



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.

BRIONES UTILITY COMPANY,

Respondent.

OSHRC Docket No. 10-1372

ON BRIEFS:

Allison Graham Kramer, Attorney; Heather R. Phillips, Counsel for Appellate Litigation;
Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health;
M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Edward L. Pina, Esq.; Edward L. Pina & Associates, PC, San Antonio, TX
For the Respondent

DECISION

Before: ATTWOOD, Chairman; and MACDOUGALL, Commissioner.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued Briones Utility Company a serious citation alleging a violation of 29 C.F.R. § 1926.652(a)(1) for failing to protect employees working in a trench from potential cave-ins. Administrative Law Judge John H. Schumacher vacated the citation, finding that the Secretary failed to establish employee exposure. For the following reasons, we reverse the judge and affirm the citation.

BACKGROUND

Briones is an excavation contractor that was exposing underground sewer and gas lines at a worksite in San Antonio, Texas. An OSHA compliance officer drove past the worksite and stopped to inspect when he saw an open trench. The CO photographed a Briones employee working in a trench that was 10 feet long, 3 feet wide, and 7 feet deep, with aluminum hydraulic

shoring installed at one end. A second, uninstalled shore was also at the worksite. The shoring installed in the trench included two hydraulic cylinders (one above the other) that spanned the width of the trench and pressed against vertical rails on either side. Sandwiched between the rails and trench walls were 4-foot-wide, 8-foot-tall panels. Measured from the center line of the hydraulic cylinders, the distance to the closer end of the trench was 2 feet, and the distance to the farther end was 8 feet. One of the CO's photographs shows the employee who was standing in the trench, bent over, with the lower part of his body alongside the panel and the upper part of his body leaning past the panel toward the far end.

The cited standard, § 1926.652(a)(1), requires “[e]ach employee in an excavation [to] be protected from cave-ins by an adequate protective system” In vacating the citation, the judge found: (1) the Secretary failed to establish that the Briones employee observed in the trench was exposed to a cave-in hazard; and (2) even if the employee was exposed, it was necessary for the employee to be in the trench in order to install the second shore.

DISCUSSION

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The only element of the Secretary's prima facie case on review is employee exposure.¹

I. Employee Exposure

Regarding the element of exposure, the CO initially claimed that the protection afforded by the trench's single installed shore ended at the panel's edge, but later stated that the shore's protection extended *past* the edge of the panel by about one foot. The Secretary maintains that the CO meant that an extended area of protection exists only when *two* shores have been installed in

¹ As the judge found, the trench at Briones's worksite was an excavation covered by the standard. There is also no dispute that only part of the trench was protected by hydraulic shoring. Although the judge vacated the citation without reaching the issue of knowledge, the record shows that Briones's owner was at the worksite at the time of the alleged violation, and he testified that the company was going to install the second shore, showing his awareness that a portion of the trench lacked required shoring. *See A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (actual knowledge established through foreman who “observed the trenching process”).

a trench, but the context in which the CO made these statements does not support the Secretary's contention. In fact, the CO testified that "the shoring . . . gives you a good two to three feet of protection on *either side* of that *one shore*," and that "as you expand out, there's nothing there for you," suggesting a circumstance with only one installed shore. (Emphasis added.). We agree with the judge that, given this inconsistent and otherwise unsupported testimony, the Secretary has not established that the Briones employee in the CO's photograph—depicted as leaning past the edge of the panel toward the far end of the trench—was past the edge of the shore's protection.²

However, the Commission has recognized that exposure may be established by showing "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012). We find it was reasonably predictable that the employee could have inadvertently strayed into the adjacent, unprotected area of the trench. *See N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1471 (No. 96-0721, 2001) (exposure established where "bracket installation work was so close to . . . energized parts that minimal upward movement, inadvertent or otherwise, would have placed some part of [an employee's] body closer than [the OSHA standard's minimum working distance]"). The employee was standing on uneven dirt at the very edge of the trench's protected area, leaning over while using a shovel to clear off a pipe located in the unprotected area. Further, his access to the zone of danger was unobstructed. *See Brennan v. OSHRC*, 513 F.2d 1032, 1039 (2d Cir. 1975) (employee need not be "teetering" on the edge to be "exposed" to the fall hazard). In these circumstances, we find the Secretary has established employee exposure.³ *See N. Berry Concrete Corp.*, 13 BNA OSHC 2055, 2056 (No. 86-163, 1989) ("[E]mployees walked close enough to the floor opening that they could have fallen through."); *compare Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1374-75 (No. 08-1386, 2015) (rejecting argument that employee could be in zone of danger of unguarded shaft by

² Indeed, the CO failed to explain the basis of his opinion on the issue of whether the protection afforded by the shoring extended past the panel. *See Hurlock Roofing Co.*, 7 BNA OSHC 1108, 1111 (No. 76-357, 1979) (declining to credit opinion testimony that was not explained and for which no basis was given). Additionally, as the judge noted, the record lacks the shoring manufacturer's tabulated data.

³ Commissioner MacDougall notes that her conclusion in this regard is limited to the facts before the Commission and that she views the holding in this case as a narrow one. In particular, she notes that the company placed no visual or physical barrier (such as caution tape, a cone, a barricade, or the like) between the protected and unprotected areas of the trench.

“accidentally trip[ping] and fall[ing],” when testimony did not “show how close employees actually came to the equipment, and no evidence was adduced regarding conditions on the floor that would make a trip-and-fall reasonably predictable”), *appeal docketed*, No. 15-60443 (5th Cir. June 22, 2015); *Buffets, Inc.*, 21 BNA OSHC 1065, 1067 (No. 03-2097, 2005) (no exposure based on “potential slip hazards” where “employees wore slip-resistant shoes and kept the floors swept and cleaned”).

II. Necessity

The judge agreed with Briones’s contention that the employee’s presence in the trench was “necessary” because in order to install the second shore, Briones had to further excavate the trench, which required uncovering the sewer and gas lines. On review, the Secretary contends that: (1) an employer cannot avoid complying with OSHA standards by claiming that employee exposure is somehow necessary; and (2) even if that were so, this argument is an affirmative defense that Briones waived by failing to timely raise it below. We need not reach the Secretary’s claim that this argument is not a valid defense, however, because even if it were, it is an affirmative defense for which Briones bears the burden of proof, which it has not satisfied.⁴

Such a defense, if valid, is an affirmative defense because proof that employee exposure was “necessary” to install safety equipment would defeat the citation even if the Secretary established his prima facie case. *See Starcraft Co. v. C.J. Heck Co. of Tex.*, 748 F.2d 982, 990 n.11 (5th Cir. 1984) (affirmative defense requires defendant to “rely on new matters to extinguish the plaintiff’s claim”); *U.S. Postal Serv.*, 24 BNA OSHC 2067, 2068 (No. 08-1547, 2014) (affirmative defense “rais[es] arguments or new facts that, if proven, defeat a plaintiff’s claim even if the allegations in the complaint are true”). As an affirmative defense, Briones bears the burden of proving that its employee needed to be in the trench to install the second shore. The CO’s unrebutted testimony in explaining the installation process, however, establishes that the shoring Briones used is specifically designed to be installed from outside the trench.

⁴ As to waiver, both parties elicited testimony at the hearing regarding why the employee was in the trench, and the Secretary specifically introduced evidence that the shoring system can be installed from outside the trench. *See* Fed. R. Civ. P. 15(b)(2) (“When an issue not raised by the pleadings is tried by the parties’ . . . implied consent, it must be treated in all respects as if raised in the pleadings”); *Texland Drilling Corp.*, 9 BNA OSHC 1023, 1026 n.8 (No. 76-5307, 1980) (finding implied consent where the party claiming waiver introduced evidence relevant to the unpleaded affirmative defense). Therefore, we reject the Secretary’s claim.

With respect to the company's contention that the employee "descended into the trench briefly to clear dirt off the pipe and most importantly to pick up the chain that was being used to lower the second shore into place," the record lacks any evidence showing that the pipes had to be uncovered or cleaned in order to expand the excavation to install the second shore. In fact, Briones's owner testified that the company's excavator had a "plate in the front" to avoid "br[eaking] the utility," which suggests that Briones could use the excavator to deepen the trench without first uncovering the pipes. In short, contrary to the company's claim, the record does not show that it was necessary for the employee to uncover the pipes in order to install the second shore.

As to retrieval of the chain, there is no evidence that the chain was located in the unprotected area of the trench—indeed, Briones does not even assert where in the trench the chain was located—so there is no evidence that the employee needed to be at the edge of the protected area to retrieve it. Nor is there any evidence that Briones could not have used another chain to install the second shore. In sum, the record fails to show that it was necessary for Briones's employee to be in the trench at all, let alone that he needed to be at the edge of the first shore so as to install the second shore. Therefore, we reject the judge's necessity finding and affirm the citation.⁵

III. Characterization and Penalty

The Secretary characterized the violation as serious. Under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" a violative condition. Section 17(k), 29 U.S.C. § 666(k). The CO testified that the 7-foot-deep trench with inadequate cave-in protection created a substantial probability of serious injury, such as "fractures, broken bones, and death." There is no record evidence contradicting this testimony. Accordingly, we affirm the serious characterization of the violation.

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.

⁵ Briones also claims that the judge improperly admitted evidence regarding the classification of the trench's soil, and "coached" the Secretary's counsel at the hearing in the means by which such evidence could be admitted. However, given that soil type is relevant to whether a protective system is necessary, *see* 29 C.F.R. § 1926.652(a) & app. D, and Briones does not argue that a protective system was unnecessary, these evidentiary objections are moot.

Section 17(j), 29 U.S.C. § 666(j); *Jim Boyd Constr., Inc.*, No. 11-2559, slip op. at 8 (OSHRC Nov. 16, 2016); *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). In determining the \$1,225 proposed penalty here, the Secretary calculated a gravity-based penalty of \$3,500, and then gave Briones a 40-percent reduction for size, a 15-percent reduction for good faith because the violation was abated during the inspection, and a 10-percent reduction for lack of prior history.

We find that a \$1,000 penalty is appropriate. In reaching this conclusion, Chair Attwood relies on all of the circumstances in light of the statutory factors, including the gravity of the violation, Briones's small size, and good faith in instructing employees to remain inside the protected area as it also prepared to install the second shore. *See Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1920 (No. 96-0593, 1999) (finding good faith for penalty purposes where employer "clearly intended that employees be protected by shoring" and "selected a system configured for the particular worksite in accordance with one of the options permitted under the standard").

Additionally, regarding the gravity of the violation, Commissioner MacDougall further notes that only one employee was exposed for a short duration, the likelihood of serious injury was low given that the employee was not physically in the unprotected area of the trench at the time of the violation, and even if he were to momentarily transgress into the unprotected area, he could return to the protected area with a low likelihood of injury.⁶ *See Capform*, 19 BNA OSHC at 1378 (gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury).

⁶ Commissioner MacDougall contrasts the facts here with, for example, an employee in the zone of danger posed by an unprotected roof edge or floor opening—in that circumstance, the likelihood of injury is greater, making the gravity of the violation higher.

ORDER

We affirm Citation 1, Item 1 as serious, and assess a penalty of \$1,000.

SO ORDERED.

/s/ _____
Cynthia L. Attwood
Chairman

Dated: December 14, 2016

/s/ _____
Heather L. MacDougall
Commissioner

UNITED STATES OF AMERICA
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SECRETARY OF LABOR,

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BRIONES UTILITY COMPANY,

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OSHRC DOCKET NO. 10-1372

Appearances:

Elizabeth M. Kruse, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For Complainant

Edward L. Piña, Esq., Edward L. Piña & Associates, P.C., San Antonio, Texas

For Respondent

Before: Administrative Law Judge John H. Schumacher

DECISION AND ORDER

PROCEDURAL HISTORY

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”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a Briones Utility Company (“Respondent”) worksite in San Antonio, Texas on May 12, 2010. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging two (2) violations of the Act and proposed a total penalty of \$1750.00.¹ Respondent filed a timely notice of contest, bringing this matter before the Court. A hearing was held on January 5, 2012 in San Antonio, Texas. Both parties have filed post-trial briefs.

JURISDICTION

Based upon the record, I find that Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act.² Therefore, I conclude that the Occupational Safety and Health Review Commission has jurisdiction over the parties and subject matter in this case pursuant to Section 10(c) of the Act.³

¹. Only one of the violations is at issue in the present case. On December 9, 2011, the parties filed a Joint Notice of Partial Withdrawal of Citation. The Secretary withdrew Citation 1, Item 2. Accordingly, only Citation 1, Item 1 is before the Court.

². The Commission has held that construction activity, even a small project, affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). In this case, evidence was introduced that Respondent leased shoring equipment that was produced outside of the state of Texas from a company called National Trench Safety.

³. Respondent did not dispute that it is an employer under the Act, nor did it dispute that the Commission has jurisdiction in this matter.

DISCUSSION

On May 12, 2010, Compliance Safety and Health Officer (“CSHO”) Raul Carillo drove past Respondent’s worksite, which was located near a car lot at the intersection of Perrin Beitel and Vespero in San Antonio, Texas. (Tr. 19). As he drove by, the CSHO observed an open trench. (Tr. 19). Due to the potentially deadly hazards posed by trenches, OSHA has a National Emphasis Program regarding trenching and excavations. (Tr. 19). Pursuant to that program, it is OSHA’s policy for a compliance officer to conduct an inspection when he observes trenching operations taking place. (Tr. 19–20). In this particular case, the CSHO conducted an inspection of Respondent’s worksite, which resulted in the Citation at issue in this matter.

Respondent is owned by Alfredo Briones and its primary business is underground utility excavation and trenching. (Tr. 19, 22, 133). On the day of the inspection, Respondent was excavating a trench to expose a sewer and gas line conflict for San Antonio Sewer and Water (“SAWS”) and City Public Service (“CPS”). (Tr. 97, 133, 135–36). In order to uncover the conflicting pipes, Respondent had excavated a ten-foot long trench.⁴ (Tr. 136–37). When the CSHO arrived at Respondent’s worksite, he got out of his car and began to take photographs of the trench and surrounding conditions. (Tr. 20–21). The pictures reveal that shoring had been installed for approximately four feet along the ten-foot long trench. (Tr. 23, 55, C-2, C-7). The remaining portion of the trench did not have shoring installed, but Respondent had rented additional shores, which were located in close proximity to the trench. (Tr. 21, 146). At the end

⁴. The Citation originally indicated that the trench at issue was twenty feet long. (R-1). The CSHO clarified that this measurement was inaccurate and that the length of the trench was actually ten feet. (Tr. 27).

of the trench protected by shoring, Respondent had installed a ladder to access and exit the trench. (Tr. 78, C-2).

At the time of the CSHO's arrival on the site, Respondent's employee, Armando Briones, was working in the trench.⁵ (Tr. 103–104, 121). Although there was some disagreement as to what Armando was doing in the trench, the weight of the evidence suggests that he was using a shovel to uncover the sewer and gas lines.⁶ (Tr. 121, 124, 149). Even though he was standing between the shoring panels in the trench, Armando was observed leaning just outside of the panels while using the shovel. (C-7). Once he had taken pictures of the trench, the CSHO instructed Armando to get out of the trench, identified himself as a compliance officer for OSHA, and proceeded to conduct an opening conference. (Tr. 21). At the conclusion of the opening conference, the CSHO took some more pictures, measured the trench, and collected a soil sample from the spoil pile. (Tr. 22). The CSHO identified potential violations, including the violation that led to the present Citation, and gave Respondent the opportunity to abate those violations during the inspection, which Respondent did. (Tr. 23, 147). The CSHO ended the inspection with a closing conference and notified Respondent of the potential for the issuance of a citation and monetary penalties. (Tr. 23).

⁵. Armando Briones is the brother of Respondent's owner, Alfredo Briones. For the purposes of clarity, the Court shall refer to them individually as Armando and Alfredo.

⁶. At one point, Armando testified that the CSHO told him to pick up a shovel that was resting on the ground in the unshored portion of the trench. (Tr. 109). Later in his testimony, however, he indicated that he was using the shovel to uncover the sewer and gas lines. (Tr. 121, 124). This was later confirmed by Alfredo, who stated that Armando was "touching the pipe [to] be sure it's there." (Tr. 149). The photograph taken by the CSHO appears to support this description of Armando's actions within the trench. (C-7).

THE ALLEGED VIOLATION – 29 C.F.R. § 1926.652(a)(1)

Complainant alleges in Citation 1, Item 1 that:

On or about 5/12/10, at the worksite, employees were exposed to a cave in hazard while they worked inside a trench which measured 7 feet deep, 3 feet wide, and 20 feet long. The company had only one shore and was not adequate to prevent a cave in from occurring.

The cited standard provides:

- (a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
- (i) Excavations are made entirely in stable rock; or
 - (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

To establish a *prima facie* violation of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991).

To establish employer knowledge, an employer does not have to possess knowledge that a condition violated the Act, just knowledge that the condition existed. *Shaw Construction, Inc.*, 6 BNA OSHC 1341, 1978 CCH OSHD ¶ 22,524 (No. 3324, 1978). Further, the Secretary need not show that “an employer understood or acknowledged that the physical conditions were actually

hazardous.” *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995), *aff’d without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

A violation is “serious” if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. 666(k). Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm could result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp.*, 15 BNA OSHC 2072 (No. 88-0523, 1993).

Applicability of the Standard

There is no dispute that the trench found at Respondent’s worksite is an excavation covered by the regulations found in Subpart P. Further, the evidence clearly establishes that the exceptions to the standard do not apply. First, although there was some dispute as to whether the soil was properly classified as Type B or Type C, the trench was clearly not made in stable rock. (Tr. 28, 49). Second, the CSHO measured the trench and found it to be approximately seven (7) feet deep. (Tr. 26). Alfredo testified that he also believed that the trench was approximately seven feet deep. (Tr. 138). Accordingly, the Court finds that the cited standard applies to the condition indicated in Citation 1, Item 1.

Whether the Terms of the Standard Were Violated

If the exceptions to the standard do not apply, 29 C.F.R. § 1926.652(a)(1) requires an employer to use an “adequate protective system,” designed in accordance with subsections (b) or (c), to protect employees from a cave-in. Whether a particular protective system is considered adequate depends on the type of system an employer chooses. If the employer utilizes sloping or benching, then the employer refers to subsection (b) to determine the proper design parameters. If the employer utilizes shoring or shield systems, then it must refer to subsection (c), which provides the design parameters for such systems depending on soil type. There are four design criteria options available to employers if they utilize the protections provided in subsection (c): (1) OSHA tabulated data; (2) tabulated data from the manufacturer of the protective system; (3) tabulated data approved by a professional engineer; or (4) tabulated data created by a professional engineer. (Tr. 60–70, C-5). This data includes the minimally acceptable measurements for installing shoring, including: (1) the depth of the trench; (2) the vertical distance of the shore (measured from the floor to the hydraulic cylinder); and (3) the horizontal distance between hydraulic cylinders. (*Id.*). The determination of which set of data to use is contingent upon the type of soil present within the trench. (Tr. 61, C-5).

Respondent implemented a shoring system that utilized hydraulic cylinders or pistons that were oriented vertically and exerted pressure on opposite sides of the trench wall. These cylinders were pressed against vertical piece of aluminum, known as a waler. (Tr. 53). The walers, in turn, were placed in the center of composite sheets⁷, known as fin forms, which

⁷. The CSHO testified that the sheets were made out of plywood, whereas Alfredo stated that they were made of something more substantial. (Tr. 50, 139). The determination of what the fin forms were made of is of no consequence to this matter; however, the Court accepts the testimony of Alfredo that the fin forms were made of something more substantial than plywood, as he was the individual who rented the shoring equipment.

measured four feet in width by approximately 8 feet in height. (Tr. 50, 55, C-2, C-7). The cylinders are placed in the center of the fin forms and do most of the work of holding up the trench walls; however, the fin forms serve to disperse the pressure of the cylinders across a greater area and prevent sloughing and raveling of the walls. (Tr. 55). At the time of the inspection, only one set of cylinders and fin forms were in Respondent's trench. (Tr. 65).

Based upon his on-site observations, the CSHO determined that the trench was dug in Type B soil, which was also the determination of Respondent. (Tr. 29, 153). He also took a sample of the soil from the spoil pile, which was sent in to OSHA's Technical Center in Salt Lake City, Utah. (Tr. 31, 37). The subsequent lab tests revealed that the soil was, in fact, Type C.⁸ Type C soil is the most unstable of the soil types and, therefore, typically requires rather strict design parameters in the construction of a shoring or shield system. In fact, with respect to the particular shoring system utilized by Respondent, OSHA does not provide tabulated data. Accordingly, it was incumbent upon Respondent to utilize the manufacturer's tabulated data to determine the proper measurements for the shoring system used in its trench. (Tr. 67-71). No evidence was introduced at trial as to what the manufacturer's recommendations were.

Complainant contends that Respondent violated 29 C.F.R. § 1926.652(a)(1) because Respondent had not installed an adequate protective system in the cited trench. Respondent only had one shore in the ten-foot long trench, which, according to Complainant, left eight feet of open, unprotected trench. (Sec'y Brief at p. 9 n. 9). In order to comply with the standard,

⁸. The lab report was admitted into evidence over Respondent's objection on the basis of hearsay. The Court found and still holds that the report fell under one of two exceptions to the hearsay rule: FRE 803(6) and 803(8). Further, the Court finds no issue with the fact that the CSHO used a sampling sheet entitled "Air Sampling Worksheet" because the CSHO testified that sheet is routinely used for such samples.

Complainant argues that Respondent needed to install a second shore such that the hydraulic cylinders were spaced approximately four to six feet apart (horizontal distance). Although the manufacturer's data was not introduced into evidence, the CSHO testified that, for Type B soil, OSHA requires a horizontal distance of eight feet. (Tr. 63–64, 69). *See also* 29 C.F.R. 1926.652 tbl. D. He further testified that he has seen manufacturer's tabulated data for Type C soil and that it typically requires a horizontal distance of approximately four to six feet. (Tr. 67).

Respondent argues that it did not violate trenching standard because it was still in the process of installing additional shoring at the time of the OSHA inspection. The primary thrust of Respondent's argument is that the slope at the unprotected end of the trench prevented the fin forms from fitting properly and that additional material needed to be removed before the shoring could be installed. Respondent further points out that it had sufficient additional shores available on sight and that the second shore was ready to be installed. (Tr. 147, 158).

It is clear that a portion of the trench was unprotected and, thus, insofar as the standard is concerned, a complete "system" of shoring had not yet been installed. That said, the Court believes that a work in progress cannot be viewed in the same way as the finished product. If work was being conducted in the unprotected end of the trench, then there would clearly be a violation, as the worker would not be "protected from cave-ins" as the standard requires. However, to the extent that Complainant is arguing that Respondent violated the standard because it failed to have a complete shoring system in the trench—which was being prepped for the installation of additional shores—regardless of whether any employees were actually exposed, the Court refuses to find that a violation occurred. That being said, the Court is mindful

of the fact that Armando was in the trench at the time of the inspection. Thus, we have a case where the elements of violating the terms of the standard and exposure to the hazard/condition cannot be resolved independently of one another. *See Ormet*, 14 BNA OSHC 2134 (listing the elements of a *prima facie* violation of the Act). In order to answer the question of whether Respondent's employees were protected from cave-ins and thus, whether a violation occurred, the Court must address Armando's position in the trench and the effectiveness of the existing shoring.

As noted earlier, Armando was in the trench in order to identify the location of the sewer and gas pipes. (Tr. 121, 124, 129). The pictures taken by the CSHO clearly show that Armando was standing at the threshold of the existing shoring with his upper torso leaning slightly outside of the fin form. (C-7). Complainant contends that Armando's position exposed, at the very least, his upper body to the potential of a trench cave-in because he was outside the protective area of the shoring. Further, Complainant argues that Armando was exposed to the condition for at least five minutes, which represents the length of time between when the CSHO arrived on site and when he asked Armando to exit the trench. (Tr. 59). Respondent argues that Armando was not outside the protective area of the shoring, and if he was, it was only for a few seconds while he responded to the CSHO's request that he pick up the shovel.⁹

According to Complainant, Respondent's trench was unprotected or "open" for a distance of eight feet. (Tr. 65, Sec'y Brief at p. 9). This is based upon the fact that the trench extended

⁹. For the reasons previously mentioned, the Court finds that the CSHO did not ask Armando to pick up the shovel. The Court agrees that it would not make sense for the CSHO to ask Armando to engage in an activity that could potentially expose him to a safety hazard. (Tr. 171).

eight feet beyond the first, and only, hydraulic cylinder. This point is well-taken because the CSHO testified that “one shore itself cannot retain anything outside of it without another support system.” (Tr. 76). In other words, the second shore applies pressure to the trench wall at the point where the pressure from the first shore ends. The CSHO also testified, however, that “the shoring, it gives you a good two to three feet of protection on either side of that one shore, for that area.” (Tr. 76). Thus, the pressure from the shore in this case was effective at least to the extent of the fin forms, which extended two feet on either side of the cylinder. (Tr. 57–58).

Determining the effective area of the shoring is further complicated by the fact that no evidence was introduced as to what the manufacturer’s tabulated data required in terms of the horizontal spacing of the cylinders. As stated earlier, OSHA requires a maximum horizontal distance of eight feet between cylinders in Type B soil. In other words, OSHA has determined that for shores used in trenches dug in Type B soil, the effective area of protection provided by shores is approximately four feet in either direction. The soil at Respondent’s worksite, however, was determined to be Type C.¹⁰ (Tr. 31, 49, C-1). The CSHO’s testimony and common sense dictate that the effective area of protection provided by shores in Type C soil would be less. (Tr. 67). How much less, however, is determined by the manufacturer’s tabulated data, which was not introduced into evidence. The CSHO testified that the manufacturer’s tabulated data for shoring of the type used by Respondent typically requires a maximum horizontal distance between four and six feet. (Tr. 67). This comports with the CSHO’s understanding that the

¹⁰. At one point, both Armando and Alfredo testified that the unprotected portion of the wall on Armando’s right side in Exhibit C-7 was covered in concrete, which Respondent argues provided additional support. (Tr. 117, 160). The CSHO testified that he made no such observation. That being said, even if the Court found that one of the walls was concrete, the other wall was still previously disturbed, Type C soil. Because it only takes the collapse of one wall to cause injury, this fact plays no part in the Court’s decision.

shoring “gives you a good two to three feet of protection on either side of that one shore” (Tr. 76).

Without a more definitive understanding of the protective area of the existing shoring, the Court cannot find that Complainant has proven, by a preponderance of the evidence, that Armando was outside the protective area of the existing shoring. If the manufacturer’s tabulated data required a horizontal spacing of four feet, then the protective area of the shoring would be approximately two feet on either side; however, if the data required spacing of six feet, then the protective area would be approximately three feet on either side. The photographs submitted by Complainant illustrate that Armando was making a point to position his body within the existing shoring, which confirms the testimony of Alfredo, who stated that “I never send boys because, if no shore, they can no be inside.” (Tr. 154). Based upon the testimony regarding the width of the fin forms, and considering the evidence regarding the protective range of the shoring, the Court cannot find that Complainant proved that Armando’s position at or near the threshold of that protective range exposed him to the potential for a cave-in.¹¹

Notwithstanding the above, Complainant also seems to argue that Armando’s mere presence inside a trench that has incomplete shoring exposed him to the hazard of a potential cave-in. This line of argument addresses the question of what constitutes an “adequate protective system” pursuant to 29 C.F.R. 1926.652(a)(1). The term “protective system” is defined

¹¹. Furthermore, although the Court is mindful of the fact that a cave-in can happen in a matter of seconds, the Court cannot find that the period of exposure (five minutes) suggested by the CSHO is anything more than speculation. To be sure, Armando was in the trench during the period of time from when the CSHO arrived until he was asked to exit the trench; however, that does not equate to the amount of time he may or may not have been leaning outside the protective area of the shoring. Considering that the Court has not found that merely being in a trench without a full complement of shores is a violation, the Court cannot say that Armando was “exposed” for any longer than the time directly observed by the CSHO.

as a “method of protecting employees from cave-ins from material that could fall or roll from an excavation face or into an excavation Protective systems include support systems, sloping and benching systems, shield systems, and other systems that provide the necessary protection.” 29 C.F.R. 1926.650(b). More specifically, a “shoring system” is defined as “a structure such as metal hydraulic, mechanical, or timber shoring system that supports the sides of an excavation and is designed to prevent cave-ins.” *Id.* These definitions can apply with equal force to both an individual shore as well as a series of them; the key to any “protective system,” as it were, is that it protects employees from a cave-in. The Court finds that the shoring installed by Respondent constituted such a system. The fact that the entire trench was not shored does not mean that it is a violation to have an individual standing within the protective area of a single shore. See *General Motors Corp.*, 12 BNA OSHC 1324 (No. 80-5439, 1985) (“Inasmuch as the employees in the north-south leg were either working in a part of the trench that had already been shored or were engaged in installing the shoring in that leg, GM did not violate the standard in the north-south leg.”); see also *Adams & Mulberry Corp.*, 3 BNA OSHC 1077 (No. 2548, 1975) (“[I]f the two employees had been working from the braced portion of the trench, we would vacate.”). Although the violations in these two cases involved a different version of the present standard, the Court finds that the standards address the same hazard and the methods to protect against that hazard. See Occupational Safety and Health Standards—Excavations 54 Fed Reg. 45,894, 45,928 (Oct. 31, 1989).

It should be pointed out that the *General Motors* case cited above also stands for the proposition that an employer’s failure to “limit employee access to the trench so as to eliminate the unnecessary exposure of employees to the unshored walls” constitutes a violation. *General*

Motors, 12 BNA OSHC 1324. Those circumstances are arguably present here, where Armando was not physically prevented from accessing the unshored portion of the trench. However, there are some key distinctions to be made. First, the only way to access and exit the trench in the *General Motors* case involved traveling through an unprotected portion of the trench. *Id.* In this case, however, the ingress/egress point was well within the protection of the existing shoring. (C-2). Secondly, although no physical barrier was in place at the end of the existing shoring, it seems clear that it was Respondent's policy that employees do not work in a trench without proper protection. (Tr. 154, 158). Based upon the position of Armando's body in Exhibit C-7, it appears as if that policy was followed. (C-7). Finally, even if the Court were to find the slightest hint of exposure, it cannot say that such exposure was unnecessary as the Commission determined in *General Motors*, wherein employees were exposed to cave-ins at the access/egress point. *See General Motors*, 12 BNA OSHC 1324 ("[T]he question is whether employee presence in the trench is needless."). Alfredo testified that Armando was uncovering the sewer and gas pipes because further excavation was needed to install additional shoring. (Tr. 149, 166). Thus, the actions of Armando were calculated to facilitate the installation of shoring that was readily available and would provide additional protection.

At bottom, although Complainant showed that Respondent's employee was leaning just beyond the threshold of the fin form, the Court finds that Complainant failed to establish that Respondent's employee was outside of the protective area of the existing shoring system such that he was exposed to the hazard of a cave-in. The presence of additional shoring near the trench indicates that Respondent was taking appropriate measures to protect its employees from the hazard of a trench cave-in, and the testimony of Respondent's witnesses indicates that

Respondent stressed the importance of working within existing shoring. Accordingly, the Court finds that Complainant has failed to establish, by a preponderance of the evidence, a violation of 1926.652(a)(1).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED.

/s/ _____

John H. Schumacher

Judge, OSHRC

Date: July 9, 2012

Denver, Colorado