United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. FINLEY, LLC, and its successors, Respondent.	OSHRC Docket No. 20-1217

Appearances:

Gregory W. Tronson, Esq., Department of Labor, Office of the Solicitor, Denver, Colorado
For Complainant

Jason Finley, Owner, Finley, LLC, Bailey, CO
For Respondent

Before: Judge Peggy S. Ball – U. S. Administrative Law Judge

DECISION AND ORDER

In response to an anonymous complaint about the trenches located at 1570 Grove Street, Complainant sent Compliance Safety and Health Officer Kirk Lake to perform an inspection of the worksite. During his inspection, CSHO Lake saw five workers exiting a trench that had water along 90 percent of its length. Upon closer observation, the CSHO determined sections of the trench were benched or improperly sloped for trenches that are "submerged" according to Appendix A of Subpart P. *See* 29 C.F.R. § 1926 Subpart P, Appx. A. The parties do not dispute many of the salient facts required to establish a violation, including those related to the applicability of the standard, employees' exposure to the condition, and Respondent's knowledge

of the condition. Instead, the parties dispute the source of the water and the extent of the hazard, if any, imposed by it; thus, calling into question whether the terms of the standards were violated.

Based on its review of the record evidence and the parties' respective arguments, the Court finds Respondent failed to respond to the water in the trench in violation of 29 C.F.R. § 1926.651(h)(1) but also finds Complainant failed to prove Respondent was required to automatically slope the trench to Type C soil specifications. Section 1926.651(h)(1) is a performance standard, at least in part, which means Complainant cannot specify how Respondent should abate the hazard by citing him according to an additional section of the Act requiring specific performance. *See, e.g., American Phoenix, Inc.*, 24 BNA OSHC 2228, 2014 WL 2058099 at *6 (No. 11-2969, 2014) (ALJ Augustine) (discussing performance standards). Doing so, as Complainant has done here, is akin to citing Respondent twice for failing to do the same thing, which the Commission characterizes as duplicative. *See North Eastern Precast LLC*, 26 BNA OSHC 2275, 2018 WL 1309480 at *5 (No. 13-1169 *et. al.*, 2018). As for the other trench citation item, the Court finds Respondent failed to perform adequate inspections of the trench, as evidenced by his conversations with CSHO Lake during the inspection. However, the Court also finds Complainant failed to provide sufficient evidence of exposure as to the chemicals identified in Citation 1, Items 3a & 3b, and failed to show the purported PPE violation in Citation 2, Item 1 was anything more than a misunderstanding. The Court's findings of fact and conclusions of law in support of those conclusions are found below.

I. PROCEDURAL HISTORY

In late March 2020, Complainant received an anonymous complaint that employees were working in unsafe trenches at the worksite located at 1570 Grove Street. (Tr. 20-21; Ex. C-1). In response, Complainant sent CSHO Lake to conduct an inspection. At the conclusion of his

inspection, CSHO Lake recommended, and Complainant issued, a Citation and Notification of Penalty alleging five serious and one other-than-serious violations of the Occupational Safety and Health Act. Complainant has proposed a total penalty of $7,519. Respondent timely filed a Notice of Contest.

The Chief Judge designated this matter for Simplified Proceedings on September 28, 2020. Accordingly, this matter is governed by Subpart M of the Commission Rules of Procedure. Trial in this matter was held over Zoom Video Conferencing on May 18-19, 2021. Only two witnesses testified: CSHO Kirk Allen Lake and Jason Finley, owner of Respondent. A transcript from the deposition of John Severance, who is employed by Respondent as a Supervisor, was admitted as Exhibit C-4. Both parties submitted post-trial briefs for the Court's consideration. Based on the evidence presented at trial and the briefs submitted in support, the Court issues the following Decision and Order.

II. JURISDICTION

The Court finds the Commission has jurisdiction over this matter under section 10(c) of the Act. *See* 29 U.S.C. § 659(c). According to section 10(c), the Commission obtained jurisdiction upon Respondent's timely filing of a notice of contest. *Id.* The Court also finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act. *See* 29 U.S.C. §§ 652(3), (5); *see also Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC 1529 (No. 77-3676, 1983) (finding statutory jurisdiction exists "so long as the business is in a class of activity that as a whole affects commerce" (*quoting Usery v. Franklin R. Lacy*, 628 F.2d 1226 (9th Cir. 1980))). Respondent, like the employer in *Clarence M. Jones*, is construction contractor whose activities have an impact on interstate commerce when viewed in the aggregate with similarly situated employers. Respondent does not dispute any of the

facts supporting these conclusions. Thus, the Court finds Respondent is subject to the jurisdiction of the Act.

III. FACTUAL BACKGROUND

A. Respondent's Business

Respondent is an earthmoving and excavating contractor based in Bailey, Colorado. It is a small outfit, with roughly 5 full-time employees, including Mr. Finley, John Severance, and some laborers. (Ex. C-4 at 13). Both Mr. Finley and Mr. Severance have worked in earthmoving, excavations, and heavy equipment operating for a combined total of 50 years. (Tr. 230; Ex. C-4 at 10-12). Respondent was hired by Katerra Construction, the general contractor for the construction of an apartment complex located at 1570 Grove Street in Denver, Colorado ("worksite"). At the time of the inspection, Respondent had been at the worksite for approximately nine weeks. (Tr. 157-58).

B. The Grove Street Worksite Inspection

According to Severance, Respondent had dug multiple trenches at the worksite in performance of its time and materials contract with Katerra. (Ex. C-4, R-28). The trench at issue in this case was referred to as the plumbing excavation because it was going to be used to house the lines that supply plumbing to the apartment building. (Tr. 32). John Severance testified at his deposition that he dug the plumbing excavation during the two days before CSHO Lake's inspection on March 25, 2020. (Ex. C-4).

When CSHO Lake arrived on March 25, 2020, he observed five employees working in the trench, including Mr. Finley. (Tr. 34; Ex C-1 at 38). At CSHO Lake's request, Mr. Finley and three of his employees exited the trench and approached CSHO Lake, while one employee (later discovered to be employed by Katerra), exited at the opposite end and left the area. (Tr. 34-36).

CSHO Lake asked the group that came out of the end of the trench closest to him whether there was a manager or foreman present. (Tr. 35). Mr. Finley, who had not yet identified himself, told CSHO Lake there were no managers or foremen present and directed him to Katerra's trailer. (Tr. 36). After meeting with Katerra's superintendent, McClaine Whalen, and discussing his concerns about the trench, CSHO Lake was introduced to Mr. Finley as the owner/manager for Respondent, as well as the competent person for the plumbing excavation. (Tr. 36).

During his conversation with Mr. Finley, CSHO Lake became convinced Mr. Finley did not possess the requisite knowledge to be a competent person. (Tr. 39). Specifically, CSHO Lake asked questions about how Finley performed inspections of the soil and how he had characterized the soil type. CSHO Lake testified Finley did not appear to know how to perform a manual (as opposed to a visual) test of the soil to determine its type, nor did it appear he had performed any testing other than looking at the excavation. (Tr. 38-39). Though Finley testified he had received a little formal training in excavation safety, much of his training and knowledge came from 20-plus years of on-the-job experience. (Tr. 230).

At trial, conversely to CSHO Lake's testimony, Mr. Finley testified he knew quite well what the soil types were and how to perform a manual test of the soil. (Tr. 251-53). He claims at the time of the inspection he simply misunderstood what CSHO Lake was asking when he inquired about the "manual" test and soil typing and that, upon further clarification from Lake, he explained he had been performing the tests described. (Tr. 251). Although at the time of trial, Mr. Finley appeared to have a firm grasp on the terminology and methodology of the excavation standard, the foregoing is one of many instances where it appears Mr. Finley relies on a purported misunderstanding about something he, as a self-professed, long-tenured member of the profession and competent person, should be intimately familiar with. The nature and number of these

purported "misunderstandings",[1] many of which are conveniently targeted at key elements of Complainant's case, call into question the consistency and credibility of Mr. Finley's testimony when compared to CSHO Lake's, which was consistent with his contemporaneously taken notes and held up in response to cross-examination. Accordingly, in this instance (and many others), the Court credits CSHO Lake's testimony over Mr. Finley's.

C. The Trench Dimensions and Measurements

According to CSHO Lake, the trench was approximately 160 feet long, 18 feet across, and ranged in depth from a little over six feet to roughly ten feet. (Tr. 84-88). CSHO Lake observed water in the bottom of the trench that extended across 90% of its length, starting on the south end and extending north. (Tr. 34, 76, 86). In the southern end of the trench, where he observed Mr. Finley and his employees working, the walls were set in a bench configuration on the east and west sides. (Tr. 86; Ex. C-1 at 38). While many portions of the wall were sloped at a 33- to 34-degree angle, at least one portion on the northern end of the trench was sloped at a 45-degree angle. (Tr. 79-80, 90-91; Ex. C-2). Subsequent testing revealed the soil CSHO Lake retrieved from the spoil pile was Type B, which was consistent with the geotechnical report generated prior to work beginning at the worksite and with Respondent's visual assessment. (Tr. 115, 252; Ex. C-3 at 40).

D. The Source of the Water

The principal disagreement between the parties revolves around the source of the water CSHO Lake observed in the trench when he arrived to conduct the inspection. CSHO Lake interviewed Mr. Severance; Mr. Finley; a couple of Respondent's employees; Phil Pollock, a Katerra Superintendent; Andrew Mesches, a Katerra superintendent; McClain Whalen, a Katerra superintendent; Rob Turner, Katerra's project manager; and Steve Silvestre, Katerra's safety and

1. Including, as previously mentioned, Mr. Finley's attempt to obscure his own identity from the CSHO when asked about the on-site manager or foreman, which would have been him at the time.

health manager. (Tr. 48-53, 111). According to CSHO Lake, as well as his contemporaneously recorded notes, Respondent's employees, Severance, Pollock, and Mesches all told CSHO Lake the water was coming from the trench itself, including seepage from the walls of the excavation.[2] (Tr. 108, 111-112). Pollock specifically told him roughly 80% of the excavations at the site had groundwater issues, which was consistent with the geotechnical report indicating the possibility of fluctuating groundwater levels. (Tr. 172; Ex. C-3 at 40). CSHO Lake testified Severance told him he encountered water almost immediately and that it seemed to increase as he moved south along the plumbing excavation. (Tr. 108). Supporting this conclusion is CSHO Lake's observation that the water level did not change during the entirety of his inspection. (Tr. 81).

Finley, on the other hand, testified the water came from a pipe, which he had cut open right before CSHO Lake arrived at the worksite. (Tr. 255). According to Finley, the water had not dissipated because it was resting on top of squeegee, which is an aggregate similar to pea gravel used to level the pipe. (Tr. 236). Finley also testified his version of what happened was supported by the deposition testimony of Severance, as well as the interview statements given by Whalen, Turner, and Silvestre. All of them stated the source of the water was the pipe, which Respondent had cut to remove and replace. (Tr. 306).

There are a couple of problems with Finley's explanation of the source of the water. First, the statements Finley relies on are, at times, inconsistent or are otherwise dependent on knowledge he provided. In the case of Mr. Severance, CSHO Lake testified and documented Mr. Severance stating the water had come from the excavation, which he was responsible for digging during the two days prior to the inspection. (Tr. 125; Ex. C-1). Mr. Severance later testified at deposition the water came from the pipe after the plumbers cut it. (Ex. C-4 at 44). Mr. Finley, on the other hand,

2. Subsequently CSHO Lake testified he could not be sure whether Mesches told him he observed the walls seeping, but he reiterated that Phil Pollock "definitely" told him that. (Tr. 203).

testified he had cut the pipe after Severance told him the plumbers installed it incorrectly. Finley argues this is when the water was released from the pipe, though Finley could not say where it had come from in the plumbing system. (Tr. 238).

Second, according to CSHO Lake's discussions with Pollock, it was impossible for water to have been released from a pipe hooked to a sand and water interceptor as alleged by Finley because Pollock was the only person onsite who knew how to hook the pipe to a source of water through the sand and water interceptor, which was located in the trench under discussion. (Ex. C-1 at 0018). This is consistent with both CSHO Lake's narrative of the events, as well as Finley's discussion of what was occurring at the point in time that he cut the pipe. Finley proclaimed he is not a plumber and thus could not opine on the source of the water, but he did testify the pipe had recently been set by Katerra Plumbing employees and speculated they could have been testing the seal by filling it with water. (Tr. 238). Even though the pipe had been set recently, no one testified seeing the pipe being filled with water.

In response to some of the foregoing inconsistencies, Respondent argues it does not matter if Severance incorrectly identified who cut the pipe; rather, it only matters whether he agrees the pipe was the source of the water. The Court disagrees. Severance's deposition testimony is inconsistent with his statement to CSHO Lake. (*Compare* Tr. 125 *with* Ex. C-4). According to Finley, Severance's deposition testimony regarding the source of the water should be credited over his statement to CSHO Lake because it was given under oath. But, he argues, Severance's deposition should not be credited over Finley's testimony as to who was responsible for cutting the pipe, even though both were physically present for the act itself. This explanation, like others discussed throughout this opinion, relies on inconsistent versions of the same event in an attempt to weave a consistent narrative. CSHO Lake, however, recounted statements both favorable and

unfavorable to the government's case and was nonetheless capable of showing why Respondent's version of events was unlikely given what he had learned from the general contractor during his inspection of the entire worksite and subsequent review of relevant documents, including the geotechnical report.

The Court understands it is crediting, in part, the hearsay statements of Pollock, Mesches, and Respondent's employees over the trial testimony of Mr. Finley. The Court's decision to do so is premised on a couple of grounds.[3] First, Simplified Proceedings are not governed by the rules of evidence as standard cases before the Commission—the amount of discovery is limited, and the breadth of permissible evidence is expanded. *See* 29 C.F.R. § 2200.200 *et seq*. Second, none of the statements attributable to the out-of-court declarants, other than Mr. Severance, were refuted; indeed, most of Mr. Finley's statements to CSHO Lake were consistent with those he gave at trial. Third, of the statements submitted in support of Mr. Finley's version of the events, which were recorded by CSHO Lake himself, three of them were premised on Finley's own first-hand account. Fourth, the remaining statement supporting Mr. Finley's explanation of the water's source, Mr. Severance's sworn testimony, was inconsistent with the statement Severance gave CSHO Lake

3. In *R.P Carbone*, the Sixth Circuit also evaluated a CSHO's hearsay testimony on the topic of duration using a multi-factor analysis outlined by the Supreme Court. *See R.P. Carbone Constr. Co.*, 166 F.3d at 818-19 (citing *Richardson v. Perales,* 402 U.S. 389, 402–06, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971)). The Sixth Circuit stated that, in certain circumstances, hearsay testimony can constitute substantial evidence depending on consideration of the following factors:

> (1) the independence or possible bias of the declarant, (2) the type of hearsay material submitted, (3) whether the statements are signed and sworn to as opposed to anonymous, oral, or unsworn, (4) whether the statements are contradicted by direct testimony, (5) whether the declarant is available to testify and, if so, (6) whether the party objecting to the hearsay statements subpoenas the declarant, or whether the declarant is unavailable and no other evidence is available, (7) the credibility of the declarant if a witness, or of the witness testifying to the hearsay, and finally, (8) whether the hearsay is corroborated.

See id. (citations omitted). In *Carbone*, the Sixth Circuit found the hearsay presented to the ALJ was properly relied upon as substantial evidence because: (1) the statements of the employees corroborated each other and were corroborated by their manager who said the employees did not know they needed fall protection while performing certain activities; and (2) those statements were also corroborated by an anonymous complaint filed with OSHA that the employees had been in violation of fall protection requirements for a significant period of time. *Id.*

during the inspection and inconsistent with Mr. Finley's as to the person responsible for cutting the pipe. Finally, the testimony of CSHO Lake, which recounted statements from Respondent's employees and members of Katerra's management team, squared with the facts surrounding the specific excavation at issue in this case, including the work being performed by Katerra's plumbers prior to the pipe being cut and the geotechnical report indicating groundwater potential at the worksite.

While the Court ultimately credits Complainant's version of the events surrounding the source of the water, subsequent analysis shows it does not always matter where the water came from so much as what type of hazard it presents and whether an employer appropriately responds.

E. Respondent's Safety and Health Programs

During CSHO Lake's inspection, he requested various documents from Respondent, including Respondent's safety and health programs related to trenching and excavations, hazard communications, soil testing records, training and certifications, safety audits, and records of discipline. (Tr. 59-60). At the time of the request, Respondent only provided Complainant with a copy of an undated safety and health manual, which did not have provisions for trenching and excavations or for hazard communications. (Ex. C-3). The former was of concern considering Respondent's principal business is trenching and excavations, whereas the latter was concerning because CSHO Lake had determined Respondent's employees were assisting the plumbers in the sealing and gluing of pipe at the bottom of the trench and were thus exposed to materials warranting training in hazard communications. Respondent ultimately provided Complainant with a copy of its hazard communications program as an exhibit at trial. (Ex. R-27).

With respect to the hazard communications program, Respondent points out its employees received basic training from Katerra as to the chemicals they might encounter at the worksite, but

that it did not provide specific training to its employees because they were not expected to be exposed to any hazardous chemicals. This is consistent with Mr. Finley's testimony, as well as CSHO Lake's, that his employees may have been in the trench at times when the plumbers were working on the pipe, but they were not authorized nor trained how to install plumbing. The only testimony indicating Respondent's employees worked on the pipe itself is Mr. Finley testifying he cut the improperly installed pipe. Otherwise, Finley testified his employees only install drainage pipe, which is a perforated pipe laid around the exterior of a building and does not require adhesives to connect. (Tr. 254).

IV. LEGAL ANALYSIS

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq*. ("Act"), the Secretary must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

The Secretary must establish his *prima facie* case by preponderance of the evidence. *See Hartford Roofing Co*., 17 BNA OSHC 1361 (No. 92-3855, 1995).

"Preponderance of the evidence" has been defined as:

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

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

A. Citation 1, Item 1a

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

> 29 CFR 1926.651(h)(1): Employees were working in excavations in which there was accumulated water, or excavations in which water was accumulating, and adequate precautions had not been taken to protect employees against the hazards posed by water accumulation.
>
> a) Finley, LLC at 1570 Grove Street, Denver, CO: On and around March 25, 2020, the exposing, creating, and correcting employer did not ensure that each employee working inside an excavation that was approximately 18 feet wide and varied from 6.4 to 9.8 feet in depth was protected from cave-in due to water accumulation, in that ground water was accumulating in the bottom of the excavation. This condition exposed employees and contractor employees to crushing hazards by excavation wall cave-in.

See Citation and Notification of Penalty at 6.

1. The Standard Applied and its Terms Were Violated

According to 29 C.F.R. § 1926.650(a), "[T]his subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches." There is no dispute the plumbing excavation qualifies as an "excavation", which is defined as "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." *Id.* § 1926.650(b). Accordingly, the standard applies.

The real dispute in this case is whether the standard was violated, which the parties have boiled down to a question about the source of the water CSHO Lake identified in the trench when he began his inspection on March 25, 2020, in response to an anonymous complaint about trenches with water and inadequate protection. Complainant contends the water in the excavation came from groundwater at the bottom and sides of the excavation, which is based on CSHO Lake's interviews with Respondent's employees, members of Katerra's management team, and the geotechnical report provided by Respondent. This, in turn, Complainant argues presented a cave-in hazard because standing water at the base of an excavation weakens the integrity of its walls.

Conversely, Respondent contends a limited amount of water came from a pipe which was cut shortly before the inspection did not pose a cave-in hazard because it was temporary and merely resting on top of squeegee, which is not designed to absorb water. The Court finds Complainant established a violation of the standard.

First, the Court previously credited CSHO Lake's testimony that the source of the water was the ground itself. As noted above, Finley's testimony and version of the events of that day and the two days prior was inconsistent with every person CSHO Lake interviewed, except for the people whom Finley told the water was from the pipe. (Tr. 306). During the inspection, Severance told CSHO Lake he encountered water in the plumbing excavation when he started digging and throughout the two days it took to sufficiently prepare it for the Katerra plumbers. It was not until his deposition, taken over a year later, that he recalled the water coming from the pipe the Katerra plumbers cut, even though Finley is adamant he alone cut the pipe. (Ex. C-4). However, it is important to note even Severance testified the source of the water was irrelevant. (Ex. C-4 at 61). Instead, he stated the presence of water in an excavation automatically converts the soil to type C, because he recognized the potential for groundwater to "soak up the bank, the bottom of the ditch and make – it can make it collapse." (Ex. C-4 at 46, 61). Regardless of the source, and by Respondent's own admission at trial, neither Finley nor Severance performed an inspection of the soil once the water had entered the excavation, even though both explicitly recognized the increased hazard associated with the presence of water in the excavation. (Tr. 295; Ex. C-4 at 46, 61).

Second, in addition to the Court crediting the testimony of CSHO Lake and the statements he gathered over that of Mr. Finley, the Court also finds other facts support a violation of the standard. Finley himself admitted he is not a plumber and could not speculate as to the source of

the water, but then went on to say plumbers often fill pipes with water to leak test them, which would explain why there was water in the pipe. According to statements taken by CSHO Lake, Finley's explanation does not hold water because Phil Pollock, one of Katerra's superintendents, told CSHO Lake he was the only person qualified to tie the new pipes into the sand/water interceptor. (C-1 at 0018). Further, there was no testimony or statement indicating water had been pumped into the excavation for such testing. Instead, we have two Katerra managers and three of Respondent's employees telling the CSHO the water was coming from the ground and that it had done so in nearly 80% of the excavations at the worksite, which itself is consistent with a geotechnical report finding groundwater at various locations around the worksite. (Ex. C-1 at 18, C-3 at 38).

It is true, as Respondent argues, the geotechnical report indicates the core samples did not run into water until 18 feet below grade. (Ex. C-3 at 38). The report also mentions, however, that groundwater levels may fluctuate depending on conditions. (Ex. C-3). One thing the report notes that neither party mentioned, however, is the caveat provided at the very beginning of the report's discussion of the subsurface exploration. (Ex. C-3 at 0042). The report states, "Because of the significant elevation differentials across the site, in GROUND's opinion, the test hole locations and elevations should be determined more precisely by surveying. More precisely determined elevations may require modification of some parameters in this report." (*Id.*) (emphasis in original). A closer look at the starting elevations of the core samples illustrates this very issue: the core samples taken have different starting elevations that vary by as little as one foot and as much as 14 feet. (Ex. C-3 at 0067). Although Respondent's trench, by CSHO Lake's very rough measurements,[4] only measured roughly 10-feet deep at its deepest, the site's elevation variations,

4. Though the Court is without any accurate way to measure, the photographs of CSHO Lake's attempts to measure

as well as the potential for fluctuations in the groundwater, certainly provide a reasonable explanation for the existence of groundwater and support the statements provided to CSHO Lake by Respondent's employees and by those managers of Katerra who had independent, first-hand knowledge of the condition of the trench.

The standard itself prohibits working in an excavation with accumulated water unless proper precautions are being taken to protect against the hazards of accumulation. 29 C.F.R. § 1926.651(h)(1); *see also Excavations*, 54 Fed. Reg. 45894 (October 31, 1989) (noting importance of change was to permit working in excavations with water so long as precautions are taken). Subsequently, it notes the precautions will vary with each situation. *Id.* In this situation, there is no indication Respondent took any precautions whatsoever in response to the water in the trench, nor is it clear adequate inspections were conducted in light of the geotechnical report, which both identified groundwater on a land plot with large variations in elevation and recommended sloping at 1.5 : 1 (horizontal : vertical), which is a type C slope. Both Finley and Severance gave sworn testimony that water in an excavation warrants re-inspection, reclassification, and appropriate precautions. There is no evidence any of these occurred. Instead, Finley contends the water was merely resting at the bottom of the trench due to his crew installing squeegee, which is not designed to absorb water. (Tr. 247; Ex. C-3 at 0057). As CSHO Lake explained, however, the level of the water, which had purportedly only just been introduced in the hour prior to his arrival, never abated during his time at the worksite, which he estimated to be around two hours. Given how recently the spill purportedly occurred, CSHO Lake wondered why the water was not more quickly absorbed into the surrounding soil.

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the depth of the trench illustrate how much the trench rod flexes downward when he is attempting to hang a plumb bob to the floor of the trench. (Ex. C-1). While this alone may not account for a full extension to 15 feet below grade, the variances between the various locations at which water was found suggests its location below grade around the site was hardly uniform.

While the source of the water has implications for the type of hazard presented by the excavation and the appropriate response, all parties agree any water in an excavation requires a response of some sort in light of the hazards associated with the condition, including slips and falls, or, as alleged in this case, a cave-in hazard. *See* 54 Fed. Reg. at 45922. Although there was no testimony as to the depth of the water, all agreed the water extended from the south end towards the north along roughly 90% of the bottom, which CSHO Lake estimated to be roughly 160 feet long.

Commission ALJs have upheld violations of the cited standard for water as shallow as four- to five-inches when adequate precautions have not been taken. *See, e.g., B&B Underground Contractors*, 23 BNA OSHC 1909, 2011 WL 3851820 at *9 (No. 11-0466, 2011) (ALJ Calhoun). While some areas of the trench were sloped at approximately 34 degrees by CSHO Lake's measurements, other portions of the trench were sloped at 45 degrees or were benched, which, according to both the Appendix and Mr. Severance himself, is improper for submerged soil or excavations walls that are seeping. *See* 29 C.F.R. § 1926, Subpart P, Appx. A & B. As previously noted, Respondent failed to perform a follow-up inspection after water was found in the trench, let alone implement any discernible response to its presence. This represents a violation of the standard according to its very terms: Respondent had employees in the trench with accumulated water and failed to take any precautions to address the hazards associated with the presence of water. Accordingly, the Court finds Respondent violated the hazard.

2. Respondent's Employees Were Exposed to the Hazard

To prove a *prima facie* violation of the Act, Complainant must show "employees . . . will be, have been, or are in a zone of danger." *See Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072 (No. 93-1853, 1997). In this case, the question of exposure is not complicated. CSHO Lake observed Finley and three of his own employees working inside the trench in a location where the

excavation was improperly benched and had water at the bottom. (Ex. C-1 at 38). As testified to by CSHO Lake, Severance, and Finley, the presence of water has the potential to cause cave-ins by soaking up the bank and causing it to collapse. (Ex. C-4 at 46). While Respondent may contest the source of the water and attempt to explain away why it stayed in the trench, the water remained in the trench for the entirety of CSHO Lake's inspection without abating and Respondent did nothing to remove it or abate the hazard imposed by its presence.

Respondent attempts to question CSHO Lake's credibility and his exposure findings by noting his inspection narrative for Citation 1, Item 1a identifies multiple Katerra employees as being exposed to the hazard and as providing information. Finley contends this clouds CSHO Lake's assessment, because it is unclear whether those employees were referring to the correct excavation or whether they were actually Katerra's employees. The Court finds this is a problem in search of a solution. CSHO Lake adequately explained to the Court why he listed the people he did as employees in his narrative and how he ensured the people he was speaking to were employees of Respondent and were speaking specifically about the trench at issue in this case. There is nothing in the record or in Finley's testimony to suggest otherwise other than a bare insinuation that CSHO Lake *might have* gotten it wrong. The Court declines Respondent's invitation to so speculate.

Based on the foregoing, the Court finds Complainant established Respondent's employees, including Finley himself, were exposed to the hazard posed by the standing water in the excavation.

3. Respondent Knew or Could Have Known of the Hazardous Condition

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA

OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of an employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The question of whether Respondent knew or could have known of the hazardous condition is not complicated. When CSHO Lake arrived, he observed a person later identified as Jason Finley in the excavation working alongside his employees. Finley is not merely a supervisor, but is the owner and operator of Respondent (Finley, LLC). Not only did Finley observe the conditions as they existed on the date of the inspection, but he was in the area of the hazard identified by CSHO Lake. Regardless of whether Finley or Severance perceived those conditions as hazardous is immaterial; the Act only requires Respondent be aware of the condition constituting the hazard. *See Phoenix Roofing, Inc.*, *supra*. Accordingly, the Court finds Respondent was aware of the hazard.

4. The Violation Was Serious

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). Complainant need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010). CSHO Lake testified, without dispute, the presence of water in an improperly protected trench presents a cave-in hazard. Trench cave-ins are dangerous, and sometimes fatal, events. (Tr. 120). The Court finds Citation 1, Item 1a is properly characterized as serious.

Accordingly, the Court finds Complainant proved Respondent committed a serious violation of 29 C.F.R. § 1926.651(h)(1).

B. Citation 1, Item 1b

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

> 29 CFR 1926.652(b)(2): Maximum allowable slopes, and allowable configurations for sloping and benching systems, were not determined in accordance with the conditions and requirements set forth in Appendices A and B to this subpart:
>
> (a) Finley, LLC at 1570 Grove St., Denver, CO: On and around March 25, 2020, the exposing creating, and correcting employer did not ensure that each employee working inside an excavation, where ground water had accumulated, that was approximately 18 feet wide and varied from 6.4 to 9.8 feet in depth was protected from gave-in, in that the excavation was sloped at an angle greater than the 34 degree maximum allowable slope for type C soil and that the excavation was benched, which is prohibited for type C soil. This condition exposed employees and contractor employees to crushing hazards by excavation wall cave-in.

See Citation and Notification of Penalty at 7.

1. The Standard Applied

For the same reasons listed above with respect to Citation 1, Item 1a, the Court finds 29 C.F.R. § 1926.652(b)(2) applies to the condition cited by Complainant.

2. The Citation Item is Duplicative

Complainant seeks to hold Respondent liable for two violations of essentially the same condition. First, Complainant alleged Respondent violated 1926.651(h)(1) because there was water in the trench in which Respondent's employees were working, and not all the walls were sloped appropriately for type C soil. Next, Complainant alleged Respondent violated 1926.652(b)(2) because it did not slope all of the excavation walls appropriately for submerged soil, which, according to Appendix A and B, should be characterized as type C. *See* 29 C.F.R. § 1926, Subpart P, Appx. A. Not only was proper sloping the only abatement method discussed with

respect to either violation, but it would appear Complainant, by citing Respondent in this manner, is attempting to mandate the method of abatement for a performance standard.

Citations are duplicative if "the abatement of one violation necessarily results in the abatement of the other." *North Eastern Precast LLC*, 26 BNA OSHC 2275, 2018 WL 1309480 at *5 (No. 13-1169 *et. al.*, 2018). In fact, the Commission has found violations duplicative under three basic sets of facts: where they require the same abatement conduct; where they involve substantially the same violative conduct; or where they involve the same abatement. *See id.* (internal citations omitted). According to the Commission, however, violations are not duplicative "where they involve standards directed at fundamentally different conduct . . . or where the conditions giving rise to the violation are separate and distinct." *Id.* (citations omitted).

Here, the Court finds Citation Item 1, 1b is duplicative of Item 1, 1a. In both cases, the identified hazard is the presence of water in the excavation. In both cases, Complainant alleges Respondent failed to treat the soil as type C, as is required when soil is submerged under water. Now, Complainant did not explicitly require abatement of Citation Item 1, 1a by way of sloping to type C specifications; however, the slope of the excavation walls was the only abatement discussed and the only condition noted as violative. In other words, not only would the same conduct abate the identified hazard in both citation items, but it appears Complainant is using Citation Item 1, 1b as a specific method of abatement for the violation identified in Citation 1, 1a. Thus, not only has Complainant cited Respondent under two separate standards for the same conduct, but Complainant seeks the same abatement method for both violations. Accordingly, the Court finds Citation 1, Item 1b is duplicative and shall be VACATED.[5]

5. That Complainant did not propose a penalty for this citation item does not make it any less duplicative. There are consequences, both professionally and legally, for having a prior, serious violation of a standard on your record, regardless of whether the violation resulted in a fine.

C. Citation 1, Item 2

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

> 29 CFR 1926.651(k)(1): Daily inspections of excavations, the adjacent areas, and protective systems were not made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications failure of protective systems:
>
> (a) Finley, LLC at 1570 Grove St., Denver, CO: On and around March 25, 2020, the exposing creating, and correcting employer did not ensure that daily inspections of an excavation that was approximately 18 feet wide and varied from 6.4 to 9.8 feet in depth were made by a competent person for evidence of a situation that could have resulted in a hazardous condition, in hat the competent person did not identify that submerged soil must be classified as type C soil and in that the competent person was not conducting manual soil analysis during excavation inspections or when conditions affecting the soils classification changed such as soil submerged with water. This condition exposed employees and contractor employees to crushing hazards by excavation wall cave-in.

See Citation and Notification of Penalty at 8.

1. The Standard Applied and its Terms Were Violated

Like the previous two citation items discussed above, the Court finds the standard applies. Also, like the previous two items, the key issue before the Court is whether Respondent violated the terms of the standard. During his inspection, CSHO Lake asked Severance and Finley a series of questions about how they assessed the soil in order to make the appropriate soil type designation and implement the appropriate protection. According to CSHO Lake, both Severance and Finley appeared confused by the questions he asked about soil typing and manual testing of the soil. (Tr. 38, 39, 45, 131; Ex. C-1 at 1). At the time of the inspection, both Finley and Severance told CSHO Lake they had not performed anything other than a visual examination of the trench and that they had relied on the geotechnical report to ascertain the appropriate soil type. (Tr. 45, 133-134). There

is virtually no documentation of Respondent performing inspections of this or any other trench (though none is legally required) it worked on in the seven weeks it was at the worksite. As regards the trench at issue, Finley testified he did not perform a new examination of the soil or reclassify it in response to the presence of water. (Tr. 295). Because of these facts, CSHO Lake determined neither Finley nor Severance was a competent person and that Respondent failed to perform competent person inspections according to the terms of the standard.

In response, Finley contends both he and Severance simply misunderstood CSHO Lake's questions regarding manual testing of the soil and that CSHO Lake is simply mistaken as to whether additional testing was performed on the excavation once water was discovered in the bottom. Further, Finley argues he and Severance are clearly competent people based on their extensive experience in the field of earthmoving and excavation. In other words, the Court is yet again faced with conflicting reports over a key fact in this case. As with the previous disputes, the Court again finds CSHO Lake's testimony to be more credible.

Notwithstanding Finley and Severance's extensive experience, they were apparently incapable of understanding CSHO Lake's question about whether they had performed a manual test of the soil. Finley claims he misunderstood what CSHO Lake meant by a "manual" test, as if he were referring to some unidentified manual, when he was actually referring to the test recommended by the excavation and trenching standard. This represents yet another excuse by Respondent that does not square with the facts. The Court would expect someone with Respondent's extensive experience would understand what someone was asking if they inquired whether he had performed additional, manual tests to go along with the visual tests he told CSHO Lake about. Instead, at the time of the inspection, Finley exhibited ignorance of the requirements and then, when it came time for trial, illustrated an encyclopedic knowledge of those same

requirements. CSHO Lake's testimony, however, was consistent with his contemporaneously taken notes and withstood cross-examination by Respondent.

A competent person is, according to the Act, "one who is capable of identifying existing or predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. § 1926.650(b). Generally, this requires training and knowledge in the areas of soil analysis, protective systems, and the standard's requirements. *See* Excavations, 54 Fed. Reg. 45894, 45909. *See also Superior Masonry Builders*, 20 BNA OSHC 1182 (No. 96-1043, 2003) (holding a person illustrates competence by performing a competent and reasonable inspection and that experience alone does not qualify a designee as a "competent person").

In the face of the foregoing, the Court is presented with two likely scenarios: (1) Finley, with his copious amounts of experience, is a competent person under the terms of the standard, albeit one who failed to perform adequate inspections of his worksite and appropriately assess the soil of the excavations he and his employees were working in; or (2) Finley, with his copious amounts of experience, failed to gain the necessary knowledge during his tenure in order to perform compliant inspections and respond appropriately to changes in trench conditions. In either case, the Court finds Respondent violated the standard, because it means either Respondent did not understand enough to be a competent person or simply did not perform the inspections as required by the terms of the standard. By Respondent's own admission to CSHO Lake, he did not perform an updated inspection or assessment of the trench after water had been introduced. By his own admission he primarily performed visual inspections of the trench, but there is no evidence of this or any other examination of the trench or soil occurring. To the extent Respondent's visual

examinations were, in fact, occurring, the Court finds they were inadequate in the face of the condition of this excavation specifically, and the worksite generally.

Given the condition of the trench and Respondent's statements to CSHO Lake at the time of the inspection, the Court finds Respondent violated the terms of 29 C.F.R. § 1926.651(k)(1).

2. Respondent's Employees Were Exposed to a Hazard

For the same reasons expressed above with respect to Citation 1, Item 1a, the Court finds Respondent's employees were exposed to the hazard posed by Respondent's failure to conduct competent person inspections.

3. Respondent Knew or Could Have Known of the Hazardous Condition

Complainant can show constructive knowledge through a lack of any policy or procedure designed to uncover hazards. "[A]n employer has a general obligation to inspect its workplace for hazards." *Hamilton Fixture*, 16 BNA OSHC 1073, 1993 WL 127949 at *16 (No. 88-1720, 1993) (citing *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980)). The scope of that obligation "requires a *careful and critical examination* and is not satisfied by a mere opportunity to view equipment." *Austin Comm. v. OSHRC*, 610 F.2d 200, 202 (5th Cir. 1979) (emphasis added). Some factors to assess whether an employer has exercised reasonable diligence include an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981).

It is notable Respondent does not have a section of its safety and health program dedicated to trenching or excavations. In fact, after reviewing Respondent's safety and health program in its entirety, the Court cannot find a single mention of trenches or excavations at all, which is unusual

for a company whose primary business is trenches.[6] In light of this utter lack of any safety and health policies related to trenching and excavations, it is hardly surprising Respondent failed to perform regular or adequate inspections of its excavations. As the owner of Respondent, it was Finley's responsibility to ensure his program accounted for the hazards his employees could reasonably be expected to be exposed to and implement an inspection regime designed to identify and mitigate those hazards. Not only did Respondent lack a program or policy discussing the hazards of trenches and excavations, but there is nothing within the policy itself discussing worksite inspections of any sort. In light of the generic nature of Respondent's safety and health policy, Finley's initial inability to understand CSHO Lake's inquiries during the inspection and the unstructured and informal nature of his inspection regime makes much more sense given his fairly extensive experience in the arena of excavations.

In light of the foregoing, the Court finds Respondent, through its owner, knew it was not complying with the requirement to perform daily inspections sufficient to uncover hazardous conditions. While Finley and Severance are clearly experienced, the lack of any safety and health policy regarding trenches and excavations inhibited their ability to perform timely and adequate inspections.

4. The Violation Was Serious

The Court finds Citation 1, Item 2 is properly characterized as serious for the same reasons it did with respect to Citation 1, Item 1a. An improperly monitored excavation, particularly one that has exhibited groundwater problems, can lead to serious injuries up to and including death.

6. It is also notable Respondent's safety and health program has a footer on every page entitled, "Small Company Health and Safety Program Manual", suggesting it is a generic program not specific to Respondent's operations. (Ex. C-3 at 0005 to 0038).

Accordingly, the Court finds Complainant proved Respondent committed a serious violation of 29 C.F.R. § 1926.651(k)(1).

D. Citation 1, Item 3a

Complainant alleged a serious violation of the Act in Citation 1, Item 3a as follows:

> 29 CFR 1910.1200(e)(1): Employer had not developed or implemented a hazard communication program included [sic] the requirements outlined in 29 CFR 1910.1200(e)(1)(i) and (e)(1)(ii):
>
> (a) Finley, LLC at 1570 Grove St., Denver, CO: On and around March 25, 2020, the employer did not develop, implement, and maintain at the workplace a site-specific written hazard communication program. Employees were potentially exposed to hazardous chemical, including but not limited to the following;
>
> 1) Christy's Red Hot Blue Glue Low VOC PVC Plastic Pipe Cement
> 2) MAINLINE Purple Low VOC Primer for PVC and CPVC

See Citation and Notification of Penalty at 9.

E. Citation 1, Item 3b

Complainant alleged a serious violation of the Act in Citation 1, Item 3b as follows:

> 29 CFR 1910.1200(h)(1): Employees were not provided effective information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard that the employees had not previously trained about was introduced into their work area:
>
> (a) Finley, LLC at 1570 Grove St., Denver, CO: On and around March 25, 2020, the employer did not provide employees with effective information and training on the location and availability of the written hazard communication program, the format of safety data sheets, and the format and availability of Globally Harmonized System labels for chemical containers. This condition potentially exposed employees to chemical hazards.

See Citation and Notification of Penalty at 10.

1. Complainant Failed to Establish Exposure in Citation 1, Items 3a & 3b

Respondent did not have a copy of its hazard communication program at the worksite as required by 1910.1200(e)(1), nor did it provide chemical- or site-specific training as required by

1910.1200(h)(1). Notwithstanding these failures, the Court finds Complainant's evidence regarding exposure to the identified chemicals is insufficient to establish his *prima facie* case. According to CSHO Lake, Finley told him he did not know what a hazard communication program was, and it was not until trial that Finley provided a copy of a generic hazard communications program.[7] (Tr. 55, 59, 63-67; Ex. R-26). Further, Respondent readily admitted he did not provide hazard communications training to his employees, relying instead on the basic primer provided by Katerra prior to starting work at the Grove Street site. (Tr. 282). Notwithstanding these failures, the Court finds Complainant did not prove Respondent's employees were exposed to the chemicals identified, nor does it find a violation of the standard can be substantiated by Respondent's failure to have an SDS sheet for the gasoline it puts in its vehicles or the battery acid present in those vehicles' batteries.

Complainant asserts it is undisputed Respondent's employees were exposed to the two chemicals specified in the citation narrative and cites to three separate portions of the transcript, none of which identify testimony from Respondent indicating agreement. (Tr. 48, 147, 154). In fact, Respondent explicitly denied his employees helped the plumbers connect the pipe at the bottom of the trench. (Tr. 254). While Finley admitted his employees may have worked in the trench while the plumbers were connecting and sealing pipe with the chemicals in question, he took great pains to point out his employees do not do plumbing work. (Tr. 254). This jibes with other testimony given by Finley, where he testified his company only installs drainage pipe, which does not require adhesive, or where he admitted not knowing how water entered the pipe the plumbers had installed in the excavation. Further, in this case, as opposed to the other instances

7. The generic nature of Respondent's hazard communication program bore striking similarities to Respondent's "Small Company Health and Safety Program Manual", neither of which mentioned anything specific about Respondent's primary business of excavation and earthmoving. (*Compare* C-3 at 0003 *with* R-26).

where the Court credited CSHO Lake's testimony over Finley's, the Court finds CSHO Lake's testimony on this topic vague when it came to identifying who, exactly, was connecting pipes and applying the identified adhesives. Based on Finley's testimony, the Court finds it just as likely there was a misunderstanding about who was merely in the trench and who was installing the pipe and, thus, exposed to the chemicals identified above.

The Court is not convinced Complainant has established the level of training and information Respondent provided to its employees was insufficient. As noted previously, when Respondent installs "plumbing", it is drainage pipe that does not require adhesives. As such, there was no reason to provide independent training on hazards that were not reasonably anticipated. Further, given that expectation, the Court finds the training and information provided to Respondent's employees through Katerra appears appropriate for the hazard presented by working adjacent to other employees who are required to use such chemicals. Finally, the Court finds Complainant's attempt to include gasoline and battery acid as potential exposures is a bridge too far. First, the alleged exposures in the Citation and Notification of penalty explicitly list the adhesives applied to the pipe. Attempting to squeeze in gasoline for equipment and battery acid as additional hazards fails the basic test for an amendment because neither chemical is related to the exposure originally alleged and thus represents a new allegation requiring Complainant to plead additional facts. *See Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013) ("[A] new pleading cannot relate back if the effect of the new pleading 'is to fault [the defendants] for conduct different from that identified in the original complaint,' even if the new pleading 'shares some elements and some facts in common with the original claim."') (internal citations omitted). Second, the Court finds making such an allegation trivializes legitimate threats to safety and health and highlights the weakness of Complainant's original allegation. The Court

refuses to accept an invitation to uphold a violation based on Respondent's employees' exposure to gasoline, which represents no greater hazard to a trench digger than a stay-at-home dad filling up for soccer practice, or to battery acid, for which there was absolutely no evidence of exposure.

The Court finds Complainant failed to establish its *prima facie* case. Accordingly, Citation 1, Items 3a and 3b shall be VACATED.

F. Citation 2, Item 1

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

> 29 CFR 1926.95(d)(1):The protective equipment, including personal protective equipment (PPE), used to comply with this part, was not provided by the employer at no cost to the employees:
>
> (a) Finley, LLC at 1570 Grove St., Denver, CO: On and around March 25, 2020, PPE was not provided by the employer at no cost to the employees in that the employer required employees to purchase their own chemically resistant and cut resistant gloves. This condition potentially exposed employees to chemical and physical hazards, while laying pipe in an excavation.

See Citation and Notification of Penalty at 11.

1. Complainant Failed to Prove a Violation of the Standard

Complainant's failure to include any argument about who provides PPE is a testament to the strength of Complainant's case as to this violation. Complainant did include a single, proposed finding of fact, which indicated Finley admitted his employees are required to pay for their own PPE. Specifically, CSHO Lake targeted the gloves Respondent's employees were wearing in light of his determination those employees were exposed to chemical hazards while installing pipe. (Tr. 162). As with the previous violation, the Court finds the proposed violation is the result of a misunderstanding and lack of follow-up.

CSHO Lake testified Finley told him his employees were required to provide their own PPE but that he had extra equipment available if they need it. (Tr. 161). CSHO Lake

acknowledged, however, he did not follow up with Respondent's employees to determine whether their PPE was provided free of charge, because "it's an other than serious, and usually this get thrown out anyway during informal conferences, so I don't put a lot of trouble into documenting these things." (Tr. 162). Finley, on the other hand, testified he was attempting to tell CSHO Lake that some of his employees choose to wear their own equipment, which they provide at their own expense; however, he also testified he provides the equipment necessary to address the hazards to which his employees are regularly exposed. (Tr. 254-55, 272-73).

Given Complainant's failure to seriously pursue this citation item, CSHO Lake's nonchalance as to its importance, and Respondent's reasonable explanation as to the misunderstanding, the Court finds Complainant failed to prove a violation of the standard. Accordingly, Citation 2, Item 1 is VACATED.

V. Penalty

Under the Act, the Secretary has the authority to propose a penalty according to Section 17 of the Act. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441–42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). Ultimately, it is the province of the Commission to "assess all civil penalties provided in [Section 17]", which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995).

"Regarding penalty, the Act requires that "due consideration" be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA

OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). Rather, the Commission assigns the weight that is reasonable under the circumstances. *Eric K. Ho,* 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (Consol.), *aff'd sub nom.*, *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005). It is the Secretary's burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed. *Valdak Corp*., 17 BNA OSHC at 1138. "The gravity of the violation is the 'principal factor in a penalty determination. Assessing gravity involves considering: (1) the number of employees exposed to the hazard; (2) the duration of exposure; (3) whether any precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury. *See, e.g.*, *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished).

With respect to Citation 1, Item 1a, Complainant proposed a penalty of $2892, which it based on a determination the severity of the violation was "high", but its probability was "lesser". (Tr. 126-27). CSHO Lake explained the severity was high due to the potential for serious injury and death, but low in terms of probability because of the duration of the exposure. This penalty was also premised on Citation 1, Item 1a being grouped with Item 1b. Complainant awarded a 70% reduction for Respondent's size, but did not award any additional reductions due to Respondent's lack of a formal safety and health program. The Court finds the proposed penalty is too high for the following reasons: (1) the Court vacated Item 1b; and (2) while CSHO Lake identified water in the excavation, he did not show additional indications of the trench weakening, nor was there a precise measurement indicating the depth of the water at the bottom of the trench. In light of those facts, the Court finds a penalty of $1200 is appropriate.

With respect to Citation 1, Item 2, Complainant proposed a penalty of $2892, which is identical to the grouped penalty proposed with respect to Citation 1, Item 1a. The assessment is

identical because they targeted the same condition, at the same time, affecting the same people. Again, the Court finds the penalty is high, albeit for slightly different reasons. The Court believes Respondent was conducting some level of review of the trench's conditions; however, it was not nearly as robust or thorough as what is required by the standard. This, in turn, had an impact on Respondent's ability to identify and rectify hazardous conditions that can occur while excavating. While a downward departure from Complainant's proposal is appropriate, the Court will not reduce the penalty similar to Item 1a. The lack of an adequate inspection regime is a direct result of Respondent relying on a cookie cutter safety and health plan that bears little connection to the work Respondent performs. This, in turn, reflects a need for Respondent to take more seriously its duty as a steward of its employees' safety and health. Accordingly, the Court finds a penalty of $2000 is appropriate.

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 1a is AFFIRMED as serious, and penalty of $1200 is ASSESSED.
2. Citation 1, Item 1b is VACATED.
3. Citation 1, Item 2 is AFFIRMED as serious, and a penalty of $2000 is ASSESSED.
4. Citation 1, Items 3a & 3b are VACATED.
5. Citation 2, Item 1 is VACATED.

SO ORDERED

/s/ Peggy S. Ball
Peggy S. Ball
Judge, OSHRC

Date: November 5, 2021
Denver, Colorado