soil (not stable rock) is all that is required to established knowledge. [22] *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079 ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation"). Actual knowledge is established. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC at 2095-96 (knowledge is imputed to the employer "through its supervisory employee").

CO Reed testified that OSHA considered the severity of injury associated with a cave-in was "high," because trench cave-ins can be very serious. People can be killed or severely injured if a trench wall collapses." (Tr. 65). The Court finds that "there is a substantial probability that death or serious physical harm could result" from the violative condition of the unprotected Elm Street trench. *D.A. Collins Const. Co.*, 117 F.3d at 694.

The Court affirms Citation 1, Item 2.

Unpreventable Employee Misconduct Defense

Only after the Secretary has established his *prima facie* case of a violation of an OSHA standard does the burden then shift to the employer to establish the affirmative defense of

[22] Respondent's Safety Plan recognizes that "Trench and Excavation protection meeting OSHA requirements must be in place before nay [*sic*] [any] CEI employees can enter trenches or excavations deeper than 5 ft. even for short periods." (Ex. 5, at 3, ¶ B4).

unpreventable employee misconduct. *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 108 (2nd Cir., 1996).

> To establish the affirmative defense of "unforeseeable employee misconduct," an employer must prove that (1) it established work rules to prevent the violation; (2) these rules were adequately communicated to the employees; (3) it took steps to discover violations;[] and (4) it effectively enforced the rules when infractions were discovered.

D.A. Collins Const. Co. v. Sec'y of Labor, 117 F.3d 691, 695 (2d Cir. 1997).

> [A]n employer may defend the citation on the ground that, due to the existence of a thorough and adequate safety program which is communicated and enforced as written, the conduct of its employee(s) in violating that policy was idiosyncratic and unforeseeable. By its nature, information with respect to the implementation of its written safety program will be in the hands of the employer, and it is not unduly burdensome to require it to come forward with such evidence.

Brock v. L.E. Myers Co., High Voltage Div., 818 F.2d 1270, 1277 (6th Cir. 1987). If the sufficiency of an employer's safety program is at issue, the burden is on the Secretary to establish that the program was not adequate. *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d at 108. "In cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy." *Brock v. L.E. Myers Co., High Voltage Div.,* 818 F.2d at 1277 citing *Nat'l Realty and Constr. Co., Inc. v. OSHRC,* 489 F.2d 1257, 1267 n. 38 (DC Cir. 1973).

Respondent raised the UEM defense from the very beginning of this proceeding in its Answer to the Secretary's Complaint and at the hearing. (Tr. 149-50, 165-68). Respondent again raises the defense in its post-hearing brief. The entirety of its argument regarding its UEM defense in its post-hearing brief is replicated here:

> Question: In the employees [*sic*] disregard [*sic*] safety pre-cautions, was there "Employee Misconduct"?

> The answer is "Yes". As Mr. Bowen stated during his testimony, he was in possession of his OSHA 10 card which meant that he did go through the OSHA training course with regards to what and unsafe trench was. Mr. Bowen through his testimony stated that he willingly entered the trench even though he knew it was unsafe. Mr. Bowen entered the trench under the supervision of Mr. Adam Beilawa [*sic*], site foreman, and not under the direction of Mr. Casale. Mr. Beilawa [*sic*]was a member of IUOE Local 158 at the time of the incident, where he also received his training.

(Resp't Br. at 5).

The Secretary suggests that Respondent had no rules addressing trench protection or spoil piles, pointing out that Mr. Casale failed to mention any rules during his testimony at the hearing. (Sec'y Br. at 30). The Court, however, notes that an exhibit in the record indicates that Respondent had a safety rule addressing the hazards at the Worksite here. Respondent's Safety Plan has a section that addresses "Excavations, Trenching, Shoring." (Ex. 5 at 1-2). The Safety Plan states that all "CEI[23] staff must comply with Health and Safety Regulations in effect at the construction site," and that "CEI employees involving excavations, trenching, and shoring shall be conducted in accordance with the Occupational Safety and Health Administration's (OSHA) regulations, 29 CFR 1926, Subpart P." (Ex. 5 at 2). The Secretary does not address the Safety Plan in his brief.

The Court, however, agrees with the Secretary's remaining arguments. Respondent has not set forth adequate evidence of communication of work rules to its employees.[24] Respondent has also not presented any evidence that it took adequate steps to discover violations of these work rules, or enforce work rules once it discovered any violations of them.

[23] Respondent's Safety Plan does not indicate what "CEI" stands for. The Safety Plan was not discussed at all in the hearing or in post-hearing briefs.

[24] The final page of the Safety Plan contains the following statement: "I have been given a copy of Casale Construction Service's Health and Safety Plan. I have read it and understand it is imperative to always keep my safety and the safety of others number one priority. I agree to work in a safe and competent way." (Ex. 5, at 7). There is no evidence that any of Respondent's employees signed any such statement.

(Sec'y Br. at 30-31). Respondent primarily blames Laborer Bowen for its receipt of the citation. Mr. Casale testified: "And just after the last testimony [of Mr. Bowen], it solidifies the position I'm in as a contractor that a guy can go and do anything at any time and get the contractor in a whole heap of crap." (Tr. 149-50). Respondent's focus is misplaced. Respondent's management representative, Foreman Bielewa, ordered Bowen to work at the bottom of the unprotected trench for up to three hours.[25] Mr. Bowen worked there in unsafe conditions for fear of losing his job. This credible fear was grounded in Respondent's long-term culture, as evident by a repeat citation, that did not prioritize worker safety. (Tr. 143-47; Ex. 8, at 2; Ex. 67, at 1, ¶ 5c). Respondent failed to adequately monitor Foreman Bielewa at the Worksite.

Instead, Respondent relies on "faith" that its workers will work safely. In response to the question, "How do you personally make sure it is being installed safely?", Mr. Casale testified, as a general matter:

> So how do I assure it? How do I assure it? How do I assure it because I've got to -- they go to the hole. I get the best guy I could get and, you know what, I've got to have faith that he does it. That's all there is to it. I mean, I can't stand there or else I'll go do it myself. I just got to do it alone. I mean, there'd just be me. And you know what, I don't even want to go through the whole thing. So we're good.

(Tr. 163-64).

The Court therefore finds that Respondent has not satisfied the remaining factors of the UEM defense. *D.A. Collins Const. Co. v. Sec'y of Labor*, 117 F.3d at 695.

Respondent illuminates how it views its role with regard to its employees at the conclusion of its post-hearing brief:

[25] *L.E. Myers Co.*, 16 BNA OSHC 1037, 1041 (No. 90-945, 1993) (concluding "where a supervisory employee is involved, the proof of [UEM] is more rigorous and the defense is more difficult to establish").

> Furthermore, construction companies that hire union employees from local unions are at the mercy of the quality of the employee provided by the Union. Owners cannot be onsite monitoring the means and methods of construction personnel 24/7, which is why they look for local unions to provide trained and experience [*sic*] employees.

(Resp't Br. at 6) (emphasis added). This argument contradicts the very purpose of the Act. "Responsibility under the Act for ensuring that employees do not put themselves into any unsafe position rests ultimately upon each employer, not the employees, and employers may not shift their responsibility onto their employees." *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994) ("Employers may not gamble with the safety of their employees").

Respondent's UEM defense is rejected. Both citation items are affirmed.

CHARACTERIZATION

To establish a repeat characterization of a violation, the Secretary must show that "at the time of the alleged repeated violation, there was a Commission final order ... for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). "[P]roof that an employer has committed a prior violation of the same standard constitutes a *prima facie* showing by the Secretary of substantially similar violations." *FMC Corp.*, 7 BNA OSHC 1419, 1421 (No. 12311, 1979). A previous violation enshrined in an informal settlement agreement with OSHA, wherein an employer withdraws its NOC, is deemed a final order of the Commission under the Act. 29 U.S.C. § 659(a); *see also Potlatch,* 7 BNA OSHC at 1062 n.3.

The Secretary has established his *prima facie* case that the two affirmed citation items in this case are characterized as repeat. Respondent violated both cited standards just two years prior to the inspection of the violative Worksite in this case. In the prior circumstance, Respondent also allowed spoil piles to sit on the edge of a trench and also did not properly

protect the sides of a trench. (Exs. 3 at 1, 4 at 1). Respondent initially filed a NOC for the prior citation, but then withdrew its NOC of contest to that citation in furtherance of an informal settlement agreement with OSHA dated May 21, 2015. As a result, the prior citation became a final order of the Commission before the inspection of the Worksite at issue here.

Respondent does not address the issue of characterization in his brief. *L & L Painting Co.,* 23 BNA OSHC 1986, 1989 n.5 (No. 05-0055, 2012) (item not addressed in post-hearing briefs deemed abandoned). The Court therefore finds that the two citation items in this matter are properly characterized as repeat.

PENALTY

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

CO Reed testified to the proposed penalties in this matter. For Citation 1, Item 1, the spoil piles violation, OSHA proposed a $10,140 penalty. (Tr. 64). CO Reed testified that OSHA considered a medium severity gravity, a lesser probability of occurrence of the injury, and 30 percent reduction to Respondent's small size. However, OSHA used a multiplier for the penalty due to the repeat violation. (Tr. 63-64; J. Ex. II). For Citation 1, Item 2, the unprotected trench violation, OSHA proposed a $12,676 penalty. (Tr. 66-67; Ex. 8). CO Reed testified that OSHA considered a high severity gravity, lesser probability of occurrence of the

injury, and 30 percent reduction for Respondent's small size, and the multiplier for the repeat violation. (Tr. 66-67; Ex. 8).

Respondent has not addressed the amount of the proposed penalties in its brief. After consideration of the statutory factors with regard to the penalties for the affirmed violations, the undersigned agrees with the penalty amounts proposed by the Secretary for each citation item. *Calang Corp.*, 14 BNA OSHC 1789, 1794 (No. 85-0319, 1990) (substantial penalties typically warranted for cave-in protection violations because "the incidence of cave-ins is high, and the likelihood of death or severe injury to employees in a collapsing trench is . . . high"). The proposed penalty amounts are assessed for each affirmed citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based on these findings of fact and conclusions of law, it is **ORDERED** that:

1) Citation 1, Item 1, alleging a repeat violation of 29 C.F.R. § 1926.651(j)(2), is **AFFIRMED** and a penalty of $10,140 is **ASSESSED**, and
2) Citation 1, Item 2, alleging a repeat violation of 29 C.F.R. § 1926.652(a)(1), is **AFFIRMED** and a penalty of $12,676 is **ASSESSED**.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: October 21, 2019
Washington, D.C.