

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS
PENDING COMMISSION REVIEW**

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Florida Gas Contractors, Inc.,

Respondent.

OSHRC Docket No. **14-0948**

Appearances:

Kristin R. Murphy, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

George E. Spofford, IV, Esquire, Gray Robinson, P.A., Tampa, Florida
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). Florida Gas Contractors, Inc., (hereinafter Florida Gas) is engaged in the business of installing gas lines. On April 23, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Christos Nicou conducted an inspection of Florida Gas at 5405 Sheldon Road in Tampa, Florida. Based upon CSHO Nicou's inspection, the Secretary of Labor, on May 15, 2014, issued a Citation and Notification of Penalty with three items to Florida Gas alleging serious violations of 29 CFR §§ 1926.651(i)(3), 1926.651(j)(2), and 1926.652(a)(1) for failure to protect workers in an excavation from hazards associated with collapse or cave-in of the excavation. The Secretary proposed a total penalty of \$14,700.00 for the Citation. Florida Gas timely contested the Citation. All three violations are at issue.

A hearing was held in this matter on October 23 and 24, 2014, in Tampa, Florida. The

proceedings were conducted pursuant to the Commission's Simplified Proceedings. 29 CFR §§ 2200.200-211. At the close of the hearing, the parties presented oral closing arguments. The parties submitted supplemental written closing arguments on December 10, 2014.

For the reasons that follow, Item 1 is vacated; Items 2 and 3 are affirmed as serious violations and a total penalty of \$5,500.00 is assessed.

Jurisdiction

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Review Commission pursuant to § 10(c) of the Act (Exh. J-1 ¶¶2 and 3). Florida Gas also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Exh. J-1 ¶1).

Background and Facts

Florida Gas is a Florida company engaged in the business of installing gas lines (Tr. 342). It contracts such services with various suppliers of gas. It employs approximately 125 individuals (Tr. 373). The majority of those employees are engaged in the installation of gas lines which requires excavation work.

On April 23, 2014, Florida Gas had a worksite on Sheldon Road in Tampa, Florida, at which its employees were working to tie a gas line from a Burger King under renovation to the main supply line at Sheldon Road (Tr. 155). Florida Gas had a two-man crew performing the work. The foreman for the site was John Horan (Exh. J-1 ¶4). He was being assisted by Isacc Perez. Mr. Horan had been a foreman with Florida Gas for three years at the time (Tr. 133). According to Michael Petralia, a project manager with Florida Gas and Mr. Horan's supervisor, Mr. Horan typically worked in shallow excavations (Tr. 345). Mr. Perez was a new employee, having been hired four months earlier.

At the start of the project, Florida Gas first had to remove a portion of the sidewalk along Sheldon Road in order to access the existing gas line (Tr. 34, 134). Once the sidewalk was removed, Mr. Horan and Mr. Perez began to manually dig at the location they expected to find the gas line, using hand held shovels (Tr. 134; Exh. J-1 ¶12). Mr. Horan testified he expected to find the gas line at a depth of approximately three to four feet, but did not (Tr. 134, 155-56, 346). When he and Mr. Perez reached a depth of four feet, Mr. Horan installed a shoring system along

the north and south walls of the excavation (Tr. 134-35; Exhs. C-2, C-4, C-11). He did not install a shoring system along the west or east wall of the excavation (Tr. 138; Exh. J-1 ¶7). Mr. Horan testified he did not think a shoring system was necessary along the west wall because it appeared to be hard packed and he observed no cracking (Tr. 138). However, the parties stipulated the soil was previously disturbed, type C soil (Exh. J-1 ¶19). *See* Appendix A to Subpart P, 29 CFR §§ 1926.650-652.

The excavation was bisected by a concrete structure that had formed a curb-like wall adjacent to the sidewalk along Sheldon Road (Tr. 34; Exh. J-1 ¶5). Mr. Horan estimated the structure was 28 inches tall, with approximately half the structure above the original ground level and half below (Tr. 165; Exh. J-1 ¶5). He described it as being wider at the bottom than the top - approximately 18 inches at the bottom and 12 inches at the top (Tr. 165). In their attempt to find the main gas line, Mr. Horan and Mr. Perez dug under this structure (Tr. 140-42; Exh. J-1 ¶10). Although they dug several feet underneath the structure, they placed no support system under it (Tr. 141; Exh. J-1 ¶11).

The parties stipulated Mr. Horan dug the excavation on the west side of the concrete structure and Mr. Perez dug the excavation on the east side (Exh. J-1 ¶12). According to the testimony of both Mr. Horan and Mr. Perez, as they dug, Mr. Horan stood in the west side of the excavation and threw the excavated dirt under the concrete structure to Mr. Perez (Tr. 161). Mr. Perez stood in the back of the east side of the excavation (Tr. 145).¹ As Mr. Horan threw the dirt toward him, Mr. Perez used his shovel to pick up the dirt and throw it onto the spoil pile located on the east and south side of the excavation. The spoil pile created by Mr. Perez was less than two feet from the edge of the excavation (Exhs. J-1 ¶8, C-1). Mr. Horan consistently testified Mr. Perez was standing next to the spoil pile (Tr. 145-46, 205, 219, 227). No support system was in place on the side of the excavation where Mr. Perez stood (Exhs. C-1, C-9, C-10).

At some point after the installation of the shoring system, Mr. Horan noticed water entering the excavation (Tr. 135-36). He and Mr. Perez then installed a well point system to remove the water (Tr. 135-37). The men continued to dig until they were more than six feet deep (Tr. 146). Having reached that depth, Mr. Horan testified he decided to abort the job because the

¹ According to Mr. Perez, he stood somewhere along the top edge of the east side of the excavation, but was not in the excavation itself (Tr. 241-42). For the reasons discussed in detail herein, I did not find Mr. Perez's testimony on this issue credible.

main gas line was too deep (Tr. 146). He and Mr. Perez stopped working and left the job site (Tr. 144). Sometime during their absence from the worksite, the pump of the well point system stopped working (Tr. 144).

That same day, CSHO Nicou was returning to the Sheldon Road location to follow-up on an inspection he had begun the day before of other employers working on the Burger King renovation (Tr. 31). It was at that time he observed the excavation created by Florida Gas employees (Tr. 31-32). CSHO Nicou observed water in the excavation as well as cracking on the west wall (Tr. 42, 50-54; Exhs. C-3, C-4, C-7) and separation of the wall along the south side of the excavation (Tr. 37). CSHO Nicou testified he saw spoil piles on both sides of the concrete structure with the spoil pile on the east side at the edge of the excavation (Tr. 58-59; Exhs. C-9, C-10). He also observed two shovels in the excavation – one resting along the east wall and one partially submerged in water and mud on the bottom of the west section of the excavation (Tr. 44; Exhs. C-1, C-4, C-5, C-9). He concluded cave-in of the excavation was imminent (Tr. 42, 54, 60).

Around the same time CSHO Nicou arrived at the excavation, Mr. Horan and Mr. Perez were returning. CSHO Nicou first spoke with Mr. Horan who identified himself as the foreman (Tr. 32). Initially, Mr. Horan told CSHO Nicou he was the only one working in the excavation (Tr. 34, 63, 457). He later admitted to CSHO Nicou both he and Mr. Perez were in it (Tr. 63, 138). Mr. Horan also told CSHO Nicou he had not used shoring along the west wall because he felt the excavation was safe without it. Mr. Perez told CSHO Nicou he believed the excavation was too small to require shoring.

Neither employee reentered the excavation after CSHO Nicou arrived on the worksite. Rather, according to CSHO Nicou, the employees backfilled the trench within 30 minutes of their return to the worksite (Tr. 63).

Prior to that, CSHO Nicou measured the excavation with the assistance of Mr. Horan. Using CSHO Nicou's trench rod, they found the excavation was 6 feet, 4 inches deep (Tr. 453). CSHO Nicou testified the bottom of the excavation was the same depth on both sides of the concrete structure (Tr. 35). Mr. Horan's testimony was essentially the same. He stated under the structure it was "almost level" (Tr. 142). Mr. Horan estimated the entire excavation was 5 feet in width (north to south) and 8 feet in length (east to west) (Tr. 143). CSHO Nicou described the

excavation has having all four walls vertical (Tr. 36). He observed both the south and east wall on the side of the excavation dug by Mr. Perez to be “relatively straight.” (Tr. 453). CSHO Nicou photographed the excavation from several angles (Tr. 39; Exhs C-1 - C-11).

Based upon his inspection, CSHO Nicou recommended three citations be issued to Florida Gas. CSHO Nicou’s recommendations were based on his observation of a lack of support for the concrete structure under which Mr. Horan and Mr. Perez had dug, the spoil pile being “right on the edge” of the excavation, and failure to protect employees in the excavation from cave-in along the west and east side of the excavation.

Legal Analysis

The Secretary has the burden of establishing the employer violated the cited standard.

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. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Each of the three items at issue alleges a violation of Subpart P of the construction standards, which addresses excavations. Item 1 alleges a violation of 29 CFR § 1926.651(i)(3) for failure to support the undermined concrete structure that bisected the excavation, exposing employees to potential collapse of that structure. Item 2 alleges a violation of 29 CFR § 1926.651(j)(2) for placing the spoil pile along the east side of the excavation less than two feet from the edge of that excavation. Item 3 alleges a violation of 29 CFR § 1926.652(a)(1) for failing to provide a protective system on the east and west vertical walls of the excavation.

Florida Gas raises several challenges to the Secretary’s prima facie case. With regard to each violation, Florida Gas contends the Secretary cannot establish employer knowledge of the hazard because knowledge cannot be imputed to Florida Gas through Mr. Horan absent a showing its safety program was deficient, which the Secretary has failed to do. With regard to Items 1 and 2, Florida Gas contends the Secretary has failed to meet his burden to establish any employee was exposed to a hazard. With regard to Item 1, Florida Gas contends the standard cited does not apply to the concrete structure at issue. Finally, Florida Gas raised the affirmative

defense of unpreventable employee misconduct.

Item 1: Alleged Serious Violation of 29 CFR § 1926.651(i)(3)

Item 1 alleges:

... employees were exposed to a possible concrete curb wall collapse in that, a trench was dug under the concrete curb wall adjacent to the sidewalk without providing any support to prevent it from collapsing into the trench.

The cited standard at 29 CFR § 1926.651(i)(3) reads:

Sidewalks, pavements, and appurtenant structures shall not be undermined unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures.

Applicability of the Standard

The standard prohibits any undermining of sidewalks, pavement, and appurtenant structures unless a support system is provided. The Secretary contends the concrete structure, to which he refers in his citation as a curb wall, is an appurtenant structure for which no undermining is permitted without use of a support system. Florida Gas contends, to the contrary, the concrete structure is like a retaining wall or other structure, and, therefore, covered by the requirements of § 1926.651(i)(1) or (2). On this point I disagree with Florida Gas. Both §§ 1926.651(i)(1) and 1926.651(i)(2) refer to structures adjacent to an excavation and address the hazard posed by the loads imposed on the soil at or near the excavation by the structure or the instability of the structure created by the adjacent excavation. 54 Fed. Reg. 45894-01, 45923 (1989). Neither address the hazard addressed by § 1926.651(i)(3) of the collapse of the structure due to having been undermined. I also disagree with Florida Gas that the structure referenced in the citation is not covered by the standard. As noted in the 1989 Preamble to the standard, the term “appurtenant structures” refers to “structures attached to sidewalks and pavements.” 54 Fed. Reg. 45894-01, 45924 (1989). It is undisputed the concrete structure referenced in the citation was attached to the sidewalk before the sidewalk was removed. Therefore, it is the type of structure addressed by the standard and the standard applies.

Failure to Comply with the Terms of the Standard

The hazard addressed by § 1926.651(i)(3) is collapse of the sidewalk, pavement, or

appurtenant structure. The standard is intended to address both the hazard associated with being struck by the collapsing structure while working in the excavation, and the hazard associated with walking on the unsupported structure. *Id.* Generally, a standard presumes a hazard and the Secretary need only show the employer violated the terms of the standard. *Kasper Electroplating Corp.*, 16 BNA OSHC 1517, 1523 (No. 90-2866, 1993). However, a hazard is not presumed when the standard incorporates the hazard as a violative element. *Bunge Corp v. Secretary of Labor*, 638 F.2d 831 (5th Cir. 1981).

It is my determination § 1926.651(i)(3) incorporates the hazard as a violative element the Secretary must establish in order to show the employer in violation.² Although the standard reads as a prohibition of undermining without the use of a support system, it limits that prohibition to circumstances in which there is the “possible collapse of such structures.” It is well recognized that statutes must be read as a whole, “making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous.” *Lake Cumberland Trust, Inc. v. E.P.A.*, 954 F.2d 1218, 1222 (6th Cir 1992), quoting, *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1431-32 (9th Cir. 1991)). The last phrase of the cited standard incorporates an additional element to the Secretary’s prima facie case, i.e. establishing the possibility of collapse of the structure. To interpret the regulation otherwise would render the final phrase - “to protect employees from possible collapse of the structure” – superfluous.

In so holding, I am aware at least one other administrative law judge (ALJ) has ruled to the contrary.³ In *Rawson Contractors, Inc.*, 20 BNA OSHC 1273 (No. 02-1921, 2003), Judge Barkley held the standard

presumes that undermined pavement is no longer capable of supporting the loads such pavement could sustain before being undermined, and so presents a hazard

² Florida Gas did not challenge the Secretary’s position the cited standard presumes a hazard, relying rather on its argument the Secretary cited the wrong standard. Nevertheless, I have addressed the question of interpretation of the standard. It has long been recognized courts are not bound to accept stipulations as to questions of law. *Estate of Sanford v. Comm’r of IRS*, 308 U.S. 39, 51 (1939). Rather, when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, (1991); and *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77, (1990).

³The Secretary relied on Judge Phillips’s decision in *Teichert Construction*, 24 BNA OSHC 1020 (No. 10-0220, 2012). However, Judge Phillips never specifically reached this issue.

to employees working within the zone of danger.

I note Judge Barkley's decision is an unreviewed ALJ decision and, therefore, not binding precedent. *Leone Construction Co.*, 3 BNA OHSC 1979 (No. 4090, 1976). Moreover, I do not find his analysis persuasive. If the regulation simply read "sidewalks, pavements, and appurtenant structure shall not be undermined unless a support system or another method of protection is provided," I would be inclined to agree the regulation presumes a hazard, but the regulation does not stop there. Rather, it requires such support system "to protect employees from the possible collapse of such structures." Judge Barkley's analysis simply ignores this qualifying statement. For this reason, I disagree with Judge Barkley's decision and find the standard does not presume a hazard of collapse.

The only other decision of which I am aware specifically discussing the standard at issue is Judge Baumerich's decision in *Penney's Construction Company, LLC*, 24 BNA OSHC 1819 (No. 12-0596, 2013). In finding the employer had violated the standard, Judge Baumerich never reached the issue presented here of whether the standard presumes a hazard. Moreover, the facts of the case were distinctly different in that the undermined structures had fallen into the excavation prior to the initiation of the inspection, rendering the issue of the possibility of collapse undisputed.

Having found the Secretary has the burden to establish the possibility of collapse of the undermined structure, I turn to whether the Secretary has met that burden. I find he has not. The only evidence of the possibility of collapse of the concrete structure was the testimony of CSHO Nicou. He admitted he had not inspected the structure for signs of structural compromise (Tr. 107, 458). Nor did he observe any (Tr. 107). Rather, CSHO Nicou testified any number of things could have happened to diminish the structure's strength (Tr. 459-60). However, given the lack of evidence of any such events, it is equally likely, on this record, that nothing was done to the structure to compromise its integrity. The Secretary presented no evidence of the make-up of the structure, or any explanation of how, or under what circumstances it might collapse. Finally, the record contains no documentary or photographic evidence of any compromise in the integrity of the structure.⁴ I find the Secretary's evidence speculative and, consequently, of little

⁴ In support of its position there was no possibility of the structure's collapse, Florida Gas presented the testimony of

probative value. Therefore, I find the Secretary has failed to meet his burden to establish a violation of the standard and vacate Item 1 of Citation 1.

Item 2: Alleged Serious Violation of 29 CFR § 1926.651(j)(2)

Item 2 alleges, on the “[w]est side of the construction site, employees were exposed to struck by hazard, in that, the spoil was placed right at the edge of the east side trench wall.”

The sited standard at 29 CFR § 1926.651(j)(2) reads:

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

Applicability of the Standard

The standard requires the protection of employees from excavated materials falling into an excavation. The standard applies, therefore, to circumstances in which material has been excavated and remains on the worksite. Because there was excavated material at the worksite, I find the standard applies.

Failure to Comply with the Terms of the Standard

The hazard addressed by § 1926.651(j)(2) is material or equipment falling or rolling into an excavation and striking employees working there. The Secretary contends the standard presumes a hazard and that all he need show is the existence of excavated material less than two feet from the edge of the excavation with no retaining device in use. Florida Gas contends, to the contrary, the standard does not presume a hazard. Rather, to show a violation of the standard, the Secretary must show the excavated material “could pose a hazard by falling or rolling” into the excavation. Further, Florida Gas contends because no material was observed to be falling

Jason Burby whom it offered as an expert in engineering. I declined to accept Mr. Burby as an expert on the grounds Florida Gas had not provided sufficient notice of its intent to call an expert to either the court or the Secretary. However, I did admit his lay opinion testimony over the Secretary’s objection. In finding the Secretary has failed to meet his burden to establish a hazard, I did not rely on the testimony of Mr. Burby, as the Secretary failed to present probative evidence sufficient to meet his burden. Therefore, I find no prejudice to the Secretary in having admitted the testimony of Mr. Burby.

into the excavation, the Secretary has failed to meet his burden. Although I agree with Florida Gas that the standard does not presume a hazard, and thus, the Secretary has the burden to establish the excavated material could pose a hazard by falling or rolling into the excavation, I disagree the burden can only be met with proof of material actually having fallen, or in the process of falling, into the excavation. Based upon the totality of the evidence, I find the Secretary has established Florida Gas violated the terms of § 1926.651(j)(2).

First, I find § 1926.651(j)(2) incorporates the hazard as a violative element the Secretary must prove. In so holding, I am again bound by the standard of statutory interpretation requiring a statute be read as a whole such that all provisions have meaning. The first sentence of the regulation requires protection of employees from “excavated material or equipment that could pose a hazard by falling or rolling into excavations.” The inclusion of this sentence requires the Secretary to prove material or equipment could pose a hazard of falling or rolling into the excavation and the material or equipment was less than two feet from the edge of the excavation. To hold otherwise would render the first sentence without purpose.

Although the Commission has yet to address this issue, the majority of ALJs who have addressed the issue have ruled the Secretary must establish the hazard in order to prove the employer violated the standard. *Columbia Gas of Ohio*, 17 BNA OSHC 1510 (No. 93-3232, 1995); *Honey Creek Contracting, Inc.*, 1998 WL 1386877 (No. 97-0353, 1998); *Performance Site Management*, 21 BNA OSHC 2115 (No. 06-1457, 2007); and *Schaer Development of Central Florida, Inc.*, 23 BNA OSHC 1842 (No. 11-0371, 2011), *but see North Texas Contracting, Inc.*, 21 BNA OSHC 1419 (No. 05-0330, 2006). Although these decisions are unreviewed ALJ decisions and are not, therefore, binding precedent, I do find the reasoning persuasive. A careful reading of the standard indicates to me that unless the excavated or other material “could pose a hazard by falling or rolling” into the excavation, there is no violation of the standard even if the materials are less than two feet from the excavation’s edge.

I do not agree, however, with Florida Gas’s urging that the Secretary’s burden can only be met by establishing material had fallen, or was in the process of falling, into the excavation. As Judge Welsch noted in *Performance Site Management*, the Secretary’s burden is not to show “significant risk of the hazard coming to fruition;” rather, the Secretary need only show that “if the hazardous event occurs, it would create a significant risk to employees.” *Performance Site*

Management, 21 BNA OSHC at 2119, citing *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993). Again, I find Judge Welsch's holding persuasive as it is based on long standing Review Commission precedent and is well-reasoned.

I find the preponderance of the evidence supports a finding not only of the possibility of the spoil pile materials falling into the excavation, but that if the event were to occur, it would create a significant risk to employees. The parties stipulated the spoil pile along the south wall of the east side of the excavation was within 2 feet of the excavation's edge (Exhs. J-1 ¶8, C-1, C-9, C-10).⁵ The parties also stipulated the material comprising the spoil pile was previously disturbed, type C soil (Exh. J-1 ¶19). CSHO Nicou observed the soil on the spoil pile material to be loose (Tr. 119-20). CSHO Nicou testified soil of this type would fall back into the excavation as it is thrown, given the angle of repose of the spoil pile (Tr. 43, 119). Moreover, the walls on this portion of the excavation were vertical or straight (Tr. 119, 453-55). The spoil pile was 2 to 3 feet high (Tr. 67, 217). A careful review of the photographs taken by CSHO Nicou shows a large spoil pile well within 2 feet of the excavation's edge (Exhs. C-1, C-9, C-10).⁶ Because there was little sloping on the east wall on which the spoil pile sat, if the loose material were to fall, a large volume of material, weighing as much as 100 to 200 pounds per cubic foot, would have fallen unimpeded on Mr. Perez (Tr. 67). Thus, given the size of the spoil pile, the type of soil, and the vertical walls of the excavation, I find the Secretary has established a violation of the terms of the standard.

Employee Exposure to the Hazard

The Secretary has also established employee exposure to the hazard. Mr. Horan testified Mr. Perez was in the east side of the excavation next to the spoil pile (Tr. 145-46, 205, 226). Mr. Horan stated he was passing the dirt from his side, under the concrete structure, to Mr. Perez who, in turn, threw the dirt over his shoulder onto the spoil pile (Tr. 145-46). Florida Gas stipulated Mr. Perez dug the east side of the excavation and was in the east side of the excavation

⁵ Florida Gas argues Mr. Perez testified the spoil pile was two feet from the edge prior to he and Mr. Horan leaving the worksite. For the reasons discussed herein, I do not find Mr. Perez a credible witness. Mr. Horan testified the sides of the excavation changed, but could not recall which sides changed or how much the conditions changed (Tr. 158-59). I find Florida Gas's argument, based on the less than credible testimony of Mr. Perez unpersuasive.

⁶ I note the citation references only the spoil pile on the east excavation wall and not the south wall. The photographic evidence shows a spoil pile along the edge of both the south and east excavation walls.

for at least 2 hours (Exh. J-1 ¶¶12 and 15). The Secretary has established Mr. Perez was exposed to the hazard addressed in the standard.

Relying on the testimony of Mr. Perez, Florida Gas contends the Secretary cannot show Mr. Perez was exposed to the hazard. Mr. Perez testified he stood on the top edge of the excavation and reached 4 to 5 feet down into the excavation as Mr. Horan threw dirt under the concrete structure to him. Therefore, Florida Gas argues, he was never exposed to material potentially falling into the excavation because he was not in the excavation. On this I find Mr. Perez less than credible and reject Florida Gas's argument. First, contrary to Mr. Perez's testimony, Mr. Horan's testimony was that Mr. Perez was on a ledge approximately 2 feet into the excavation, next to the spoil pile and digging under the concrete structure (Tr. 145-46, 205, 219, 227). I found Mr. Horan to be a more credible witness than Mr. Perez. Mr. Perez's various statements regarding where he stood while assisting Mr. Horan were not consistent (Tr. 241, 258, 267-68). Nor was his testimony consistent with facts to which Florida Gas previously stipulated (Exh. J-1 ¶¶12 and 15). Mr. Perez was often confused and equivocal while testifying, changing his testimony when prompted by counsel (Tr. 267-68).⁷ Mr. Horan, on the other hand, did not waver on this point. Mr. Perez's statement that he stood on the top of the excavation wall, bent over, and extended his shovel at times more than 5 feet down to the bottom of the excavation, under the concrete structure simply does not have the ring of truth (Tr. 258).

Nothing in the standard requires the Secretary to establish the employee was at the bottom of an excavation more than 5 feet deep. The Secretary need only show the employee was within the zone of danger. Because the preponderance of the credible evidence establishes Mr. Perez was in the east side of the excavation next to the spoil pile, the Secretary has established he was exposed to the hazard of the spoil pile material falling into the excavation and onto him.

Employer knowledge

The Secretary must establish Florida Gas had knowledge of the violative condition. In order to establish employer knowledge of a violative condition, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engd Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An

⁷ Although I am cognizant of the fact Mr. Perez had limited English language skills, his inability to consistently state his location was not the result of a language barrier.

employer is required to make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their scheduled work. *Automatic Sprinkler Corporation of America*, 8 BNA OSHC 1384, 1387 (No 76-5089, 1980). The Secretary contends Mr. Horan's knowledge of Mr. Perez's location and the condition of the spoil pile should be imputed to Florida Gas. Florida Gas, to the contrary, contends Mr. Horan's knowledge of the condition cannot be imputed to it under the 11th Circuit's holding in *ComTran Group, Inc., v. U.S. Dept. of Labor*, 722 F.3d 1304 (11th Cir. 2013), absent a showing of the inadequacy of its safety program. I disagree with Florida Gas and find the Secretary has established employer knowledge.

The Court of Appeals for the 11th Circuit recently discussed the Secretary's knowledge element in the *ComTran* decision:

As for the knowledge element [], the Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer (citations omitted). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See e.g., Secretary of Labor v. Kansas Power & Light Co.*, 5 O.S.H. Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct but he was in close enough proximity that he should have. *See, e.g., Secretary of Labor v. Hamilton Fixture*, 16 O.S.H. Cas. (BNA) 1073 *17-19 (1993) (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, *see New York State Elec. & Gas Corp.*, 88 F.3d 103, 105-06 (2d Cir. 1996) (citations omitted), with the rationale being that ---in the absence of such a program ---the misconduct was reasonably foreseeable.

ComTran, 722 F.3d at 1307-1308.

Further, in *ComTran* the court held "if the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the conduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct." *Id.* at 1318. The 11th Circuit held, however, its decision in *ComTran* did not apply to the ordinary case in which constructive knowledge is established because the supervisory employee should have

known through reasonable diligence of the exposure of his subordinates to the hazardous conditions. *ComTran*, 722 F.3d at 1308, n. 2. Such is the case here. Mr. Horan was in proximity to Mr. Perez during the entire day. He was aware of what Mr. Perez was doing (Tr. 205). Although he did not admit to knowing the location of the spoil pile, Mr. Horan admitted he knew Mr. Perez was next to it (Tr. 145-46; 205; Exh. C-12). The Secretary has established employer knowledge.

Florida Gas's reliance on *ComTran* ignores its inapplicability to the facts of the instant case. At issue in *ComTran* were two violations of specific safety standards addressing trench safety. The supervisory employee in *ComTran* not only created the hazard addressed by the standard (dug the trench), he was also the exposed employee. *Id.* at 1309. The Secretary attempted to impute knowledge to the employer through the actual knowledge of the supervisor of his own misconduct. In the instant case, it was Mr. Perez who created and who was exposed to the hazard. I find Florida Gas had knowledge of the hazard because Mr. Horan should have known through reasonable diligence of the conditions created by, and exposure of his subordinate. Thus, the case falls outside of the standard set out in *ComTran* as the 11th Circuit explicitly stated. *ComTran*, 722 F.3d at 1308 n. 2.

Classification

The Secretary alleged the violation § 1926.651(j)(2) was properly classified as a serious violation because, should the spoil pile fall onto the employee working in proximity to it, that employee would be exposed to soil hitting or falling on him (Tr. 67-68). Given the weight of soil, this could result in broken bones or other serious injuries. Florida Gas did not dispute this. Therefore, I find Mr. Perez was exposed to a hazard likely to result in serious injury and find Item 2 properly classified as a serious violation.

For the foregoing reasons, the Secretary has established a serious violation of 29 CFR § 1926.651(j)(2).

Item 3: Alleged Serious Violation of 29 CFR § 1926.652(a)(1)

Item 3 alleges, on the

[w]est side of the construction site, employees were exposed to possible cave-ins, in that, while in progress of locating a gas pipe, a trench 7 feet by 5 feet and 6 feet

5 inches deep was not provided with a shoring system at the east and west trench walls.

The cited standard at 29 CFR § 1926.652(a)(1) reads:

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...

Designs for proper sloping and benching systems are set out in § 1926.652(b); and for support systems in § 1926.652(c).

Applicability of the Standard

The standard requires the protection of employees working in excavations from cave-ins. The standard applies to circumstances in which employees are working in excavations that are over 5 feet deep and not dug in stable rock. 29 CFR §§ 1926.652(a)(1)(i) and (ii). The standard defines excavation as any “man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.” Florida Gas concedes employees were working in an excavation (Exh. J-1 ¶15). Moreover, the excavation was over 6 feet deep and dug in type C soil (Exh. J-1 ¶19). I find the entire excavation (both sides of the concrete structure) was over 5 feet deep. As CSHO Nicou and Mr. Horan testified, the excavation was 6 feet, 4 inches at its lowest point (Tr. 453). Based upon Mr. Horan’s testimony, this would have created a 5 foot gap underneath the concrete structure. This gap can be seen in the photographs taken by CSHO Nicou (Exhs. C-1, C-5, C-7, C-9, C-10, C-11). According to Mr. Horan, the excavation was level at that point and then sloped upward on the east side (Tr. 142). Given this large gap and the manner in which Mr. Horan and Mr. Perez were working, I find the worksite constituted a single excavation and the standard applies to the operations of both Mr. Horan and Mr. Perez.

Failure to Comply with the Terms of the Standard

The parties stipulated the west side of the excavation did not comply with 29 CFR § 1926.652(a)(1). The parties also stipulated there was no shoring on the east excavation wall (Exh. J-1 ¶16). CSHO testified the east excavation wall was vertical (Tr. 36, 48; Exh. C-6). This would not comply with the benching requirements for type C soil found in § 1926.652(b). Mr. Horan conceded as much in his testimony (Tr. 224). CSHO Nicou further testified walls of this

configuration in type C soil could collapse (Tr. 50). Moreover, there were signs of instability of the walls (Tr. 47, 51-54; Exh. C-7). Therefore, the terms of the standard were violated.

Employee Exposure to the Hazard

The Secretary has also established employee exposure to the hazard. There is no dispute Mr. Horan was in the excavation at a point at which it was over five feet deep without any protective system on the west wall of the excavation. Moreover, as previously discussed, I have found the preponderance of the credible evidence establishes Mr. Perez was in the east side of the excavation with no protective system in place on the east wall of the excavation.

Florida Gas contends Mr. Perez was not exposed to the hazard of the excavation cave-in because he was standing on the edge of the excavation. As I have previously discussed, I have found Mr. Perez was working in the excavation, not on the top edge. Moreover, Mr. Perez was exposed to the hazard of a cave-in as is evidenced by the fact that some of the walls of the excavation had begun to cave in while he and Mr. Horan were away from the worksite (Tr. 217-22). The Review Commission has recognized the cited standard is implicated by the depth of a particular trench, without regard to an individual worker's precise location in it. *Ford Development Corp.*, 15 BNA OSHC 2003 (No. 90-1505, 1992) (rejecting the employer's argument that workers standing on a pipe while in a trench were effectively only exposed to a depth of 3 ½ feet and therefore, not in violation of the standard); *see also P. Gioioso & Sons v. OSHRC*, 115 F.3d 100, 108-09 (1st Cir. 1997). Thus, even if Mr. Perez was not standing at a point below 5 feet, he was exposed to the hazard addressed by the cited standard. The Secretary has met his burden to establish both Mr. Perez and Mr. Horan were exposed to the hazard addressed in the standard.

Employer Knowledge

The Secretary must establish Florida Gas was aware or, with the exercise of reasonable diligence should have been aware, of the violative condition. The Secretary contends Mr. Horan's knowledge of his own location and that of Mr. Perez and the condition of the excavation should be imputed to Florida Gas. As with Item 2, Florida Gas contends Mr. Horan's knowledge of the condition cannot be imputed to it under the 11th Circuit's holding in *ComTran*, absent a showing of the inadequacy of its safety program. For the reasons discussed with regard to Item 2,

I disagree with Florida Gas and find the Secretary has established employer knowledge.

I find Florida Gas had knowledge of the hazard because Mr. Horan knew of the exposure of both himself and his subordinate to the hazardous condition (Tr. 226-27). Mr. Horan testified, “I kind of knew that I needed a four-side—like I would need a four-sided trench box, but I just kind of did it anyways.” (Tr. 199). Thus, the case falls outside of the standard set out in *ComTran* as the 11th Circuit explicitly stated. *ComTran*, 722 F.3d at 1308 n. 2.

Classification

The Secretary alleged the violation of § 1926.652(a)(1) was properly classified as a serious violation because cave-in of an excavation could result in employees being engulfed or buried by soil (Tr. 69). This, in turn, could result in serious injury such as broken bones or death (Tr. 69). Florida Gas did not dispute this. Therefore, I find Mr. Horan and Mr. Perez were exposed to a hazard likely to result in serious injury and find Item 3 properly classified as a serious violation.

For the foregoing reasons, the Secretary has established a serious violation of 29 CFR § 1926.652(a)(1).

Unpreventable Employee Misconduct

Florida Gas has asserted a defense of unpreventable employee misconduct with regard to each of the alleged violations. To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., Stark Excavating, Inc.*, 2014 WL 5825310 (Nos. 09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). Where the asserted misconduct is that of a supervisory employee, the Commission has made the employer's burden of proof “more rigorous” and the defense “more difficult to establish” because it has recognized the supervisor has the duty to protect the safety of employees under his supervision and a supervisor’s misconduct is “strong evidence that the employer’s safety program is lax.” *CBI Services, Inc.*, 19 BNA OSHC 1591 (No. 95-0489, 2001). Florida Gas contends, if the Secretary has established any of the violations, each was the result of the unpreventable misconduct of Mr.

Horan and Mr. Perez.

I find Florida Gas has met the first three elements of the affirmative defense. Florida Gas presented evidence of its work rules designed to prevent the violation of the specific standards at issue and that it trained its employees on those rules. Lisa Judge, operations safety and compliance manager of Florida Gas, testified the company has an employee safety guide provided to all employees upon starting work (Tr. 383; Exh. R-4). This document contains rules that address safety issues with regard to excavations generally, and the violations at issue in this matter specifically (Exh. R-4 pp. 73, 74, and 75). Florida Gas's employee handbook also contains safety standards (Tr. 383; Exh. R-3 p. 44). Each of these rules was communicated to employees during their orientation (Tr. 178, 275, 374). Part of Florida Gas's orientation also includes an interactive computer training developed by National Utilities Contractors Association (NUCA) (Tr. 373; Exh. R-1). Employees must complete the course prior to beginning work and do so on computers at Florida Gas's training facility (Tr. 172-73, 375-77). Both Mr. Horan and Mr. Perez completed this training and acknowledged receipt of the each of these documents (Tr. 168-69, 275; Exhs. R-2, R-5, R-9). In addition to orientation training, Florida Gas provides its employees with competent person training (Tr. 378; Exhs. R-6, R-7). Both Mr. Horan and Mr. Perez completed this training as well (Tr. 174-75, 278-80; Exhs. R6, R-9). Florida Gas requires its foremen to conduct biweekly tool box talks (Tr. 379-80; Exhs. R-10, R-11). The company has a safety committee, comprised of employees, designed to allow employees to air their concerns and have them addressed by management (Tr. 379; Exhs. R-14, R-15). The NUCA DVD, tool box talks, and Employee Safety Guide were all available in Spanish for Spanish speaking employees (Tr. 379-80).

I also find Florida Gas took reasonable steps to discover violations of their work rules. Mr. Petralia testified he has oversight of 12 crews. He stated he tries to visit all 12 of his crews each day (Tr. 343). His crews do not know his route for the day and he may observe the worksite from a distance before letting employees know he has arrived (Tr. 349-50). Thus, Mr. Petralia ensures he sees employees in the normal course of their work. Mr. Petralia testified this is consistent with his understanding of how other project managers conduct oversight of their jobs. Steve Furry, Florida Gas's director of operations, also testified he performs unannounced site visits (Tr. 361). Mr. Horan corroborated his supervisors have come to his worksites "many

times.” (Tr. 195-96). Ms. Judge testified the company uses a service provided by its insurance company to perform inspections and write reports for the company on its findings (Tr. 411; Exh. R-16).

Despite finding adequate most aspects of Florida Gas’s safety program, I find Florida Gas failed to meet its burden to establish it effectively enforced its rules once it discovered violations. The Commission most recently addressed the employee misconduct defense in *Stark Excavating, Inc.*, 2014 WL 5825310 at *5-7. In *Stark*, the Commission held the employer had failed to meet its burden with regard to the last element of the affirmative defense. The Commission found the employer had a disciplinary program that “required the issuance of a written safety ticket for any safety violation and progressive disciplinary consequences for subsequent violations.” *Id.* at *5. However, the evidence established the safety director had issued the majority of the written discipline. In 22 months, no other supervisor had issued written discipline, preferring to use verbal warnings. Although the Commission recognized verbal warnings may be adequate in certain cases, it found because the employer’s policy expressly required written warnings, “giving only oral warnings undermined the policy’s progressive nature.” *Id.* at *6 citing *GEM Industrial, Inc.*, 17 BNA OSHC 1891 (No. 93-1122, 1996). Moreover, the Commission found the employer’s evidence lacking for failure to provide documentation of any verbal warnings. In so holding, the Commission relied on its prior holdings in *Precast Services, Inc.* 17 BNA OSHC 1454 (No. 93-2971, 1995) and *Rawson Contractors, Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003), in which it found, although verbal warnings may suffice, it is the rare case and generally requires a showing of a long history of safe work practices despite frequent opportunities for violations and evidence of actually having administered the discipline.

Florida Gas’s employee handbook contains the company policy for progressive discipline (Exh. R-3 p. 14). Under that policy, an employee is first issued a verbal warning (Exh. R-3, p. 14). According to Mr. Furry, if the condition is not corrected, a written warning or harsher penalty is issued (Tr. 364). According to Ms. Judge, verbal warnings are to be reduced to writing (Tr. 382). The form used by Florida Gas for all discipline since at least 2006, with the exception of that issued to Mr. Horan and Mr. Perez,⁸ is designed to allow for such

⁸ When asked why there were no other similar documents, Ms. Judge responded “because we just changed the forms” (Tr. 428). She could not state when this change occurred. Nor did Florida Gas provide any explanation for

documentation, as well as keep track of subsequent discipline for the same offense (see Exh. R-17). Mr. Petralia testified he gives verbal warnings for violations such as failure to wear a safety vest or hard hat, but was unable to state whether he had issued a written warning in 2014 (Tr. 356). Mr. Furry testified to two instances of suspensions issued to a crew leader for a safety violation (Tr. 366-67). However, he did not provide any details.

Based upon a careful review of Florida Gas's disciplinary records, I find Florida Gas has failed to establish effective enforcement of its safety program. These records corroborate only one of the disciplinary actions to which Mr. Furry testified and none referenced by Mr. Petralia. The record of the discipline referenced by Mr. Furry show it occurred in 2011 (Exh. R-17C). Moreover, only five of the 30 disciplinary records submitted by Florida Gas address safety violations occurring before this inspection (Exhs. R-17C, 17-D, 17M, 17O, 17P).⁹ The overwhelming majority of these records, which date back to 2006, show discipline for attendance violations. When asked whether the documents contained in Exhibit R-17 constituted all the discipline issued for the time period covered, Ms. Judge responded "it's just a sampling... we could not bring everything; it's too voluminous." (Tr. 430). Florida Gas has the burden to produce evidence of enforcement of its safety rules. That voluminous evidence of such exists, but Florida Gas chose not to present it and presented in its place evidence of discipline for non-safety related infractions, strains credulity. Even if I found this assertion credible, I can only consider those records before me. Based on the record before me, I find Florida Gas has failed to establish it followed its own progressive disciplinary policy when enforcing its safety rules.

The evidence shows serious safety concerns had been brought to Florida Gas's attention, yet it did not address those issues with its employees. I am unpersuaded by Florida Gas's assertion, via Mr. Judge's testimony, it did not discipline anyone for safety violations depicted in the CNA reports because the photographs do not show exposed employees. First, this is simply inaccurate, as the photos at Exhibit R-16B (employee riding in the open bed of a pick-up truck), R-16B.2 (an employee without a safety vest), and R-16B.4 (an employee without proper foot

this difference in format.

⁹ Florida Gas refers to nine safety-related disciplinary records. Because Florida Gas did not specify to which records it refers, I assume the discrepancy is due, in part, to my exclusion of the discipline issued to Mr. Horan and Mr. Perez. Florida Gas may also have included discipline for such infractions as carelessness and spitting, as well. Even accepting Florida Gas's number, the overwhelming majority of the disciplinary records do not reference safety-related discipline.

protection) establish. Florida Gas presented no evidence, other than the one set of safety committee minutes that occurred after the OSHA inspection, establishing it took measures to address any of the safety concerns raised by the insurance carrier in these meetings. In failing to respond, in light of the language used by the insurance carrier in one letter in which the inspector states “uncontrolled exposures...should have been controlled as a normal operational procedure,” (Exh. R-16B), Florida Gas undermined the effectiveness of its written program.

Although Mr. Horan and Mr. Perez were disciplined following the OSHA inspection, the records indicate they were disciplined for not following company policy with regard to conduct during such an OSHA inspection, with reference to only one of the safety concerns raised in the OSHA inspection (Exh. R-17A, 17B). Mr. Horan testified, in addition to the verbal discipline, he was required to give a presentation to his peers (Tr. 163-64). I was impressed by Mr. Horan’s sincere expression of embarrassment at having to so do. However, I found the evidence as to what this presentation involved lacking (Tr. 201). The minutes of that meeting indicate his focus was on failure to follow company procedures with regard to conduct during an OSHA inspection, such as directing the CSHO to wait for a manager to arrive and to take the same photos as the CSHO (Exh. R-15N). Therefore, I do not find this discipline of Mr. Horan to be persuasive evidence of Florida Gas’s enforcement of its safety policies.

To the extent Florida Gas’s safety committee could be construed as a mechanism to address rule violations, a careful review of the minutes of those meetings establishes employee safety was raised infrequently (Exhs. R-15A, 15E, 15F, 15I, 15K). Rather, the majority of the minutes reference discussion of property damage or loss (*see, e.g.*, Exhs. R-15B, 15-D, 15H, 15I, 15J, 15K, 15L).

I find the evidence establishes Florida Gas did not adhere to its own progressive disciplinary policy with regard to safety violations. Florida Gas failed to submit evidence showing it addressed its insurance carrier’s concerns with employees through an enforcement mechanism. As the Commission recognized in *Stark*, giving only verbal reprimands where an employer’s policy explicitly required it to use progressive discipline and issue written warnings, “undermined the policy’s progressive nature.” 2014 WL 5825310 at *6. For the foregoing reasons, I find Florida Gas has failed to establish the affirmative defense of unpreventable employee misconduct.

Penalty Determination

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (“The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission’s authority to raise or lower penalties within those limits.”), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App’x 152 (5th Cir. 2002) (unpublished). “Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). Section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer’s size, history of violation, and good faith.” *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

The Secretary proposed a penalty of \$4,900.00 each for Item 2 and Item 3 (Tr. 71). CSHO Nicou testified he considered the violations to have a high probability of causing injury; therefore, the gravity based penalty proposed for each was \$7,000.00. A reduction factor of 30% was given for the company’s small size. No other reductions were given.

With regard to Item 2, I do not agree the gravity of the violation was high. Given the type of soil, size of the spoil pile, and Mr. Perez’s location, the likelihood of injury is low. Mr. Perez was the only employee exposed and for a short period of time.

With regard to Item 3, I find the gravity of the violation was high. Either Mr. Horan or Mr. Perez, or both, could have been severely injured if the excavation caved in. The likelihood of that occurring was heightened due to the water in the excavation, evidenced by Mr. Horan’s testimony the walls had collapsed as a result of the pump having stopped (Tr. 144, 158). The record establishes Mr. Horan and Mr. Perez were exposed to the hazard for approximately 30

minutes. Therefore, a high gravity based penalty for this violation is appropriate.

I also find a reduction in the gravity based penalty is warranted. Florida Gas is a small employer. Although I found its safety program lacking, the evidence of its efforts to train employees and its response to the conditions found during the OSHA inspection evince good faith. The Secretary presented no evidence of Florida Gas having a history of violations. Therefore, I find a significant reduction in the gravity based penalty is warranted.

Considering all of the statutory factors, it is determined that a penalty of \$2,000.00 for Item 2 and \$3,500.00 for Item 3, for a total penalty of \$5,500.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, Citation 1, alleging a violation of 29 CFR § 1926.651(i)(3) is vacated;
2. Item 2, Citation 1, alleging a violation of 29 CFR § 1926.651(j)(2) is affirmed as serious, and a penalty of \$2,000.00 is assessed; and
3. Item 3, Citation 1, alleging a violation of 29 CFR § 1926.652(a)(1) is affirmed as serious, and a penalty of \$3,500.00 is assessed.

DATE: December 12, 2014

/s/

HEATHER A. JOYS

Administrative Law Judge

Atlanta, Georgia