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SECRETARY OF LABOR, Complainant, v. ANDREW CATAPANO ENTERPRISES, INC., Respondent.	OSHRC Docket No. 89-1981

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

This case presents the issue of whether Administrative Law Judge David G. Oringer erred in affirming a citation alleging that Respondent, Andrew Catapano Enterprises, Inc. ("Catapano") committed a willful violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") by failing to comply with the trench and excavation standard then in effect, 29 C.F.R. § 1926.652(b).[1] We conclude that the judge properly found Catapano in willful violation, but we do not adopt the judge's reasoning on two issues raised by Catapano. We also conclude that the judge's penalty assessment does not fully

[1]After this case arose, the Secretary substantially amended the trench and excavation standards set forth in Subpart P of Part 1926. 54 Fed. Reg. 45,894 (1989).

reflect the gravity of the violation, and we find a penalty of $7500 to be appropriate[2] rather than $5000 as the judge assessed.[3]

The judge found that a trench at the intersection of Prince Street and Roosevelt Avenue in Flushing, New York, in which one employee of Catapano was working, was not shored or otherwise protected against collapse as required by section 1926.652(b): "Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them." Catapano takes issue with the judge's factual findings as well as inferences the judge drew from the testimony of the Secretary's witnesses and the photographic evidence. We have reviewed the record, including the briefs, and we find no basis on which to disturb the judge's factual findings that the elements of this standard were not complied with; nor do we find any basis on which to set aside the judge's credibility determinations. *Keco Indus.*, 13 BNA OSHC 1161, 1167, 1986-87 CCH OSHD ¶ 27,860, p. 36,476 (No. 81-263, 1987); *Okland Constr. Co.*, 3 BNA OSHC 2023, 1975-76 CCH OSHD ¶ 20,441 (No. 3395, 1976). The judge also properly concluded for the reasons he gave that statements by Catapano's foreman and site superintendent to the Secretary's compliance officers were admissible and entitled to dispositive weight on the issue of willfulness. The judge applied the correct legal test for determining whether a violation is willful in nature, and the evidence he cites supports his finding of willfulness. Accordingly, we adopt these aspects of the judge's decision.

Catapano contends that it was not properly charged with an offense under the standard because the citation simply alleged that the trench "was not supported by an effective shoring system." Catapano correctly points out that shoring is not the only means of compliance permitted by the standard. It asserts, therefore, that the citation fails to specify in what respect the trench was not in conformity with the standard and that accordingly the citation was issued in violation of section 9(a) of the Act, 29 U.S.C. 658(a),

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[2]Commissioner Foulke dissents from the assessment of a penalty of $7500. *See infra* note 8.

[3]Judge Oringer also affirmed one and vacated two citation items alleging other violations of the trench and excavation standards. His disposition of these items is not before us.

which requires that a citation describe the alleged offense "with particularity." Catapano also points out that in his responses to its discovery requests, the Secretary reiterated that the violation was predicated on the absence of an "effective shoring system."

In rejecting Catapano's argument, the judge reasoned that since the term "shoring system" does not appear in the cited standard, it can be construed to include in the aggregate *all* the means of compliance set forth in the standard. Accordingly, the judge held that the citation in fact gave sufficient notice that the Secretary was alleging a failure to use any of the protective measures prescribed in the standard.

While we conclude that Catapano in fact was afforded fair notice of the charge, we do so for reasons other than those assigned by the judge. As Catapano properly notes in its review brief, the standard permits the employer to comply by sloping the trench. We agree with Catapano that the term "shoring system" used in the citation cannot reasonably be interpreted to refer to a method of protecting against collapse which does not involve bracing the trench walls with a device or support of some type. However, when the Secretary filed his complaint he amended the citation allegation to read as follows: "The trench in unstable or soft material, i.e., gravelly sand, was not shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working in it." This allegation plainly puts Catapano on notice that the Secretary was charging that it had failed to implement any of the prescribed methods. In any event, a citation will only be dismissed for being insufficiently particular where it appears from the full record that the employer was prejudiced in the preparation and presentation of its case. *Brabham-Parker Lumber Co.*, 11 BNA OSHC 1201, 1202, 1983-84 CCH OSHD ¶ 26,418, pp. 33,521-22 (No. 78-6060, 1983). As the Secretary correctly points out, Catapano has neither alleged nor demonstrated that either the deficient citation allegation or the Secretary's corresponding discovery responses resulted in any prejudice to its ability to conduct its case on the merits.[4]

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[4]Catapano correctly points out that when the Secretary amended the citation in the complaint he failed to identify the change made to the citation, as required by Rule 35(f)(3), 29 C.F.R. § 2200.35(f)(3), the Commission's rule of procedure in effect at the time.
(continued...)

The judge rejected Catapano's argument that the standard is inapplicable because a portion of the trench[5] included the road surface as well as the soil content. The judge interpreted the standard to apply where a trench is dug in unstable or soft material and is at least 5 feet deep; in other words, he concluded that the Secretary was not required to prove that the *soil portion* of the trench was at least 5 feet deep. We agree with the judge's conclusion but not with his reasoning. The judge engaged in an extensive analysis of the standard and made what we find to be a strained distinction between the terms "trench" and "sides of trenches." At the time the judge issued his decision, however, the Commission had already held that the depth requirement relates to the depth of the trench itself and not the depth of the unstable or soft soil portion, unless the soft or unstable portion is insignificant,

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[4](...continued)
However, the prejudice test is also used in determining whether relief should be given for a violation of a procedural rule relating to prehearing amendments. *Bland Constr. Co.*, 15 BNA OSHC 1031, 1041, 1991-93 CCH OSHD ¶ 29,325, p. 39,401 (No. 87-992, 1991); *see Con-Agra Flour Milling Co.*, 15 BNA OSHC 1817, 1822-23, 1991-93 CCH OSHD ¶ 29,808, p. 40,592 (No. 88-2572, 1992). Catapano has not shown any prejudice resulting from the Secretary's failure to specifically indicate that the citation was being amended.

[5]In its reply brief Catapano argues that the ground opening in question is "possibly" subject to the less stringent standard then in effect for the protection of "excavations," section 1926.651(c), rather than section 1926.652(b), which applies only to "trenches." Catapano asserts that only one side was dug in soil or dirt and that the other side consisted of concrete supporting structures such as a catch basin. Because only one side was required to be protected, Catapano contends that the opening in question in fact is not a trench but rather is analogous to an excavation having one single "face."

This argument was not raised before the judge. In any event, based on its dimensions as found by the judge, the opening is clearly a trench rather than an excavation under the standards in effect at the time. *Heath & Stich, Inc.*, 8 BNA OSHC 1640, 1643, 1980 CCH OSHD ¶ 24,580, p. 30,151 (No. 14188, 1980), *dismissed with opinion*, 641 F.2d 338 (5th Cir. 1981). *See Concrete Constr. Co.*, 15 BNA OSHC 1614, 1621, 1991-93 CCH OSHD ¶ 29,681, pp. 40,244-45 (No. 89-2019, 1992) (pipeline excavation is normally considered a trench). Furthermore, Catapano's underlying premise is questionable. Assuming without deciding that only one wall of the opening was in fact dug in soft or unstable soil, that circumstance alone would not establish that it could no longer be considered a trench. *See Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1110, 1981 CCH OSHD ¶ 25,728, p. 32,075 (No. 76-256, 1981) (section 1926.652(c) referring to "sides of trenches . . . 8 feet or more in length" includes trenches having only one wall at least 8 feet long).

which is not the case here. *Communications, Inc.*, 7 BNA OSHC 1598, 1602, 1979 CCH OSHD ¶ 23,759, pp. 28,812-13 (No. 76-1924, 1979), *aff'd without published opinion*, 672 F.2d 893 (D.C. Cir. 1981) and *Connecticut Natural Gas Corp.*, 6 BNA OSHC 1796, 1978 CCH OSHD ¶ 22,874, p. 27,668 (No. 13964, 1978) (citing *W.N. Couch Constr. Co.*, 4 BNA OSHC 1054, 1056, 1975-76 CCH OSHD ¶ 20,574, p. 24,592 (No. 7370, 1976)). Since this precedent is dispositive of the issue, the judge's discussion and analysis was unnecessary, and we do not adopt it.[6]

We turn now to the penalty. We review the judge's penalty assessment *de novo* and have the discretion to make the appropriate findings.[7] *Quality Stamping Prods. Co.*, No. 91-414, slip op. at 2 (July 21, 1994). In assessing a penalty of $5000 rather than the $10,000 proposed by the Secretary, the judge relied on the fact that only one employee was exposed to the hazardous trench. We conclude that the judge erred in reducing the gravity of the violation for this reason. In this regard, we stress primarily that the violation was a function of a corporate policy of not protecting trenches less than 6 feet in depth. Additionally, the trench was a relatively small one, and there were only two employees on the site at the time of the Secretary's inspection, the exposed employee and his foreman. In these circumstances, where only one employee is required to perform the work and the size of the work area itself limits the opportunity for employee exposure, we consider it inappropriate to affirmatively give the employer credit for the fact that only one employee was exposed to

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[6]The judge cited *Woolston Constr. Co.*, 15 BNA OSHC 1114, 1991-93 CCH OSHD ¶ 29,394 (No. 88-1877, 1991), *aff'd without published opinion*, No. 91-1413 (D.C. Cir. May 22, 1992) (1992 WL 117669) and *Trumid Constr. Co.*, 14 BNA OSHC 1784, 1987-90 CCH OSHD ¶ 29,078 (No. 86-1139, 1990). These decisions, however, do not address the question of whether soft or unstable soil must be at least 5 feet in depth in order for section 1926.652(b) to apply.

[7]The Secretary argues, as he has in numerous other cases, that the Commission must defer to the Secretary's penalty proposals unless the Commission can find on the record that the proposal is unreasonable or that the Secretary did not take the statutory criteria into account in formulating his proposal. Subsequent to the Secretary's brief here, the Commission held in *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621-23, 1994 CCH OSHD ¶ 30,363, pp. 41,881-83 (No. 88-1962, 1994) that the Commission and its judges have authority to assess penalties independent of the Secretary's proposal. We consider this point to be now settled.

the hazard. The record further shows that Catapano is a company of moderate size, having 140 employees, and that it had previously committed a violation of section 1926.652(b). On the other hand, as the judge found, Catapano demonstrated some good faith by immediately correcting the violation. In sum, based on all of the above, we find that a penalty of $7500 is appropriate under the criteria set forth in section 17(j) of the Act, 29 U.S.C. § 666(j).[8]

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[8]Commissioner Foulke concurs that a willful violation of 29 C.F.R. § 1926.652(b) should be affirmed, but he disagrees with the ruling of his colleagues that the ALJ assessed an inappropriate penalty. Only the issues of a violation of the standard and the willful classification of the violation were directed for review in this case. The issue of the appropriate penalty amount was not directed. Furthermore, the briefing order that was issued did not ask the parties to address the penalty question. Commissioner Foulke notes that with respect to the two issues that were directed that the Commission here finds no basis (1) "to disturb the judge's factual findings" or (2) to set aside the judge's credibility determination and that the judge correctly decided that the violation was willful. However, on the penalty issue not directed, Commissioner Foulke notes that his colleagues find that the ALJ erred in his penalty assessment. Commissioner Foulke believes that the number of employees exposed to the hazard is appropriately considered in determining the gravity of the violation as the Commission has stated on different occasions. *E.g., J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993) and cases cited therein. Therefore, Commissioner Foulke would affirm the ALJ's penalty determination on the basis that the judge applied a proper penalty analysis and the fact that the penalty issue was not directed by the Commission.

Even assuming the penalty issue is before the Commission for review, Commissioner Foulke believes that the judge's assessment need not be changed. Considering that the majority does not find that Catapano is a large employer and accords Catapano some credit for good faith, the only conclusion that can be drawn from the majority's assessment is that the majority regards this violation as being of substantial or high gravity. However, the trench, which the majority describes as "a relatively small one," was only about one foot deeper than the depth at which it could have been dug without shoring or other protection. Furthermore, the majority agrees with the judge's finding that only one employee was exposed. While in the circumstances here it may not be proper to affirmatively give Catapano credit for exposing only one employee, Commissioner Foulke does not feel that the violation here falls within the substantial or high gravity category.

Accordingly, item 1 of citation no. 2 alleging a willful violation of section 1926.652(b) is affirmed and a penalty of $7500 is assessed. The judge's decision is adopted to the extent it is consistent with this decision.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G Foulke Jr
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: August 9, 1994

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 89-1981
ANDREW CATAPANO ENTERPRISES, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on August 9, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

August 9, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-1981

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
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v.
ANDREW CATAPANO ENTERPRISES, INC.,
Respondent.

OSHRC DOCKET
NO. 89-1981

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 19, 1992. The decision of the Judge will become a final order of the Commission on September 18, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before September 8, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: August 19, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 89-1981

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Respondent.

OSHRC
Docket No. 89-1981

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Office of the Solicitor
U.S. Department of Labor
For Complainant

Robert D. Moran, Esq.
Washington, D.C.
For Respondent

Before Administrative Law Judge David G. Oringer

DECISION AND ORDER

This is a proceeding under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et. seq.*, (hereinafter referred to as "the Act") to review citations issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed assessment of penalties thereon issued, pursuant to § 10(a) of the Act.

BACKGROUND

On May 8, 1989, at about 10:30 AM, Compliance Officer Raphael Tomich was driving through the intersection of Prince Street and Roosevelt Avenue in New York City when he noticed a man in a trench. (Tr. 7) Believing that the site of the trench should be inspected, Mr. Tomich parked his car across the street from the trench and called the OSHA

Area Director in order to obtain authorization to proceed. (Tr. 8) After receiving permission to conduct an inspection, Mr. Tomich approached the work area and presented his identification to the foreman, Steve Allocca, who informed Mr. Tomich that he was an employee of Andrew Catapano Enterprises, Inc. ("Catapano"). (Tr. 8)

According to John G. Ruggiero, chief engineer and vice president of AFC Enterprises (formerly Andrew Catapano Enterprises, Inc.), this particular trench site was part of a reconstruction project being performed by Catapano involving approximately forty catch basins along Prince Street. (Tr. 229-230) This project consisted of installing "shoot" pipe, which transfers rainwater, in order to connect the old and new catch basins. (Tr. 10-11, 229-230)

Mr. Tomich conducted an inspection of the worksite and departed around noon that day to return to his office. (Tr. 22, 49) After reviewing his notes from the inspection that afternoon with his supervisor, Antonio Pietroluongo, Mr. Tomich returned to the worksite the following day accompanied by Mr. Pietroluongo. (Tr. 22-23) According to Mr. Pietroluongo, he accompanied Mr. Tomich to the worksite because he felt that the file required additional information with regard to Catapano's knowledge of the shoring requirements of 29 C.F.R. § 1926.652(b). (Tr. 117, 142-147)

As a result of these inspections, Catapano was issued two citations on June 12, 1989. The first citation alleged three serious violations and proposed an aggregate penalty of $2500.00. The second citation alleged one willful violation and proposed a penalty of $10,000.00. Catapano filed a timely notice of contest and a hearing was held pursuant to due notice in New York City on April 16, 1990. Both parties have submitted post-hearing briefs.

PRELIMINARY MATTER

In its brief, Catapano argues that the standards for which it was cited are invalid because the construction standards as a whole were not in effect on December 29, 1970, the date on which the Act was enacted. The construction standards became effective on April 27, 1971 pursuant to § 107 of the Contract Work Hours and Safety Standards Act, Pub. L. 91-54, 40 U.S.C. § 333. 36 Fed. R. 7340 (1970). These standards were adopted as such under § 4(b)(2), a provision of the Act expressly allowing their adoption:

"...Standards issued under the laws listed in this paragraph [Public Law 91-54 included] and *in effect on or after the effective date of the Act* shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts.

(Emphasis added.) The Act became effective pursuant to § 34 on April 28, 1971, 120 days after its enactment. Since the construction standards went into effect the day before, they were indeed in effect on April 28th and therefore, were properly adopted under the Act.

Catapano also argues that the construction standards are invalid because they were not issued pursuant to the notice and comment provisions found in § 6(b) of the Act. Section 6(a) of the Act, however, allowed the Secretary for the two years following the Act's effective date to promulgate any national consensus standard or established Federal standard as an occupational safety and health standard *without* the necessary notice and comment procedures. Section 3(10) of the Act defines "established Federal Standard" as "any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act."

In *Natl. Ind. Constructors v. OSHRC*, 583 F.2d 1048, 1050 (8th Cir. 1981) ("*NIC*"), the court stated that since the Act became effective on April 28, 1971, "any federal safety and health regulation *in effect on that date* could be summarily adopted by the Secretary and included in OSHA's regulation under Section 6(a) as an 'established Federal standard'." (Emphasis added). See also *Daniel Intl. Corp. v. OSHRC*, 656 F.2d 925, 927 (4th Cir. 1981); *Morrison-Knudsen Co., Inc./Yonkers Contrac. Co., Inc.*, 1987-90 CCH OSHD ¶ 28,928 (No. 88-572, 1990); *Eshbach Bros., Inc.*, 14 BNA OSHC 1400, 1400-1401, 1987-1990 CCH OSHD ¶ 28,763 (No. 88-2536, 1989); *Daniel Constr. Co.*, 9 BNA OSHC 1854, 1856, 1981 CCH OSHD ¶ 25,385, p. 31,623 (No. 12525, 1981). Under this interpretation of the phrase "presently in effect" found in the § 3(10) definition, the construction standards were properly adopted by the Act under the alternative procedures provided for in § 6(a) because, as noted above, they went into effect the day before the effective date of the Act.

Catapano argues that the Commission specifically rejected the interpretation found in *NIC* in a footnote to its decision in *Senco Products, Inc.*, 10 BNA OSHC 2091, 1982 CCH

OSHD ¶ 26,304 (No. 79-3291, 1982) ("*Senco*"). In that footnote, however, the Commission never cites to the *NIC* decision. The Commission, citing to *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶ 24,979 (No. 12470, 1980), states only that the Secretary's argument that an employer "may not challenge the procedural validity of an OSHA standard in an enforcement proceeding" is rejected. *Senco* at 2093 n.6. Simply declaring that an employer has the right to challenge a standard's validity does not directly challenge the *NIC* court's conclusions regarding the language found in § 3(10) of the Act. As a result, Catapano's argument that the construction standards are invalid must fail.

DISCUSSION

I. Alleged Serious Violation of 29 C.F.R. § 1926.650(e)

While inspecting the area of the trench on Prince Street, Mr. Tomich observed a worker, identified as a Catapano employee by Catapano's site superintendent, Pat Larkin, operating a gas-powered hand saw without eye protection. (Tr. 35-37; see also Exhibit C-4) According to Mr. Tomich, the worker was using the saw to cut rebar around the entrance of the concrete catch basin in the trench; Mr. Tomich claims that he could see sparking as well as chips of concrete and rebar flying up towards the worker's face. (Tr. 36, 91-92) Upon observing this worker, Mr. Tomich testified that he turned to Mr. Larkin, who was accompanying him on his inspection, and asked him why the worker was not wearing eye goggles while operating the saw. (Tr. 36) According to Mr. Tomich, Mr. Larkin informed him that the workers are issued eye protection and then directed Mr. Allocca, Catapano's foreman, to supply the worker in question with a pair of eye goggles. (Tr. 36, 93)

On the basis of this observation, Catapano was cited for an alleged serious violation of § 1926.650(e) which states:

> § 1926.650(e) All employees shall be protected with personal protective equipment for the protection of the head, eyes, respiratory organs, hands, feet, and other parts of the body as set forth in Subpart E of this part.[1]

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[1] Catapano argues that this standard is inapplicable to the facts as presented and that a more appropriate standard governing the cited condition can be found at § 1926.302, titled "Power-operated hand tools". These standards, however, also require that protective equipment be used when tools of this nature are operated. As a result, regardless of which standard is applied, the requirements remain the same. Furthermore, the standard cited here specifically addresses the use of such tools in trenching operations and excavations; (continued...)

A penalty of $800.00 was proposed.

Subpart E, referenced in the cited standard, is titled "Personal Protective and Life Saving Equipment" and the standard there that is relevant for our purposes states:

> § 1926.102(a)(1) Employees shall be provided with eye and face protection when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

Citing to several Commission and Circuit Court decisions, Catapano contends that this standard requires only that employers *provide* such protection, not that they guarantee its use. Since Mr. Tomich conceded at the hearing that eye goggles were provided to the workers, Catapano argues that the Secretary has failed to prove a violation of the cited standard. (Tr. 36, 93)

It is true that the Commission has held that since the term "provide", as used in OSHA standards, should be given its "ordinary meaning", a requirement of use cannot be implied. *Pratt & Whitney Aircraft Group, Div. of United Technologies Corp.*, 12 BNA OSHC 1770, 1775, 1986-87 CCH OSHD ¶ 27,564, p. 35, 795 (No. 80-5830, 1986), *aff'd*, 805 F.2d 391 (2nd Cir., 1986) ("*Pratt & Whitney*"). See also *Kennecott Copper Corp*, 4 BNA OSHC 1400, 1976-77 CCH OSHD ¶ 20,860 (No. 5958, 1976), *aff'd.*, 577 F.2d 1113 (10th Cir., 1977). This interpretation has also found favor with the 10th Circuit Court of Appeals. *Borton, Inc. v. OSHRC*, 734 F.2d 508, 510 (10th Cir., 1984); *Kennecott Copper Corp., 577 F.2d at* 1118-1119 (10th Cir., 1977).

These cases clearly support Catapano's position with regard to the literal interpretation of the term "provided" as used in § 1926.102(a)(1), the Subpart E standard. However, in basing its argument that a violation has not been established on the language of this standard, a standard for which it was *not* cited, Catapano has completely ignored the equally important language of the standard for which it *was* cited, § 1926.650(e). These two standards cannot be read in isolation, but must be read together in order to accurately determine what was required of Catapano. As the Commission has observed, it *is* possible

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[1](...continued)
therefore, § 1926.650(e) is more appropriate for our purposes than the general construction industry standard governing hand tools referenced by Catapano.

for a use requirement to be implied from a provision requirement when "*related standards* contai[n] an explicit use requirement." *Pratt & Whitney* at 1775 (emphasis added). Thus, while the relevant standard found in Subpart E requires only that protection equipment be made available to employees, the standard cited here, § 1926.650(e), requires that employees "be protected" by this equipment, implying something more than provision.

In *Clarence M. Jones*, 11 BNA OSHC 1529, 1531, 1983-84 CCH OSHD ¶ 26,516 (No. 77-3676, 1983), the Commission interpreted the phrase "be protected", as used in § 1926.100(a), the Subpart E head protection standard, to mean that employees must "be protected" by the *use* of helmets. Accordingly, "merely having protective equipment available at a worksite does not satisfy a standard that requires that this equipment be used." *Id.* In light of this interpretation, § 1926.650(e), which employs the same language, can be read to require that employees must be protected by the *use* of eye protection. As a result, when § 1926.650(e) is read *in conjunction* with § 1926.102(a)(1), it becomes evident that Catapano is required to do more than simply provide eye goggles to its employees.

Clearly, "an employer cannot in all circumstances be held to the strict standard of being an absolute guarantor or insurer that his employees will observe all the Secretary's standards at all times." *Standard Glass Co., Inc.*, 1 BNA OSHC 1045, 1046, 1971-73 CCH OSHD ¶ 15,146, p. 20,219 (No. 259, 1972). However, short of absolutely guaranteeing the use of this protective equipment, it is not unreasonable to expect Catapano to respond to the safety needs of its employees to the fullest extent possible. Thus, in addition to furnishing the necessary equipment, Catapano should instruct and train its employees as to the use of this equipment, as well as enforce safety policies and work rules which specifically require the use of the equipment in specific situations.

The Secretary, however, has failed to present any evidence which proves that Catapano has not fulfilled its duty to go beyond merely providing protective equipment to its employees. There is nothing in the record to indicate that Mr. Tomich or even Mr. Pietroluongo ever determined whether Catapano employees were instructed, either orally or through a written program, to use eye protection when operating certain equipment or whether Catapano enforced any work rules regarding the use of protective equipment. Since

Catapano satisfied the provision requirement by supplying eye protection to its employees, obtaining information about its safety practices and policies with regard to protective equipment was crucial to establishing a violation. In the absence of such evidence, the Secretary has not met her burden of proof and the alleged violation of § 1926.650(e) must be vacated.

II. Alleged Serious Violation of 29 C.F.R. § 1926.650(f)

Mr. Tomich testified that during his inspection, he observed a Catapano employee, Terry Lachner, directing traffic in the middle of Prince Street with a red flag. (Tr. 38-39, 87-88) Mr. Lachner, however, was not wearing a reflectorized warning vest at the time. (Tr. 39-40) According to Mr. Tomich, when he asked Mr. Larkin, who was still accompanying him on the inspection, why Mr. Lachner was directing traffic without a warning vest, Mr. Larkin immediately told Mr. Lachner to leave the traffic lane of the street. (Tr. 86-87) Mr. Tomich also testified that warning vests were made available to Catapano employees. (Tr. 89)

Based on this observation, Catapano was cited for an alleged serious violation of § 1926.650(f) which states:

> § 1926.650(f) Employees exposed to vehicular traffic shall be provided with and shall be instructed to wear warning vests marked with or made of reflectorized or high visibility material.

A penalty of $800.00 was proposed.

First, Catapano argues that the cited standard is inapplicable here because it is preempted by regulations issued by the Department of Transportation ("DOT"). Picking up on a reference to DOT regulations made by the Secretary in her complaint with regard to the type of warning vest that should be worn by employees, Catapano specifically cites to Part VI of the "Manual on Uniform Traffic Control Devices" ("MUTCD"), which is titled "Traffic Controls for Street and Highway Construction and Maintenance Operations". According to Catapano, the regulations found in Part VI are applicable here because their stated purpose is to promote the "safe and expeditious movement of traffic through construction and maintenance zones and...the safety of the workforce performing these operations." See Section 6A-1 of MUTCD, attached to Respondent's Brief.

The excerpted portion of the MUTCD provided by Catapano, however, also includes a "Scope" section which indicates that the regulations and standards found within Part VI deal specifically with traffic control devices, which include, "signs, signal, lighting devices, markings, barricades, channelizing, and hand signaling devices." Section 6A-2 of the MUTCD. Nowhere is the use of personal protective equipment such as warning vests mentioned. In fact, Catapano fails to identify *any* specific DOT regulations or standards which would apply to this case in place of the cited OSHA standard, providing only the introductory text of Part VI; indeed, the entire excerpt is headed: "Introduction and General Specifications".

Furthermore, proving the preemption of a standard is not a simple matter. The argument for preemption is based on § 4(b)(1) of the Act, which provides:

> "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

Two factors must be considered in any § 4(b)(1) case: (1) whether a federal agency other than OSHA has the statutory authority to regulate the safety and health of the workers involved and (2) whether that agency has actually exercised this authority in such a manner as to exempt the cited working condition from the Act. *Consol. Rail Corp.*, 10 BNA OSHC 1577, 1579, 1982 CCH OSHD ¶ 26,044, p. 32,708 (No. 79-1277, 1982).

There has been considerable debate over whether these elements of a preemption case constitute an affirmative defense to be proven by the employer or a jurisdictional issue to be established by the Secretary. The Commission has consistently held that preemption is an affirmative defense to be pleaded and proven by the employer. *Pennusco Cement & Aggregates, Inc.*, 8 BNA OSHC 1378, 1379 n.2, 1980 CCH OSHD ¶ 24,478, p. 29,888 n.2 (No. 15462, 1980); *Chevron Oil Co., et. al.*, 5 BNA OSHC 1118, 1119 n.3, 1977-78 CCH OSHD ¶ 21,606, p. 25,931 n.3 (Nos. 10799, 10646 & 10786, 1977), *aff'd* (No. 83-4371, 5th Cir. 1985); *Idaho Travertine Corp.*, 3 BNA OSHC 1535, 1536, 1975-76 CCH OSHD ¶ 20,013 (No. 1134, 1975) ("*Idaho*"). Two Circuit Courts, however, have rejected the Commission's position. According to the 4th Circuit, preemption is not an affirmative defense, but is a "jurisdictional limitation upon OSHA's authority to issue a citation [that] may be raised 'initially on appeal

or by the court *sua sponte*'." *U.S. Air v. OSHRC*, 689 F.2d 1191, 1195 (4th Cir., 1982) (quoting *Columbia Gas of PA, Inc. v. Marshall*, 636 F.2d 913, 918 (3rd Cir., 1980). Presumably the burden of proving this jurisdictional limitation, although not actually stated in either case, lies with the Secretary. Neither opinion, however, sets forth how that burden would actually operate once an employer has raised the issue of preemption.

Ironically, the dissenting opinion in *Idaho* written by former Commissioner Robert Moran, who also happens to be counsel for Catapano, provides some guidance on this issue. Quoting favorably from the Administrative Law Judge's ("ALJ") opinion in *Idaho* on review before the Commission, former Commissioner Moran stated:

> "The issue before this tribunal is a simple one: Did complainant carry its burden of proof? Judge Winters correctly answered this in the negative when he stated: '...where...the Respondent has in good faith raised the jurisdictional issue [of preemption] and *has shown by competent evidence that another particular federal agency has officially asserted what appears to be conflicting jurisdiction*, the Secretary has the burden of affirmatively showing the lack of jurisdiction in such other agency.'"

Idaho at 1536 (dissenting opinion) (emphasis added) (footnote omitted). In other words, if preemption is to be treated as a jurisdictional matter, as opposed to an affirmative defense, under Commissioner Moran's formulation, Catapano must present "competent evidence" indicating that the DOT has asserted conflicting jurisdiction in this area before the burden of proof shifts to the Secretary. Citing to the introductory text for the portion of the DOT's MUTCD that deals with traffic signs, without any reference to specific regulations, is not what I would describe as "competent evidence" and therefore, is not enough to shift the burden to the Secretary. If Catapano lacks sufficient evidence to support shifting this issue to the Secretary as a jurisdictional question, then clearly it falls short of establishing preemption as an affirmative defense should it be treated as such. As a result, for lack of sufficient evidence, Catapano has not succeeded in showing that the cited standard is preempted.

Section 1926.650(f) imposes two distinct requirements on employers: they must provide employees exposed to vehicular traffic with warning vests *and* they must instruct employees to wear these vests. As discussed above, the term "provide" has been literally defined by the Commission to require only that employers make such equipment available

to employees. Here, Mr. Tomich testified that warning vests were indeed supplied by Catapano to its employees. (Tr. 89) Thus, finding a violation hinges upon proving that Catapano failed to instruct its employees to use these vests.

Again, the Secretary has failed to meet her burden. The record is devoid of any evidence that Catapano has not instructed its employees, either orally or through a written program, on this issue. See *Ernest E. Pestana, Inc.*, 14 BNA OSHC 1337, 1338, 1987-90 CCH OSHD ¶ 28,680 (No. 88-2775, 1989) (alleged violation of § 1926.650(f) vacated because "secretary failed to provide any evidence indicating that [employer] failed to instruct its employees regarding its written policy"). This information could have been easily ascertained from any of the Catapano employees, including Mr. Allocca and Mr. Larkin who, in their supervisory roles, may have given such instruction themselves. Without this evidence, a violation has not been proven. Accordingly, the alleged violation of § 1926.650(f) must be vacated.

III. Alleged Serious Violation of 29 C.F.R. § 1926.651(i)(1)

Upon entering the trench site, Mr. Tomich observed that a spoil pile of material excavated from the trench was located on the west side of the trench in the middle of Prince Street. (Tr. 9-10, 41; also see Exhibit C-1) According to Mr. Tomich, the spoil pile led up to the edge of the trench in several places at varying distances of less than 2 feet; only towards the north end of the pile was the excavated material located at a distance of more than 2 feet from the trench's edge. (Tr. 41, 94-96, 100-110, 114; also see Exhibits C-2, C-3, C-5 and C-6) Mr. Tomich testified that the spoil pile's location added weight to the unshored walls of the trench exposing Mario Toscano, the Catapano employee observed working in the trench at that time, to the possibility of rocks and soil from the pile falling in on him, as well as to the threat of a cave-in. (Tr. 41-42, 109; also see Exhibit C-2) As a result of this observation, Catapano was cited for an alleged violation of § 1926.651(i)(1) which states:

> § 1926.651(i)(1) In excavations which employees may be required to enter, excavated or other material shall be effectively stored and retained at least 2 feet or more from the edge of the excavation.

A penalty of $900.00 was proposed.

Catapano attacks this alleged violation on several fronts. Citing to *CTM, Inc. v. OSHRC*, 572 F.2d 262 (10th Cir., 1978) ("*CTM*"), Catapano first contends that the cited standard is unenforceably vague. Catapano's reliance on this case, however, is misplaced. In *CTM*, the spoil bank was *not* less than 2 feet from the edge of the trench; a § 1926.651(i)(1) violation was still found, though, on the basis of what the ALJ perceived as the employer's failure to "effectively" store the excavated material as required by the standard. *Id.* at 263. On review, the court held that "the use of the word '[effective]' in the regulation...serves no useful purpose because a person subject to the regulation can derive no meaningful standard from it." *Id.* at 263-264. It is because of this specific ambiguity in the standard that the court concluded that § 1926.651(i)(1) "does not contain an adequate standard or warning to the petitioner sufficient to authorize an imposition of a penalty." *Id.* at 264. While this aspect of the standard may accurately be termed as "vague", the court's holding casts no doubt on the specificity of the standard's "2 feet away" requirement, which I find to be more than explicit. As a result, Catapano's challenge of the standard as vague lacks merit.

Next, according to Catapano, the purpose of the cited standard is to prevent excavated material from falling into the trench. Therefore, since the Secretary alleged a cave-in hazard, Catapano argues that § 1926.651(i)(1) is inapplicable here. In support of this argument, Catapano notes that § 1926.651(i)(2), a standard for which it was *not* cited, provides an alternative procedure for the proper storing of excavated materials for the express purpose of preventing "excavated or other materials from falling into the excavation." Catapano's dispute of this point is essentially one of semantics. A cave-in occurs when materials fall and collapse into a trench; by implication, any excavated material located within 2 feet of the trench's edge will also fall and collapse into the trench. Furthermore, recent cases indicate that the threat of cave-in is indeed the kind of hazard § 1926.651(i)(1) was intended to prevent. See *Calang Corp.*, 14 BNA OSHC 1789, 1794, 1987-90 CCH OSHD ¶ 29,080, p. 38,873 (No. 85-0319, 1990); *E.L. Davis Contrac. Co.*, 13 BNA OSHC 1678, 1679, 1987-90 CCH OSHD ¶ 28,180 (No. 87-846, 1988). Even if Catapano's position on this issue is accepted, Mr. Tomich did testify that in addition to a

cave-in hazard, Mr. Toscano was also exposed to the possibility of "residual rocks and soil [from the pile] coming in on him." (Tr. 42) In any case, the hazard alleged by the Secretary was certainly appropriate in terms of the standard cited.

Although the photographs taken by Mr. Tomich seem to confirm his testimony that most of the spoil pile was located less than 2 feet from the edge of the trench, Catapano challenges this fact, noting Mr. Tomich's failure to actually measure the distance between the pile and the trench's edge. (Tr. 94) I find, however, that it was unnecessary for Mr. Tomich to do so since, as the photographs clearly demonstrate, the spoil pile did indeed run right up to the edge of the trench at distances which could be accurately judged to be less than 2 feet. Exhibits C-2, C-3, C-5 and C-6. See also *John C. Flood Inc.*, 14 BNA OSHC 1311, 1312, 1987-90 CCH OSHD ¶ 28,667 (No. 88-1483, 1989) (rejects employer's argument that compliance officer should have measured distance from trench to pile of excavated material, which was stored within inches of trench opening, since distances of this nature can be judged).

Relying on Mr. Tomich's testimony that a portion of the spoil pile towards the north end was at least 2 feet from the trench's edge, Catapano also argues that a violation of § 1926.651(i)(1) cannot be found unless the *entire* spoil pile is less than 2 feet from the edge. In support of this argument, Catapano cites to *Miller Constr. Co.*, 4 BNA OSHC 1931, 1976-77 CCH OSHD ¶ 21,395 (No. 12750, 1976) ("*Miller*"), where it claims the Commission rejected the argument that a violation of § 1926.651(i)(1) exists when *any* material is less than 2 feet from the edge of a trench, regardless of the amount. Catapano, however, fails to point out that the Commission did not issue an opinion in *Miller,* but simply affirmed and adopted the decision of ALJ. *Id.* at 1931. A review of the ALJ's digested decision reveals that he did not even discuss this argument, but apparently vacated the alleged violation of § 1926.651(i)(1) because the evidence regarding the actual distance of the spoil pile from the edge of the trench was "sketchy". *Id.* at 1934. Specifically, the ALJ found the testimony of the employer's foreman and the photographic evidence to be inconclusive on this issue and therefore, held that "due to a lack of accurate and objective measurements, no violation

was proven."[2] *Id.* Nowhere is the *amount* of the pile in relation to its distance from the trench discussed.

Only in the dissenting opinion is any mention made of the argument which Catapano claims was rejected by the Commission. In his dissent, Commissioner Cleary first explains how he believes the record, as well as the photographic evidence, conclusively establishes that the spoil pile was indeed located less than 2 feet from the trench's edge. *Id.* at 1933. He then states that while the record, in his opinion, is clear on the *distance* issue, it is unclear in terms of exactly *how much* of the pile came within 2 feet of the trench. *Id.* It is only at this point that he mentions the Secretary's claim that a § 1926.651(i)(1) violation should exist even if only an insignificant amount of the pile is located less than 2 feet from the trench. Commissioner Cleary agrees with the argument, but adds that if the amount of material is "so insignificant as to pose a hazard that is merely trifling, the violation should be classified as *de minimus*." *Id.* Therefore, the Commission, contrary to Catapano's belief, has neither accepted nor rejected this argument because in *Miller*, neither a majority of the Commission nor the ALJ addressed the issue.

Furthermore, I am inclined to agree with Commissioner Cleary's views on this question. While I admit that it may be unrealistic to expect every spoonful of excavated material to be at least 2 feet from the trench, when the bulk of a pile is in violation of the cited standard's requirements, then a violation exists. To find otherwise would serve only to frustrate the intent of the standard to ensure the complete safety of employees working in trenches and excavations; the threat of a cave-in or of excavated material falling into a trench does not disappear if only half of the material is less than 2 feet from the trench's edge. In situations where the amount of material is not enough to pose any serious threat to employees, the violation, as Commissioner Cleary stated, should be considered *de minimus*. Here, however, the evidence is clear: the bulk of the pile was located less than the required 2 feet from the edge of the trench.

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[2] It should be understood that the evidentiary deficiencies found in *Miller* are not present here. As already discussed, the photographic evidence as well as the testimony of Mr. Tomich clearly establish, without measurement, that the distance between the majority of the spoil pile and the trench opening was less than 2 feet.

Part of the Secretary's burden in proving the violation of a standard is to show that the employer knew or with the exercise of reasonable diligence could have known of the violative condition. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, 1991 CCH OSHD ¶ 29,223 (No. 85-369, 1991). Here, Catapano argues that the Secretary has failed to prove that it had knowledge of the spoil pile's location. Mr. Tomich testified that at the time he observed the spoil pile, Mr. Allocca, the foreman, was standing at the curb "viewing..the same scene that I was...." (Tr. 42) In addition, Mr. Tomich identified Mr. Allocca in two of the photographs admitted into evidence which clearly display the spoil pile in plain view; in each photograph, Mr. Allocca is standing within a few feet of the pile. (Tr. 14, 17; see also Exhibits C-3 and C-5) In fact, in Exhibit C-5, Mr. Allocca is standing on the other side of the trench directly facing the pile and could have with little effort, let alone reasonable diligence, noticed its close proximity to the edge of the trench. As a result, Catapano had, at the very least, constructive knowledge of its location.

Lastly, the evidence as presented by the Secretary for this alleged violation clearly establishes that Mr. Toscano was exposed to a serious hazard. The added weight of the pile on the unshored walls of the trench only increased the likelihood of a cave-in. See *Lassiter Excavation Inc.*, 13 BNA OSHC 1315, 1316, 1986-87 CCH OSHD ¶ 27,936 (No. 86-515, 1987) (spoil pile located less than 2 feet from the trench exerted added pressure on unshored walls). In addition, the photographs taken by Mr. Tomich indicate that soil and other materials from the spoil pile were already starting to drift down towards the trench exposing Mr. Toscano to the possibility of excavated material falling down in on him as he worked. (Tr. 96; also see Exhibits C-2, C-3, C-5 and C-6) Accordingly, the alleged violation of § 1926.651(i)(1) must be affirmed. Since Mr. Toscano was exposed to hazards which could have resulted in serious injury, the violation was properly classified as serious. Given that some of the spoil pile was at least 2 feet from the trench, I find a penalty of $600.00 to be reasonable and appropriate in the premises.

IV. Alleged Willful Violation of 29 C.F.R. § 1926.652(b)

Mr. Tomich testified that the sides of the trench in which Mr. Toscano was working were not shored or sloped. (Tr. 8-9; also see Exhibits C-2, C-4 and C-5) Upon measuring the trench, Mr. Tomich testified that he found it to be 12 feet long, 2 to 4 feet wide, 6 feet

deep on one end and 5 feet, 2 inches deep on the other. (Tr. 15-17, 48; also see Exhibit C-2 and Exhibit C-3) According to Mr. Tomich, the soil in the trench appeared to be unstable refill from prior excavations and was already collapsing along the west wall due to the vibration of traffic along Roosevelt Street. (Tr. 15, 18-19, 59) When Mr. Tomich asked Mr. Allocca why the trench was not shored, Mr. Tomich testified that Mr. Allocca told him that it was because the trench was only about 5 feet deep; Mr. Allocca, though, agreed to shore the trench after learning Mr. Tomich's measurements. (Tr. 17-18, 53, 63, 77, 84-85; also see Exhibits C-5 and C-6)

At that time, Mr. Tomich, with the help of Bert Podall, a compliance officer who joined Mr. Tomich at the worksite, took a sample of approximately 4 to 5 pounds of soil from two different areas of the spoil pile. (Tr. 19-21, 200; see also Exhibit C-7) The soil sample was forwarded to the OSHA laboratory in Salt Lake City, Utah where Dr. Alan Peck performed a soil analysis in order to determine the soil's components. (Tr. 20, 191, 193) Dr. Peck's analysis concluded that the soil from the trench was composed primarily of fine sand and had very little cohesion. (Tr. 194-196; see also Exhibit C-9)

As already noted, after reviewing Mr. Tomich's inspection notes, Mr. Pietroluongo decided to accompany Mr. Tomich to the worksite the following day in order to obtain further information. (Tr. 22-23, 117, 144-145) At that time, Mr. Pietroluongo interviewed Mr. Allocca, Mr. Larkin, and Mr. Toscano who, according to both Mr. Tomich and Mr. Pietroluongo, all said that although they were familiar with the OSHA trenching standard which requires that trenches with a depth of 5 feet or more be shored, it was the company's practice not to shore any trenches under 6 feet deep. (Tr. 23-30, 66-70, 118-122, 126, 129, 132-133)

On the basis of these observations, Catapano was cited for an alleged violation of § 1926.652(b) which states:

> § 1926.652(b) Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2...

As a result of the statements made by the three Catapano employees interviewed by Mr. Pietroluongo, and because Catapano had been previously cited for violating the same

standard, the alleged violation was classified as willful and a penalty of $10,000.00 was proposed. (Tr. 33, 137-139, 159-160, 179-182; also see Exhibit C-10)

A. The Alleged Violation

In order to prove a violation of § 1926.652(b), the Secretary must show that the cited standard applies to the conditions alleged to be hazardous and that the requirements of said standard were not met. *Woolston Constr. Co.*, 15 BNA OSHC 1114, 1116, 1991 CCH OSHD ¶ 29,394 (No. 88-1877, 1991), *petition for review denied*, 15 BNA OSHC 1634 (No. 91-1413, D.C. Cir., 1992). The fact that the trench was not shored does not appear to be in dispute here. It is obvious from the photographs taken by Mr. Tomich that the walls of the trench in question were not supported in any way. See Exhibits C-2, C-3 and C-4. Furthermore, Catapano's immediate installation of shoring after Mr. Tomich's discussion with Mr. Allocca indicates that such a system was indeed lacking. (Tr. 17-18, 53, 63, 77, 84-85; also see Exhibits C-5 and C-6)

Catapano does claim, though, that the Secretary has not properly alleged a violation in relation to the shoring requirement. The citation states that the trench was "not supported by an effective shoring system." According to Catapano, since the standard lists five ways in which a trench can be supported, the citation should have distinctly stated that none of these five methods were employed; in other words, Catapano would have the citation read that the trench was not shored, sheeted, braced, sloped or otherwise supported.[3] However, I disagree that the language of the citation does not adequately convey the nature of the alleged violation. In particular, I find that the use of the term "shoring *system*" serves to encompass all five of the possible methods of trench support and therefore, sufficiently informs Catapano that no method of support whatsoever was utilized, a fact which is more than clear from the photographic evidence. Indeed, it was obviously understood on the day of the inspection that the trench walls lacked support of any kind since the situation was abated immediately. Accordingly, Catapano's argument must fail.

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[3] In making this argument, Catapano refers to my question at the outset of the hearing to counsel for the Secretary regarding amendments to the citation. (Tr. 3) It should be made clear that this question was asked in order to clearly identify the issues before the tribunal and was not meant to imply that the citation was in any way incomplete or in need of amendment.

In order for the cited standard to apply here, it must first be determined whether the trench was dug in unstable or soft material. Dr. Peck, a soils analyst with extensive experience in the field, testified that the soil provided to him by Mr. Tomich was composed primarily of a gravely, fine sand and had very little cohesion. (Tr. 186-190, 194-196; see also Exhibits C-8 and C-9) According to Dr. Peck, the soil, classified "cohesionless" because its level of cohesion is negligible, had an angle of repose that was 33.7 degrees. (Tr. 196-197, 201, 220) When this angle is related to the information found in Table P-1, the table referred to in the cited standard, it corresponds to the angles formed by sharp sands; at this angle, the soil had a safety factor of one, which means that there was a 50% probability that the slope would fail or collapse. (Tr. 197-198)

Catapano challenges Dr. Peck's persuasive analysis results on several grounds. First, Catapano argues that the language of the cited standard requires the Secretary to prove that the *sides* of the trench were composed of unstable material. Catapano, however, misreads the standard and again, is arguing semantics; the phrase, "in unstable or soft material", as used in the cited standard does not relate to "sides", but to "trench". Indeed, the thrust of the entire regulation is that the sides of a trench must be shored when the *trench* is dug in unstable or soft material and has a depth of at least 5 feet. As the Commission has stated, "...§ 1926.652(b) applies to *trenches* dug in 'unstable or soft' soil." *Woolston* at 1116-1117 (emphasis added). Also see *Trumid Constr. Co. Inc.*, 14 BNA OSHC 1784, 1787, 1987-90 CCH OSHD ¶ 29,078, p. 38,857 (No. 86-1139, 1990) (one of headings in Commission's discussion of alleged § 1926.652(b) violation reads "Whether the *trench* was dug in 'unstable or soft material'") (emphasis added).

Furthermore, even if Catapano's interpretation is accepted, it is obvious that a trench dug in soil shown to be unstable will have sides or walls that consist of the same unstable soil. As a result, contrary to Catapano's belief, Mr. Tomich cannot be faulted for taking soil samples from the spoil pile of material excavated from the trench; the soil found there was the very soil out of which the trench and its walls were formed. Thus, Dr. Peck's testimony that, had the task fallen to him, he "probably" would have taken the sample from the side of the trench, does not alter the validity of the analysis which he performed on soil which

was clearly representative of that found in the walls of the trench. (Tr. 207) Catapano's argument that somehow the soil in the spoil pile was affected by "sitting out" is also not persuasive. Taking a sample from the sides of the trench, as Catapano suggests, would not have cured this so-called problem since the sides are also "open" to the effects of the air and moisture evaporation. Therefore, I find that the evidence establishes that the trench in question was indeed dug in unstable soil.

Finally, only if the trench is at least 5 feet deep will the cited standard apply. Mr. Tomich testified that he measured the depth of the trench in question with a 25 foot steel mechanical measuring tape and found it to be 6 feet on the end near the manhole and 5 feet, 2 inches on the other end. (Tr. 16) Mr. Pietroluongo did not measure the trench because it had already been filled by the following day. (Tr. 130) There was no evidence to indicate whether an employee of Catapano had ever measured the trench's depth, but both Mr. Tomich and Mr. Pietroluongo testified that Mr. Allocca believed the trench to be about 5 feet deep. (Tr. 17, 29, 61, 99, 121, 135)

Catapano charges that Mr. Tomich's measurements are inaccurate for several reasons. First, Catapano criticizes Mr. Tomich's measurement procedure as flawed. I find nothing in the record to convince me of this fact. Mr. Tomich utilized the proper kind of steel measuring tape with a locking mechanism at the top, which improves the accuracy of the measurement, and he also measured the depth of the trench at the proper locations. (Tr. 16, 130-132) Catapano also relies upon the testimony of John Ruggiero, Chief Engineer and Vice President of Catapano to dispute the validity of the trench depth measurements. According to Mr. Ruggiero, the depths at which Catapano was to install the shoot pipe for this particular trench were specified by the City of New York to be 4 feet, 9 inches and 4 feet 6 inches. (Tr. 230-231) Mr. Ruggiero also testified, though, that the depth of the trench was measured by survey, not by Catapano, and that he personally had never seen the trench in question. (Tr. 231-232) Besides Mr. Ruggiero's testimony, Catapano introduced no evidence whatsoever to verify that the depths he testified to were indeed those specified by the City of New York nor was there any evidence of the surveyor's final measurements. Thus, this challenge also must fail.

Finally, Catapano argues that the measurements are incorrect because Mr. Tomich admitted that they included a 4-inch-thick macadam or concrete layer which rested on top of the soil. Citing to *Pizzagalli Corp.*, 1 BNA OSHC 3196, 1973-74 CCH OSHD ¶ 17,642 (No. 4766, 1974) ("*Pizzagalli*"), Catapano contends that § 1926.652(b) applies only to trenches whose *soil portion* is 5 feet deep. The lower portion of the trench in *Pizzagalli* was a 7 foot layer of rock and the upper portion was 6 feet of asphalt, compacted gravel, hard pan and coral rock combined; in between these two layers was a layer of loose soil which measured, from the bottom of the upper asphalt layer to the top of the lower rock layer, less than 5 feet. *Id.* Because the soil layer was measured less than 5 feet, the ALJ concluded that § 1926.652(b) was inapplicable.

This decision, however, is not at all relevant for our purposes. A trench which has a layer of soil sandwiched between two solid layers of rock, each measuring 6 to 7 feet, is not dug, but *cut*. Indeed, the ALJ in *Pizzagalli*, alludes to this when he states with regard to this particular trench that, "there is no standard which requires shoring...the walls of a trench cut in rock...." *Id.* Thus, I would submit that irrespective of the actual *length* of the soil portion of a trench of this nature, § 1926.652(b) is inapplicable to a trench cut in rock because, by its very terms, the standard applies only to trenches that are *dug in unstable or soft material*. The trench at issue here was not cut in rock but, as has already been shown, was dug in unstable soil and was measured at depths of over 5 feet. Thus, I believe that the Secretary has proven the applicability of the cited standard regardless of whether Mr. Tomich's measurements included the layer of concrete or macadam.

Assuming that Catapano is correct, though, in arguing that every inch of a trench's depth must consist of at least 5 feet of unstable or soft material before § 1926.652(b) will apply, the invalidity of the trench's measurements has still not been established. First of all, Mr. Tomich's testimony on this issue is not as clear as Catapano would like to believe; he ranged from stating that the measurements did *not* include the macadam and concrete layer at all, to stating that it *was* included in both measurements, to stating that it was only included in the measurement of the north side of the trench. (Tr. 47-48, 61-62) In addition,

Catapano never definitively established the actual thickness of the concrete or macadam layer; Mr. Tomich testified that 4 inches was only his estimate. (Tr. 45-47)

The photographic evidence is far more conclusive on this issue. In Exhibit C-5, a well-defined layer of what appears to be concrete can be seen at the end of the trench where the manhole was located. Since that end of the trench was measured by Mr. Tomich to be 6 feet deep, even if one assumes that this concrete layer was included in the measurement *and* that Mr. Tomich's estimate of 4 inches is correct, the depth on that end of the trench remains over 5 feet. The other end of the trench, which Mr. Tomich measured to be 5 feet, 2 inches deep, appears to be composed mostly of soil, with a layer of asphalt/macadam peeking out from along the *side* of the trench where the spoil pile was located. See Exhibits C-2, C-5 and C-6. It is difficult to establish, though, exactly where the macadam ends and the soil begins along this particular side of the trench, making it nearly impossible to determine its thickness. See Exhibits C-2, C-5 and C-6. Furthermore, the other side of the trench, pictured directly across from the spoil pile and just beyond the sewer grate in Exhibit C-6, seems to completely lack a layer of concrete or macadam whatsoever. See also Exhibits C-2 and C-5. Based on these photographs, I am not convinced that a discernible layer of macadam or asphalt ever existed along this end of the trench. Even if I were to assume otherwise, there is nothing in the record to conclusively establish that the thickness of this layer exceeded the more than 2 inches needed to drop the depth on that end to below 5 feet. Accordingly, I conclude that Mr. Tomich's measurements were accurate and therefore, establish that the trench in question was indeed at least 5 feet deep.

Thus, the Secretary has shown that the cited standard applies to the facts as presented. Due to the highly unstable nature of the soil, Dr. Peck's testimony that such soil has a 50% failure rate, and Mr. Tomich's observations of the trench on the day of the inspection, the Secretary has also established that Catapano's failure to support the sides of this trench exposed Mr. Toscano to the hazard of a cave-in and the possibility of serious injury. Accordingly, I find Catapano to be in violation of § 1926.652(b).

B. The Willful Classification

The Commission has defined a willful violation as one that is "done voluntarily with intentional disregard for the requirements of the Act, or plain indifference to employee

safety." *Woolston* at 1119, *aff'd as appropriate standard*, 15 BNA OSHC 1634, 1635 (No. 91-1413, D.C. Cir., 1992). Also see *Bland Constr. Co.*, 15 BNA OSHC 1031, 1036, 1991 CCH OSHD ¶ 29,325 (No. 87-992, 1991) quoting *RSR Corp. v. Brock*, 764 F.2d 355, 362 (5th Cir. 1985) ("...voluntary action done either with an intentional disregard of, or plain indifference to the requirements of the statute [or regulation]."). To establish a willful violation , it is not enough to show that the employer was familiar with the standard at issue. *Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1265, 1980 CCH OSHD ¶ 24,419, p. 29,777 (No. 76-3743, 1980). Also, while the existence of a prior citation may contribute to the determination of a willful violation, it is not a "necessary condition" to such a finding. *Woolston* at 1119.

Here, the Secretary's case relies primarily on the testimony of Mr. Tomich and Mr. Pietroluongo regarding their discussions with three Catapano employees: Mr. Larkin, Mr. Allocca and Mr. Toscano. According to Mr. Tomich and Mr. Pietroluongo, all three employees admitted that, although they were familiar with the shoring requirements imposed by the trenching standard with regard to trenches that are 5 or more feet deep, company policy or practice required only that trenches at depths of 6 or more feet be shored. (Tr. 23-30, 66-70, 118-122, 126, 129, 132-133)

At the hearing, counsel for Catapano properly objected to the testimony of Mr. Pietroluongo regarding his discussion with Mr. Toscano as hearsay. However, I admitted this testimony, as well as the testimony relating to similar discussions with Mr. Larkin and Mr. Allocca, under Rule 801(d)(2)(D) of the Federal Rules of Evidence which states:

> (d)...A statement is not hearsay if -
>
> ....
>
> (2)....The statement is offered against a party and is...
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship...

(Tr. 122, 125) See also *Regina Constr. Co.*, 15 BNA OSHC 1044, 1047-1048 (No. 87-1309, 1991) ("*Regina*"); *Morrison-Knudsen, Inc.*, 13 BNA OSHC 1121, 1123, 1986-87 CCH OSHD ¶ 27,869, p. 36,540 (No. 80-345, 1987) ("*Morrison-Knudsen*"). The comments to Rule 801, though, specifically state that there is "no guarantee of trustworthiness required in the case

of an admission"; therefore, the weight to be accorded this testimony must still be determined. See *Regina* at 1048; *Morrison-Knudsen* at 1123.

The statements made by Mr. Toscano, Mr. Larkin and Mr. Allocca are out-of-court declarations being offered for their truth. Since none of these employees testified at the hearing and thus, were not questioned on these matters, the trustworthiness of these statements must be seriously scrutinized.[4] One of the factors to consider in such a scrutiny is the ability of Mr. Tomich and Mr. Pietroluongo to understand the remarks made to them by these three employees and to accurately communicate these remarks at the hearing. *Regina* at 1048. The testimony regarding Mr. Toscano's statements illustrates the significance of this factor perfectly. Mr. Pietroluongo testified that because Mr. Toscano spoke little English, he conversed with him in Italian and then translated his responses for Mr. Tomich, who was taking notes of the interviews. (Tr. 122-126) There is nothing in the record, however, to verify Mr. Pietroluongo's language skills in Italian; he was not shown to be certified in the Italian language nor was there any proof that he and Mr. Toscano even spoke the same dialect. Therefore, there is simply no guarantee that Mr. Pietroluongo understood Mr. Toscano's responses accurately. As a result, Mr. Pietroluongo's testimony relating Mr. Toscano's translated statements lacks trustworthiness and carries essentially no weight in the resolution of this inquiry.

According this testimony no weight, though, does not mean that the Secretary's case must automatically fail. Indeed, Mr. Toscano's statements were essentially cumulative in that both Mr. Larkin and Mr. Allocca allegedly made the same comments. However, unlike the testimony dealing with Mr. Toscano, the testimony relating their comments cannot be readily dismissed. Nothing in the record suggests that Mr. Tomich and Mr. Pietroluongo did not accurately report their discussions with Mr. Larkin and Mr. Allocca. Mr. Tomich apparently took detailed notes of these interviews and his recollection of the statements made during the interviews corresponded with Mr. Pietroluongo's testimony. (Tr. 23, 66-68, 123) In addition, Mr. Pietroluongo's participation in this inspection in his role as safety supervisor

[4] At the hearing, the Secretary explained that these employees were not called as witnesses because they could not be located; counsel for Catapano confirmed this fact. (Tr. 234-236)

supervisor lends a certain amount of credibility to their findings despite the failure to obtain the addresses or the telephone numbers of the employees interviewed. His testimony indicates that he was careful to follow-up on the information obtained by Mr. Tomich the previous day; indeed, the suspicions raised by Mr. Allocca's comments on that first day were confirmed by both Mr. Allocca and Mr. Larkin. Since neither Mr. Tomich nor Mr. Pietroluongo impressed me as insincere or dishonest, I believe that their testimony was truthful.

The Commission has stated, though, that while the veracity of the compliance officer is certainly relevant to determining the trustworthiness of an out-of-court statement, "the more significant considerations concern the reliability of the *declarant* - such as, whether the declarant recognized the import of his statement, and whether the declarant had a propensity for veracity." *Regina* at 1048 (emphasis added). See also *Morrison-Knudsen* at 1123-1124. In examining a declarant's reliability, it is worth keeping in mind that out-of-court statements admitted as admissions carry an element of trustworthiness simply as a result of the context in which they are made. It can be assumed, for example, that a statement made during the employment relationship is trustworthy, because a declarant/employee is unlikely to risk his future employment by making a statement against the interest of his employer that is untrue. These statements, therefore, are not only against the interest of the employer, but are also typically against the interest of the declarant/employee. In addition, since such statements are made "within the scope" of the declarant's employment and are apt to deal with an area for which he is responsible, the declarant/employee is likely to be well-informed about the matter of which he speaks, lending his comments a certain credibility. 4 Louisell & Mueller, *Federal Evidence* § 426 at 318-321 (1980 & 1992 Suppl.).

Upon consideration of these many factors, I find that both Mr. Larkin and Mr. Allocca are reliable out-of-court declarants. With a significant amount of experience in their field between them, neither Mr. Larkin nor Mr. Allocca could be described as naive and I have no doubt that both clearly understood the consequences of the statements which they made to Mr. Tomich and Mr. Pietroluongo. Indeed, Mr. Allocca told them that his statements were "off the record". (Tr. 133, 175-176) With the understanding that doing so

could jeopardize their future employment with Catapano, I do not believe that either worker would have fabricated their remarks. Furthermore, both of these employees were well-informed and knowledgeable about this aspect of their work. As Catapano's site supervisor, Mr. Larkin was clearly in a position to know the specific company practice with regard to trench shoring, despite his being in the position for only one year. (Tr. 26, 118-119) Mr. Allocca, foreman for the project and a Catapano employee for 15 years with 41 years of trenching experience, was also in a position in which he had to be knowledgeable about Catapano's trench shoring policy.[5] (Tr. 27, 132) Overall, then, I find that the statements of Mr. Larkin and Mr. Allocca are trustworthy and carry considerable weight here.

These statements clearly indicate that Catapano enforced a policy which was in direct contravention of the trenching standard's requirements. In order for such a violation to be elevated to the level of a willful violation, though, it must be shown that Catapano enforced this policy with intentional disregard or plain indifference to the mandate of the cited standard and the safety of its employees. Both Mr. Larkin and Mr. Allocca admitted that they were aware of the specific requirements imposed by the trenching standard at issue here. (Tr. 25-26, 29, 118, 120) Furthermore, in 1988, Catapano was cited for a violation of § 1926.652(b), which it did not contest. (Tr. 30-31; see also Exhibit C-10) Alone, this prior citation would not be enough to establish a willful violation, but coupled with the statements of both Mr. Allocca and Mr. Larkin, it becomes evident that Catapano was indeed aware of the cited standard's requirements. Despite this knowledge, Catapano continued to follow a trenching policy which clearly violated the terms of the standard and placed its employees at risk of serious injury. Accordingly, the Secretary properly classified the violation of § 1926.652(b) as willful.

In rebuttal, Catapano offers its written safety program, which includes a provision that requires the shoring of trenches 5 feet or more deep. See Exhibit R-1. According to Mr. Ruggiero, this program was in effect at the time of the alleged violation. (Tr. 228-229) The

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[5] Catapano questions Mr. Allocca's remarks to Mr. Tomich that the shoring of trenches at depths of 6 feet or more was *his* general practice as opposed to Catapano's. (Tr. 73-75) Catapano, however, is responsible for the actions of its employees, particularly those employees, such as Mr. Allocca and Mr. Larkin, who are in supervisory positions.

record reveals, though, that Catapano failed to introduce any evidence in its defense to show that its employees were provided with copies of this safety program, trained in the policies contained therein, or required to follow specific work rules at each site based upon these policies. In fact, the statements of both Mr. Larkin and Mr. Allocca, who as site supervisor and foreman apparently knew nothing about this safety program and in fact, understood company policy to be otherwise, contradict any claims on Catapano's part that these safety issues had been properly addressed in their workplace.

Catapano also claims that it did not shore the trench because it believed in good faith that it conformed to the standard's requirements. *Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1114, 1981 CCH OSHD ¶ 25,728, p. 32,079 (No. 76-256, 1981) (if an employer believes in good faith that the cited condition conformed to the requirements of the standard, a willful violation cannot be found). The only possible indication of this fact is Mr. Allocca's remarks to Mr. Tomich that the trench was not shored because he believed it to be about 5 feet in depth. (Tr. 17, 29, 61, 99, 121, 135) However, if the trench was indeed 5 feet deep, it should have been shored as required by the cited standard. In addition, Mr. Allocca's statements that the trench was not shored because it would take too long to do so and would slow up an otherwise quick job imply that he actually *did* recognize that the trench was at a depth which required shoring. (Tr. 30, 120) His failure to dispute Mr. Tomich's measurements and immediate compliance also indicate that this was the case. Therefore, I am not convinced that Catapano truly believed that it had complied with the cited standard.

Accordingly, I affirm the violation of § 1926.652(b) as willful. However, given that the violation was immediately abated and that only one employee was apparently exposed to the hazard, albeit for an extended period of time, a penalty of $5000.00 is more reasonable and appropriate in the premises.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52 of the Federal Rules of Civil Procedure.

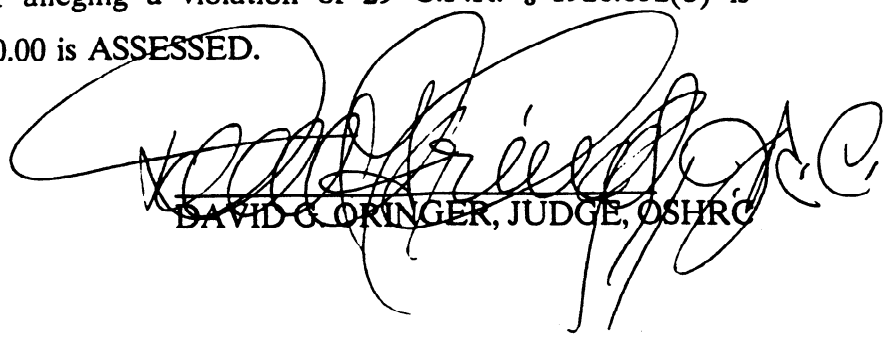
ORDER

1. Serious citation 1, item 1 alleging a violation of 29 C.F.R. § 1926.650(e) is VACATED together with the penalty proposed therefor.

2. Serious citation 1, item 2 alleging a violation of 29 C.F.R. § 1926.650(f) is VACATED together with the penalty proposed therefor.

3. Serious citation 1, item 3 alleging a violation of 29 C.F.R. § 1926.651(i)(1) is AFFIRMED and a penalty of $600.00 is ASSESSED.

4. Willful citation 1, item 1 alleging a violation of 29 C.F.R. § 1926.652(b) is AFFIRMED and a penalty of $5000.00 is ASSESSED.



DAVID G. ORINGER, JUDGE, OSHRC

Dated: _____
Boston, Massachusetts

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
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NOTICE OF DECISION

IN REFERENCE TO:

Secretary of Labor v. ANDREW CATAPANO ENTERPRISES, INC.
OSHRC DOCKET NO. 89-1981

1. Enclosed is a copy of my decision. It will be submitted to the Commission's Executive Secretary on August 14, 1992. The decision will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary, unless within that time a Member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.

2. Any party adversely affected or aggrieved by the decision may file a petition for discretionary review by the Review Commission. A petition may be filed with this Judge within twenty (20) days from the date of this notice. Thereafter, any petition must be filed with the Review Commission's Executive Secretary within twenty (20) days from the date of the Executive Secretary's notice of docketing. See paragraph No. 1. The Executive Secretary's address is as follows:

Executive Secretary
Occupational Safety and Health Review Commission
1825 K Street, N.W., Room 401
Washington, D.C. 20006

3. The full text of the rule governing the filing of a petition for discretionary review is 29 C.F.R. § 2200.91. (Part of Rule 91 is attached hereto).

DAVID G. ORINGER
Judge, OSHRC

Dated: July 24, 1992
Boston, Massachusetts

§ 2200.91 Discretionary Review; Petitions for Discretionary Review; Statements in opposition to petitions.

(a) Review Discretionary. Review by the Commission is not a right. A Commissioner may, as a matter of discretion, direct review on his own motion or on the petition of a party.

(b) Petitions for Discretionary Review. A party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a petition for discretionary review. Discretionary review by the Commission may be sought by filing with the Judge a petition for discretionary review within the twenty-day period provided by 2200.90(b). Review by the Commission may also be sought by filing directly with the Executive Secretary a petition for discretionary review. A petition filed directly with the Executive Secretary shall be filed within 20 days after the date of docketing of the Judge's report. The earlier a petition is filed, the more consideration it can be given. A petition for discretionary review may be conditional, and may state that review is sought only if a Commissioner were to direct review on the petition of an opposing party.

• • • •

(d) Contents of the Petition. No particular form is required for a petition for discretionary review. A petition should state why review should be directed, including: Whether the Judge's decision raises an important question of law, policy or discretion; whether review by the Commission will resolve a question about which the Commission's Judges have rendered differing opinions; whether the Judge's decision is contrary to law or Commission precedent; whether a finding of material fact is not supported by a preponderance of the evidence; whether a prejudicial error of procedure or an abuse of discretion was committed. A petition should concisely state the portions of the decision for which review is sought and should refer to the citations and citation items (for example, citation 3, item 4a) for which review is sought. A petition shall not incorporate by reference a brief or legal memorandum. Brevity and the inclusion of precise references to the record and legal authorities will facilitate prompt review of the petition.

(e) When Filing Effective. A petition for discretionary review is filed when received. If a petition has been filed with the Judge, another petition need not be filed with the Commission.

(f) Failure to File. The failure of a party adversely affected or aggrieved by the Judge's decision to file a petition for discretionary review may foreclose court review of the objections to the Judge's decision. See *Keystone Roofing Co. v. Dunlop*, 539 F.2d 960 (3d Cir. 1976).

(g) Statements in Opposition to Petition. Statements in opposition to petitions for discretionary review may be filed in the manner specified in this section for the filing of petitions for discretionary review. (See other side)

Employer

Robert D. Moran, Esq.
919 - 18th Street, N.W.
Suite 800
Washington, D.C. 20006

FOR THE EMPLOYEES

I hereby certify that a copy of the decision in this case has been served by First Class Government Mail to the parties whose names and addresses appear on this notice.

Boston, Linda M. Quinn
July 24, 1992 (date)

Regional Solicitor

Patricia M. Rodenhausen, Esq.
Regional Solicitor
U.S. Department of Labor
201 Varick Street, Room 707
New York, New York 10014
Attn: Diane Sherman, Esq.