



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

SECRETARY OF LABOR,

Complainant,

v.

JPC GROUP, INC.,

Respondent.

OSHRC Docket No. 05-1907

**APPEARANCES:**

Lee Grabel, Attorney; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC  
For the Complainant

Dennis J. Morikawa, Esq., and Thomas Benjamin Huggett, Esq.; Morgan, Lewis & Bockius LLP, Philadelphia, PA  
For the Respondent

**DECISION**

Before: ROGERS, Chairman; and THOMPSON, Commissioner.

BY THE COMMISSION:

**STATEMENT OF THE CASE**

JPC Group, Inc. ("JPC") entered into a subcontract to underpin the foundation walls of two buildings positioned on either side of a construction site located in Philadelphia, Pennsylvania. On September 13, 2005, one of the buildings on which JPC had been working collapsed. Following an inspection of the construction site, the Occupational Safety and Health Administration ("OSHA") issued JPC a serious citation alleging a single grouped violation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), for JPC's failure to comply with two provisions of the excavation standard set forth at 29 C.F.R. § 1926.651. Administrative Law Judge Covette Rooney affirmed the grouped citation and assessed the Secretary's proposed penalty of \$2,500. For the following reasons, we affirm the citation and assess the proposed penalty.

## ISSUE

At issue on review is whether the judge properly affirmed grouped Item 1a and 1b.<sup>1</sup> Under Item 1a, the Secretary alleges that JPC performed excavation work adjacent to a building foundation wall without providing adequate support, in violation of 29 C.F.R. § 1926.651(i)(1).<sup>2</sup> Under Item 1b, the Secretary alleges that during excavation work, JPC did not ensure a competent person inspected the work area as needed throughout the shift, in violation of 29 C.F.R. § 1926.651(k)(1).<sup>3</sup>

## FINDINGS OF FACT

JPC's work on the project consisted of "underpinning" to enhance the foundations of two walls—each supporting one of two buildings located at 1902 Spring Garden Street ("building 1902"), and 1910 Spring Garden Street ("building 1910").<sup>4</sup> Prior to commencing the underpinning work, JPC conducted a "test dig" at building 1910 by removing enough soil from against the wall to expose a portion of its foundation. After removing the soil, JPC laborer Claude Enoch examined the foundation wall and discovered that it contained loose stones with no mortar between them, and questioned whether the wall was suitable for underpinning. Enoch then contacted JPC foreman and designated competent person Jeffrey Nicolai, to request that he assess the wall's condition. After examining the wall, Nicolai agreed with Enoch's concern and called JPC project manager Timothy Boyce, an engineer by training, for advice on how to proceed. Boyce instructed Nicolai to close the test dig area and halt all underpinning work until he could evaluate the site.

The following day, JPC conducted a second test dig at the same location, with Boyce, project engineer Bevan Lawson, and a number of employees from the general contractor and another subcontractor in attendance. The test revealed that due to the deteriorated condition of the mortar,

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<sup>1</sup> On review, the parties do not address characterization or penalty, and we see no basis upon which to question the judge's findings on these issues.

<sup>2</sup> Section 1926.651(i)(1) states that "[w]here the stability of adjoining buildings, walls, or other structures is endangered by excavation operations, support systems such as shoring, bracing, or underpinning shall be provided to ensure the stability of such structures for the protection of employees." § 1926.651(i)(1).

<sup>3</sup> Section 1926.651(k)(1) states that "[d]aily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift."

<sup>4</sup> The underpinning process involves removing earth from underneath a wall and pouring concrete as structural support into the space created by the removed dirt. The process here was to be repeated in four-foot wide segments until the entire length of each of the two walls was underpinned.

some of the foundation wall's stonework had collapsed upon attempting to excavate soil from underneath the wall. As JPC stipulated, Boyce "determined that excavation under the wall of 1910 Spring [G]arden Street as originally proposed would endanger the stability of 1910 Spring Garden Street." It was therefore determined that underpinning of the walls would be delayed until project engineer Lawson could revise the plans. Boyce then suggested that JPC protect the walls on an interim basis by applying a waterproofing agent known as Gunitite. Although preparation for the Gunitite application was to include excavation and removal of all of the soil along the sides of each wall, it did not require the removal of any soil from underneath the wall.

Nearly two weeks later, JPC backhoe operator Richard Hartley and two JPC laborers, Enoch and Theodore Slater, began preparing the foundation walls for the Gunitite application. Hartley first removed all of the soil from the foundation wall of building 1902, then moved his backhoe to the rear of building 1910. According to the parties' stipulation, Hartley "began excavating at the rear of 1910 Spring Garden Street and worked his way along the wall towards the front of the property."<sup>5</sup> Enoch and Slater then used shovels to remove any remaining soil that Hartley could not remove with the backhoe, before attaching mesh and rebar to the wall. It is undisputed that JPC did not use any type of support system, such as shoring, while performing the excavation work. Less than an hour after Hartley had removed soil approximately halfway along the wall of building 1910, the rear of the building collapsed.

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<sup>5</sup> Although Hartley, Enoch, and Slater testified that Hartley did not excavate any soil along the foundation wall of building 1910 on the day it collapsed, this testimony directly contradicts the parties' stipulation, and JPC does not claim the stipulation is not binding. *Pyramid Masonry Contractors Inc.*, 16 BNA OSHC 1461, 1463, 1993-95 CCH OSHD ¶ 30,255, p. 41,673 (No. 91-0600, 1993) (finding that "the plain language and intent of the stipulation prevail"). Moreover, the compliance officer testified that Hartley told him he had removed soil from half the length of building 1910, and another subcontractor's foreman testified that he personally observed JPC employees remove soil along building 1910. Based on the "demeanor of the witnesses as they testified, including their facial expressions and body language," the judge credited the testimony of these two witnesses, finding them more sincere and believable witnesses than Hartley, Enoch, and Slater. After reviewing the record and the judge's opinion, we see no basis for setting aside the judge's credibility determinations. *See Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1708, 2001 CCH OSHD ¶ 32,504, p. 50,406 (Nos. 96-1330 and 96-1331, 2001) (deferring to judge's credibility determination "because he is the one who heard the witness and observed his demeanor"); *P & Z Co.*, 6 BNA OSHC 1189, 1192, 1977-78 CCH OSHD ¶ 22,413, p. 27,024 (No. 76-431, 1977) ("what is necessary is a finding that specifically resolves conflicting testimony or doubts as to credibility").

## PRINCIPLES OF LAW

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1982 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Reasonable diligence includes “tak[ing] into account all available, factual information relating to whether hazardous conditions exist, or reasonably could exist, where work is being performed.” *Bland Constr. Co.*, 15 BNA OSHC 1031, 1036, 1991-93 CCH OSHD ¶ 29,325, p. 39,396 (No. 87-992, 1991). Thus, “[i]n exercising reasonable diligence an employer is required to inspect and perform tests to discover safety-related defects . . . .” *Union Boiler Co.*, 11 BNA OSHC 1241, 1244, 1983-84 CCH OSHD ¶ 26,453, p. 33,606 (No. 79-232, 1983), *aff'd*, 732 F.2d 151 (4th Cir. 1984).

## ANALYSIS

JPC does not dispute that the cited standards apply. In terms of noncompliance, the evidence establishes that on the morning of the collapse, prior to the commencement of work, JPC foreman Nicolai inspected the work area and, before he left the worksite, instructed Hartley, Enoch, and Slater to excavate the soil along the foundation wall of buildings 1902 and 1910. After finishing the excavation work at building 1902, Hartley set up the backhoe at the rear of building 1910 to begin excavating the soil along that wall. Hartley testified that when he looked at the wall, he observed that it was in “very . . . poor condition” and “crumbly.” Indeed, in its briefs both before the judge and the Commission on review, JPC acknowledges Hartley specifically “determined the condition of the foundation wall was questionable.” According to Hartley, “at that point [he] stopped what [he] was doing . . . [,] [Enoch] came over to take a look at the wall [and] . . . [Enoch] told us just to hold off and not touch anything with the back wall, to wait for [Nicolai].” There is no evidence, however, that Nicolai or any other competent person ever evaluated the condition of the wall or addressed the concerns raised by Hartley and Enoch.<sup>6</sup> Nonetheless, as the parties stipulated, “Hartley began

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<sup>6</sup> We reject JPC’s argument on review that the judge erred in finding Enoch failed to qualify as a “competent person.” Under the excavation standard, a competent person is “one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are . . . dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.” 29 C.F.R. § 1926.650. As the judge noted, the compliance officer testified that Enoch told him he lacked the authority to remove employees from exposure to a hazard. Enoch also testified that he lacked the authority to stop the job without permission from a supervisor. Therefore, we agree with the judge that Enoch was not a competent person at this worksite. *Southwestern Bell Telephone Co.*,

excavating at the rear of [building 1910] and worked his way along the wall towards the front of the property.”

Based on these facts, we find JPC failed to exercise reasonable diligence in that they did not have a competent person address its employees’ concerns about whether it was safe to proceed with their assigned excavation work along the building 1910 foundation wall, in violation of § 1926.651(k)(1).<sup>7</sup> *Bland Constr. Co.*, 15 BNA OSHC at 1036, 1991-93 CCH OSHD at p. 39,396 (reasonable diligence requires consideration of available factual information relating to whether hazard exists). In addition, we find JPC failed to exercise reasonable diligence by continuing to perform the excavation work in the absence of a reassessment of the wall’s condition, thereby risking employee exposure to a potential hazard, in violation of § 1926.651(i)(1). *Id.* In these circumstances, we also find that JPC had constructive knowledge of these conditions. *Id.* (finding failure to exercise reasonable diligence to assess potential hazard establishes constructive knowledge of cited condition). Finally, the record establishes that JPC employees were exposed to the violative conditions. Hartley, Enoch, and Slater all continued to perform excavation work along the building 1910 foundation wall after Hartley had questioned its condition. Moreover, Enoch testified that he and Slater were so close to building 1910 when it began to crack they had to run away from the wall to avoid being struck as the building collapsed.

While we recognize that the same set of facts support overlapping violations of both Item 1(a) and 1(b), the Secretary has grouped these items and assessed a single penalty. Accordingly, we conclude that JPC was in violation of the cited standards and, therefore, affirm the grouped citation item.<sup>8</sup> *See Burkes Mechanical Inc.*, 21 BNA 2136, 2142, 2007 CCH OSHD ¶ 32, 922, pp. 53,564-65 (No. 04-0475, 2007) (assessing single penalty for closely-related grouped violations).

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19 BNA OSHC 1097, 1098, 2000 CCH OSHD ¶ 32,198, p. 48,747 (No. 98-1748, 2000) (finding that employees who could decline dangerous work not qualified as “competent persons,” because they lacked requisite “authority to ‘take prompt corrective measures’ regarding the physical hazards in the working conditions”), *aff’d without published opinion*, 277 F.3d 1374 (5th Cir. 2001).

<sup>7</sup> Though not a basis for affirming the violation here, we also note that JPC’s own safety program requires that “[w]hen employees are occupying an excavation, the competent person will remain at the excavation constantly evaluating conditions.”

<sup>8</sup> We note that before the judge and on review, the Secretary argues that removing the soil berm along the foundation wall prior to Gunitite application endangered the stability of the building. Given our basis for affirming the grouped citation item, as discussed above, we need not address this argument. However, in Commissioner Thompson’s opinion the record did not demonstrate that the stability of the building was endangered by the removal of the soil berm.

**ORDER**

We affirm Serious Citation 1, Item 1(a) and (b) alleging violations of 29 C.F.R. §§ 1926.651(i)(1) and (k)(1), and assess a single penalty of \$2,500.

SO ORDERED.

/s/ \_\_\_\_\_  
Thomasina V. Rogers  
Chairman

/s/ \_\_\_\_\_  
Horace A. Thompson III  
Commissioner

Dated: August 11, 2009



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

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SECRETARY OF LABOR, :  
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Complainant, :  
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v. : OSHRC DOCKET NO. 05-1907  
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JPC GROUP, INC., :  
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Respondent. :  

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Appearances:

Adam F. Welsh, Esquire  
U.S. Department of Labor  
Philadelphia, Pennsylvania  
For the Complainant.

Thomas B. Huggett, Esquire  
Morgan, Lewis & Bockius LLP  
Philadelphia, Pennsylvania  
For the Respondent.

Before: Covette Rooney  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). From September 13 through 18, 2005, the Occupational Safety and Health Administration (“OSHA”) inspected a work site of JPC Group, Inc. (“JPC” or “Respondent”), located in Philadelphia, Pennsylvania; OSHA initiated its inspection after a building at the site collapsed into an excavation abutting the building. As a result of the inspection, OSHA on October 27, 2005, issued a serious citation alleging violations of 29 C.F.R. §§ 1926.651(i)(1) and (k)(1), provisions of OSHA’s excavations standard. JPC filed a timely notice of contest with respect to the citation, and the hearing in this matter took place in Plymouth Meeting, Pennsylvania, on June 26, 2006. Both parties have filed post-hearing and reply briefs.

### *The OSHA Inspection*

James Touey, the OSHA compliance officer (“CO”) who conducted the inspection, went to the job site on September 13, 2005, after his office was notified of the collapse; the area was filled with dust and the fire department was still there when he arrived at about 12:45 p.m.<sup>1</sup> According to the CO’s testimony, the property under construction was between 1902 and 1910 Spring Garden Street (“1902” and “1910,” respectively) in Philadelphia, Pennsylvania, and one of his photos, No. 89, shows the back of 1910, the building that collapsed; another view, No. 96, shows how 1910 had collapsed into the excavated area in back of that property.<sup>2</sup> Pursuant to his inspection, CO Touey learned that JKT, the excavation and grading contractor, had been working in the area shown in No. 96 and that JPC, the contractor hired to do underpinning work on both 1902 and 1910, had also been working in the area; the CO explained that underpinning involves placing concrete forms underneath structures to provide stability. CO Touey further learned that on September 2, test digs were done at 1902 and 1910 to inspect the foundation walls of those properties; Bevan Lawson, the consulting engineer for the project, was present, as were Timothy Boyce and Jeff Nicolai, JPC’s project manager and foreman, respectively, at the site.<sup>3</sup> The test digs raised concerns about the stability of the foundation walls of both 1902 and 1910, and, after those present discussed the matter, it was decided that the initial underpinning plans would be abandoned and that Mr. Lawson would prepare new underpinning plans;<sup>4</sup> in the meantime, the soil “berm”<sup>5</sup> that JKT had left along the walls of 1902 and 1910 to provide support would be removed and Gunitite, a concrete waterproofing substance that protects a wall from damage but does not contribute to its structural integrity, would be applied to the walls. (Tr. 14, 17-29, 35, 49, 61, 64).

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<sup>1</sup>Hereinafter, all dates in this decision will refer to the year 2005 unless otherwise stated.

<sup>2</sup>The photos the CO took at the site are contained in C-14, and the number of each photo appears on the back of the photograph.

<sup>3</sup>Mr. Boyce is also an engineer. (Tr. 178).

<sup>4</sup>R-39, Mr. Lawson’s September 3 letter, sets out new underpinning plans for 1910; as to 1902, it was to have no underpinning but was to be “reinforced with gunitite and tie-backs.”

<sup>5</sup>A “berm” is “a mound or wall of earth or sand.” *See* [www.merriamwebster.com](http://www.merriamwebster.com).



CO Touey also learned that in the days prior to the collapse, Richard Hartley, JPC's operator, used a backhoe to remove most of the soil from 1902's wall, after which two JPC laborers, Claude Enoch and Theodore Slater, manually removed the rest; Mr. Enoch and Mr. Slater then placed rebar and wire mesh on the wall in preparation for the Gunitite to be applied. On the morning of September 13, Mr. Nicolai was at the site for about an hour to get the work started; after he left, the JPC employees finished up the wall of 1902 and moved to the wall of 1910. Mr. Hartley began digging the soil away from the wall of 1910 with the backhoe, starting at the south end of 1910 and moving towards the north end, as shown in C-5, a photo taken at the site shortly before the collapse.<sup>6</sup> After Mr. Hartley had removed the soil from about half the length of the wall, he could not go any further as a large amount of bulk soil was blocking his way. Mr. Hartley left the backhoe and went to ask Reginald Williams, JKT's foreman, if JKT could remove the soil.<sup>7</sup> Mr. Williams said JKT could not and expressed his concern about the way the soil was being removed, after which Mr. Hartley moved his backhoe to the southeast corner of the excavated area and parked it.<sup>8</sup> Mr. Enoch and Mr. Slater were at the south end of 1910, preparing to place rebar and mesh, when they heard popping sounds; Mr. Williams, the JKT foreman, yelled at them from his location above the excavated area to get away from the building, as he saw it was about to fall, and Mr. Enoch and Mr. Slater both escaped injury by running away from the building. (Tr. 30-31, 34-52, 62, 91). *See also* C-37, No. 10.

After his inspection, CO Touey concluded that JPC had violated 29 C.F.R. 1926.651(i)(1) because it had not provided shoring, bracing or underpinning to ensure the stability of structures endangered by excavation operations; he also concluded JPC had violated 29 C.F.R. 1926.651(k)(1) because a competent person had not been available to inspect areas adjacent to the excavation site as needed throughout the work shift. (Tr. 16-17, 52-55).

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<sup>6</sup>R-5 is a photo taken by a partner of the general contractor ten to 30 minutes prior to the collapse, which, according to the CO, occurred about 11:45 a.m. The left side of R-5 is the south end of the foundation wall of 1910. (Tr. 38-39, 43-50; C-38).

<sup>7</sup>Mr. Hartley evidently made this request because the bucket of his backhoe was small, about a 1-foot bucket, while that of JKT was much larger. (Tr. 163, 167-71).

<sup>8</sup>Mr. Williams also expressed his concern about how JPC was proceeding to Mr. Enoch; this conversation occurred before the one with Mr. Hartley. (Tr. 41-42).

### *Credibility Determination*

As a preliminary matter, I note that certain testimony of JPC's witnesses differed significantly from that of CO Touey. Mr. Enoch, for example, testified that although he and Mr. Slater finished up 1902's wall on September 13, they did no work on 1910 that day because Mr. Hartley was unable to remove the soil from that wall due to other dirt and debris in the area; he said that Mr. Hartley first tried to remove the soil from the south end of 1910 but could not and that he next tried to remove the soil from about the middle of 1910, as shown in C-5, but still could not.<sup>9</sup> Mr. Enoch further testified that he did not speak with anyone from JKT that day but that Mr. Hartley did; according to Mr. Enoch, Mr. Hartley asked JKT's foreman if JKT could remove the dirt and debris so he could do his work but the foreman refused. (Tr. 134-43, 146). Mr. Slater also testified that no work was done on 1910's wall on September 13. He said no soil was removed from that wall that day and that he did not recall seeing Mr. Hartley in the backhoe in the location depicted in C-5; he indicated that the reason Mr. Hartley could not do anything that morning was because JKT refused to remove the dirt and rubble in the excavated area. (Tr. 150-55). Mr. Enoch and Mr. Slater both agreed that they were standing right by 1910's wall when they heard popping noises and saw a crack going up the building; they avoided being injured by running away from the building. (Tr. 115-17, 155-57).

In addition to the above, Mr. Hartley testified that although he cleaned off the small amount of soil that was left on 1902's wall on September 13, he did not do any cleaning of 1910's wall that day. He explained that after setting up the backhoe by 1910, he noticed the wall was in very poor condition; he had Mr. Enoch take a look, and Mr. Enoch told him to not touch the wall and to wait and run the situation by Mr. Nicolai. He also explained that Mr. Enoch then told him he could move further down the wall and try to remove some of the brick, dirt and concrete material that was there; however, when he tried to do so, as shown in C-5, he found the backhoe was too small for that work. Mr. Hartley went to ask JKT's foreman if JKT could remove some of the material, but the foreman refused; Mr. Hartley waited for about a half hour and then made the same request of the foreman,

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<sup>9</sup>Mr. Enoch said he was not concerned about removing the soil along 1910 but that that wall was not stable for underpinning, which requires digging under the wall. (Tr. 129, 144).

who again refused. Mr. Hartley next went to speak to one of the project owners who was there; as he was doing so he heard a cracking noise, after which the building collapsed. (Tr. 158-76).

Finally, Mr. Boyce testified that on September 2, when he and others met to discuss the walls of 1902 and 1910, he discovered the stones making up the walls had no mortar between them and that the proposed underpinning could not be done; it was agreed the walls would be cleared, that Gunitite would be applied to waterproof the walls, and that Mr. Lawson would draw up new plans for underpinning the walls. Mr. Boyce said there were no restrictions on uncovering the walls and that he had no concerns about doing so, but he agreed two of his suggestions had been to put a “tieback through the wall” or to “pour another retaining wall.” He also said that underpinning is an extension of a foundation wall which allows the builder to develop earth below the existing foundation wall and that underpinning does not support the existing wall; however, he agreed that not underpinning a building next to an excavation can create the risk of collapse if the excavation goes deeper than the existing foundation wall. Mr. Boyce stated he had seen R-7 and R-8, the original underpinning plans for 1902 and 1910, before the September 2 meeting but that he had not seen R-39, Mr. Lawson’s September 3 letter and new proposed plans, until after the collapse occurred. (Tr. 179-95).

It is clear from the above that, besides being contrary to the CO’s testimony, the testimony of Messrs. Enoch, Slater and Hartley was not consistent. Mr. Enoch and Mr. Slater, for example, indicated that Mr. Hartley could not remove the soil from 1910 due to other dirt and debris that was in his way, while Mr. Hartley testified he could not remove the soil at the south end of 1910 due to the poor condition of the wall, which he described as “crumbly.” (Tr. 172-73). Mr. Hartley denied removing the soil along the wall up to the point depicted in C-5. (Tr. 174). However, his testimony that he was trying to remove brick, dirt and concrete from the area shown in C-5 but was unable to is simply unpersuasive in light of C-5 itself, which shows the bucket of Mr. Hartley’s backhoe digging into the soil right next to the wall. Moreover, the CO testified that Mr. Hartley himself told him that he had removed the soil from about half the length of 1910.<sup>10</sup> (Tr. 36-37). In addition, the

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<sup>10</sup>In this regard, I note that C-37, the parties’ Stipulated Facts, states that “JPC’s backhoe operator, Rich Hartley, also moved soil adjoining the foundation wall of 1910 ... on September 13, 2005. Hartley began excavating at the rear of 1910 ... and worked his way along the wall towards the front of the property.” Further, C-37 establishes Mr. Enoch and Mr. Slater were using shovels to remove soil from 1910 on September 13. *See* C-37, Nos. 9-10.

CO testified that Mr. Williams, JKT's foreman, told him he was watching JPC remove the soil along 1910's wall and that he spoke to both Mr. Enoch and Mr. Hartley about his concerns regarding how they were proceeding; Mr. Williams also told the CO that Mr. Hartley had asked him to remove the bulk material that was ahead of his work and that he (Mr. Williams) had said he was not responsible for doing that. (Tr. 41-43). Mr. Williams' testimony was consistent with that of the CO, and he noted that JKT's owner had told him to not touch the soil along the wall; he also noted he had told Mr. Hartley the soil should be removed in 10-foot sections, with the wall in that section then being repaired and covered back up, to keep the building from collapsing.<sup>11</sup> (Tr. 93-99).

Besides the foregoing, I observed the demeanor of the witnesses as they testified, including their facial expressions and body language. I found CO Touey and Mr. Williams to be sincere and believable witnesses, while Messrs. Enoch, Slater and Hartley were found to be less reliable in their testimony. For this reason, and for the reasons set out *supra*, I credit the testimony of the CO and Mr. Williams over that of Messrs. Enoch, Slater and Hartley. I also credit the testimony of the CO over that of Mr. Boyce to the extent their testimony does not agree. As set out above, Mr. Boyce indicated there were no restrictions on uncovering the walls and that he had no concerns about doing so. (Tr. 185). However, the CO testified that Mr. Boyce told him the stability of the walls was of great concern to him and that while a decision was made to clean the walls and apply Gunitite, the understanding was that the soil was to be removed in 20-foot sections, the rebar, mesh and Gunitite applied, and the section recovered with soil. The CO further testified that Mr. Lawson, the consulting engineer, told him he had been shocked to learn the wall had been totally exposed and that he had anticipated the work would be done in 20-foot sections. (Tr. 27-28, 77-78). In view of my credibility findings, the CO's testimony is credited over that of Mr. Boyce.<sup>12</sup>

#### **Item 1a**

Item 1a of the citation alleges a violation of 29 C.F.R. 1926.651(i)(1), which states that:

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<sup>11</sup>Mr. Williams said that the soil Mr. Hartley wanted him to remove was the accumulated soil that he (Mr. Hartley) had dug out from the wall. (Tr. 98-99).

<sup>12</sup>As to the statements that JPC's witnesses made to the CO at the time of the inspection, I find them to be reliable in that they were made at a time when the employees did not have time to realize their own self-interest or to feel pressure from their employer. *Regina Constr. Co.*, 15 BNA OSHC 1044, 1048 (No. 87-1309, 1991) (citation omitted).

Where the stability of adjoining buildings, walls, or other structures is endangered by excavation operations, support systems such as shoring, bracing, or underpinning shall be provided to ensure the stability of such structures for the protection of employees.

Where, as here, the Secretary alleges a violation of a specific standard, she must establish by a preponderance of the evidence that: (1) the standard applies, (2) the terms of the standard were not met, (3) employees had access to the violative condition, and (4) the employer either knew of the violative condition or could have known of it with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

In regard to the first element, the record establishes that Mr. Hartley was excavating when he removed the soil berm along the foundation walls of 1902 and 1910. *See* C-37, No. 10. The record also establishes that the stability of the walls of 1902 and 1910 was endangered by Mr. Hartley's excavation activities. The CO testified he learned through interviews with representatives of the general contractor and JKT, the excavating and grading contractor, that JKT had left the soil berm pushed up against the walls of 1902 and 1910 to maintain the stability of those walls. (Tr. 29, 35). The CO further testified that Mr. Williams, JKT's foreman, told him he spoke to Mr. Enoch and Mr. Hartley about his concerns as to how they were removing the soil from 1910. (Tr. 41-43). Mr. Williams also testified in this regard. In addition, he said JKT's owner had told him to not touch the soil along the wall; he also said he told Mr. Hartley the soil should be removed in 10-foot sections, with the wall in that section then being repaired and covered back up, to keep the building from collapsing. (Tr. 93-98). The testimony of the CO and Mr. Williams has been credited.

JPC disputes that its work at the site endangered the stability of the walls of 1902 and 1910. However, JPC fails to mention in its brief the evidence showing that JKT had left the berm along the walls to support the walls. Further, although JPC asserts Mr. Hartley did no excavation along the wall of 1910 on September 13, that assertion is rejected in light of the evidence demonstrating otherwise, particularly the parties' stipulation noted above. *See* C-37, No. 10. In addition, I have noted the testimony of Mr. Boyce that he had no concerns about exposing the walls and that there were no restrictions on uncovering the walls to waterproof them. (Tr. 185). Regardless, his testimony is belied by the CO's testimony that Mr. Boyce told him he was greatly concerned about the walls' stability and that while a decision was made to clean the walls and apply Gunitite, the understanding was that the soil would be removed in 20-foot sections, the rebar, mesh and Gunitite

would be applied, and the section would be recovered with soil; it is also belied by the CO's testimony that Mr. Lawson, the consulting engineer, told him he had been shocked to learn the wall had been totally exposed and that he had anticipated the work would be done in 20-foot sections. (Tr. 27-28, 77-78). The CO's testimony is credited over that of Mr. Boyce, based on my credibility findings *supra*, and I find that the Secretary has proved the applicability of the cited standard.

As to the second element, the record shows that the terms of the standard were not met. The CO testified that JPC took no measures to support the walls when the soil berm was removed, and Mr. Enoch and Mr. Hartley conceded this was the case. (Tr. 52, 114-15, 176). In view of the evidence of record, the Secretary has demonstrated the second of the required elements.

With respect to the third element, the record establishes that employees had access to the violative condition. Mr. Enoch and Mr. Slater were both exposed to the hazard of the walls of 1902 and 1910 collapsing, as they were working right next to the walls after the soil berm was removed; as noted *supra*, Mr. Enoch and Mr. Slater escaped injury only by running away from 1910 just before it fell. Mr. Hartley was also exposed to the cited hazard, as he moved along the walls of 1902 and 1910 and dug out the soil with the backhoe. Based on the evidence, the Secretary has met her burden of showing employee access to the violative condition.

As to the fourth element, JPC contends that the Secretary has not demonstrated knowledge. I find, however, that JPC knew or should have known of the violative condition. Mr. Lawson, the consulting engineer, and Mr. Boyce and Mr. Nicolai, JPC's project manager and site foreman, respectively, were at the September 2 meeting when it was decided that the proposed underpinning could not be done, that Mr. Lawson would draw up new underpinning plans, and that, in the meantime, the soil berm would be removed from the walls and Gunite would be applied.<sup>13</sup> Mr. Boyce told the CO he was greatly concerned about the walls' stability and that those at the meeting discussed that the soil berm would be removed in 20-foot sections, that rebar, mesh and Gunite would be applied, and that the section would then be recovered with soil; in addition, Mr. Lawson

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<sup>13</sup>Mr. Nicolai told the CO he had been at the September 2 meeting and that he also had been concerned about the walls' stability. (Tr. 26-29).

told the CO that he had been shocked to learn the wall had been totally exposed and that he had anticipated the work would be done in 20-foot sections.<sup>14</sup> (Tr. 27-29, 77-78).

Despite the September 2 discussion, neither Mr. Boyce nor Mr. Nicolai gave the employees at the site appropriate instructions about how to remove the soil. In fact, Mr. Nicolai told the CO that the only instruction he gave the employees on September 13 was to clear the walls completely for the application of the Gunitite; that is, the soil was to be excavated “as close as possible to the wall” and the rest was to be dug out by hand. The CO specifically asked Mr. Nicolai if the work was to be done in sections, and Mr. Nicolai said his only instruction to employees was to clear the walls. (Tr. 30-34). As noted above, Mr. Nicolai was at the site for about an hour to get the work started; he then left, and no other supervisor for JPC was at the site after his departure. (Tr. 30).

Under the foregoing circumstances, I find the Secretary has shown the knowledge element. In particular, she has established that Mr. Boyce and Mr. Nicolai were present at the meeting on September 2, when the proper procedure for removing the soil berm from the walls was discussed, and that neither passed on this information to the employees at the site to ensure the work was done safely.<sup>15</sup> The knowledge of both Mr. Boyce and Mr. Nicolai is imputable to JPC, as they were the project manager and foreman, respectively, at the site. The Secretary has met her burden of proving the alleged violation, and Item 1a is affirmed. The violation is properly classified as serious, since it is clear that a building collapsing could cause serious injuries or death.

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<sup>14</sup>I have noted the CO’s testimony, on cross-examination, that he did not know if anyone involved in the project “required” the Gunitite to be applied in 20-foot sections; he also testified that R-39, Mr. Lawson’s letter setting out the new plans for the two walls, did not mention the Gunitite being applied in 20-foot sections. (Tr. 79). Regardless, it is clear from what they told the CO that Messrs. Boyce, Nicolai and Lawson were all concerned about the walls’ stability and that it was decided at the September 2 meeting that the Gunitite application would be done in 20-foot sections. It is therefore reasonable to conclude that Messrs. Boyce, Nicolai and Lawson all knew of the proper procedure for applying the Gunitite at the site, even if no one explicitly stated, orally or in writing, that it was “required.”

<sup>15</sup>The record shows the Gunitite contractor was to be at the site the next day, indicating that the Gunitite was to be applied all at once to the uncovered walls. (Tr. 35). Regardless, it was JPC’s responsibility to ensure the work was done in a manner that would not endanger its employees.

**Item 1b**

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

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

The CO testified that he concluded that Mr. Nicolai, the job site foreman, was a “competent person” based on what Mr. Nicolai told him.<sup>16</sup> The CO further testified that although Mr. Nicolai was at the site at the beginning of the day on September 13, at which time he conducted an inspection of the site and then got the work started, he left after about an hour to go to another JPC job site. The CO determined that JPC had violated the standard because Mr. Nicolai had left and there was no one else at the site from JPC who was a supervisor; if Mr. Nicolai had stayed and had conducted appropriate inspections, he might have been able to recognize the situation as being potentially dangerous, and he would have had the authority to stop the work and remove the employees from the hazardous situation. (Tr. 17, 30, 35-36, 53-56). *See also* C-37, Nos. 7-8.

JPC contends that the standard does not require the competent person to remain on site for the entire workday and that the Secretary did not show there was a “hazard increasing occurrence” that made any further inspection necessary. While it is true that the standard does not require the competent person to be at the work site all day, I disagree with the second part of JPC’s contention. The discussion relating to Item 1a, *supra*, demonstrates that JKT left the soil berm against the walls in order to provide support for the walls and that JPC’s removal of the soil was in fact a hazard-increasing occurrence. JPC’s contention is rejected.

JPC also contends that Mr. Enoch was the “competent person” at the site after Mr. Nicolai left. In this regard, Mr. Enoch testified that before leaving on September 13, Mr. Nicolai told him

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<sup>16</sup>The OSHA excavations standard defines “competent person” as “one who is capable of identifying existing and 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.” *See* 29 C.F.R. 1926.650(b).



he was responsible for the other employees at the site.<sup>17</sup> Mr. Enoch noted that Mr. Hartley was “not too familiar” with underpinning and that Mr. Slater had never done such work before; he further noted that he himself had done a number of underpinning jobs, five to seven in the last two years, that he had received underpinning training through his union, and that Mr. Nicolai recognized that he knew what he was doing. Mr. Enoch said he had looked at 1910’s wall about two weeks before the accident, when he, Mr. Slater and Mr. Hartley were preparing to underpin it; it was not in good shape for underpinning, as there was no mortar between the stones and some of them were loose, and he had called Mr. Nicolai, who in turn had called Mr. Boyce.<sup>18</sup> Mr. Enoch also said he looked at the wall again on September 13; the wall was not stable for underpinning, but he was not concerned about soil being removed along the wall. (Tr. 110-13, 117-21, 127-31, 137, 143-44).

JPC’s contention is rejected. First, I note that Mr. Enoch was a laborer at the site. (Tr. 109). Second, the CO testified that when he spoke to him, Mr. Enoch said nothing about being left with the responsibility of acting as the competent person at the site; in fact, Mr. Enoch told the CO that while he could advise Mr. Slater, for example, he had no authority to remove him from a hazard at the site. (Tr. 53-54). Third, despite Mr. Enoch’s training and experience in underpinning, he admitted that he did not know if JPC had evaluated his training and experience. (Tr. 119-20). Fourth, as indicated above, Mr. Enoch conceded that no one from JPC had told him he was the competent person at the site; he also conceded that no one told him he was responsible for inspecting the wall of 1910. (Tr. 119-21). For all of these reasons, I find that Mr. Enoch was not a “competent person” at the site within the meaning of the standard. The Secretary has met her burden of proving the alleged violation, and Item 1b is affirmed. The violation is properly classified as serious, in that not having a competent person at the site, under the circumstances of this case, could have resulted in serious injury or death.

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<sup>17</sup>Mr. Enoch at first testified that before leaving, Mr. Nicolai had told him he was the competent person at the site; he then admitted Mr. Nicolai had not used the term “competent person” but had said that he was “responsible” for the others at the site. (Tr. 120-21).

<sup>18</sup>Mr. Enoch said he could stop the work at the site as long as he called Mr. Nicolai and let him know what he was doing and why. (Tr. 130).

### **Penalty Determination**

The Commission, in assessing penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *See* section 17(j) of the Act, 29 U.S.C. § 666(j). The CO testified that he considered the violations to be of high gravity, in light of the fact that they were life-threatening hazards, and that the probability of an accident occurring, in view of what happened, was greater. The CO also testified that Items 1a and 1b were grouped for penalty purposes, for a total proposed penalty of \$2,500.00. (Tr. 56-57). I find the proposed penalty appropriate, and it is accordingly assessed.<sup>19</sup>

### **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Serious Citation 1, Item 1a, alleging a violation of 29 C.F.R. § 1926.651(i)(1), is AFFIRMED as a serious violation.
2. Serious Citation 1, Item 1b, alleging a violation of 29 C.F.R. § 1926.651(k)(1), is AFFIRMED as a serious violation.
3. A total penalty of \$2,500.00 is assessed for Items 1a and 1b of Serious Citation 1.

/s/  
Covette Rooney  
Judge, OSHRC

Dated: 9/11/2006  
Washington, D.C.

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<sup>19</sup>Although the CO did not testify as to the size, history and good faith of JPC, the record shows that JPC has approximately 200 employees. *See* C-37, No. 1. Moreover, OSHA's Field Inspection Reference Manual ("FIRM") indicates that, after arriving at a gravity-based penalty, OSHA reduced the penalty due to JPC's size, history and good faith. *See* Chapter IV, section C, of the FIRM, which is set out in OSHA's web site at [www.osha.gov](http://www.osha.gov).