
SECRETARY OF LABOR,

Complainant,

v.

WESTAR MECHANICAL, INC.,

Respondent.

OSHRC Docket Nos. 97-0226 &
97-0227 (consolidated)

DECISION

Before: ROGERS, Chairman, and EISENBREY, Commissioner.

BY THE COMMISSION:

At issue before us are two sets of citations issued by the Occupational Safety and Health Administration (“OSHA”) to Westar Mechanical, Inc. (“Westar”) following an OSHA investigation of a fatal workplace accident. Two workers, one employed by Westar and the other by its subcontractor, 5L Enterprises, Inc. (“5L”), were first trapped by a collapsing trench wall and then drowned by water pouring out of a broken water pipe that fell into the trench along with the collapsing trench wall. The citations contested in Docket No. 97-0226 allege violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (“the Act”), that occurred on July 17, 1996, the day of the fatal accident. The citations contested in Docket No. 97-0227 allege violations that had occurred on the previous day, July 16, when Westar and 5L employees had been working in and near an adjacent excavation as part of the same construction project.

Both parties have taken exception to different aspects of the decision below of Administrative Law Judge Covette Rooney. The Secretary challenges the judge’s conclusion that Westar’s violations of 29 C.F.R. § 1926.652(a)(1), the cave-in protection standard, were not willful, as alleged. Westar challenges the judge’s affirmance of two separate violations

of section 1926.652(a)(1) and also two separate violations of 29 C.F.R. § 1926.651(k)(1), the “competent person” inspection standard.¹ Westar also challenges the “appropriateness” of penalties totaling \$31,950 that were assessed by the judge for the three serious violations of the Act affirmed in Docket No. 97-0226 and the four serious violations affirmed in Docket No. 97-0227. For the reasons that follow, we affirm the judge’s resolution of each of these disputed issues.

I. Background

Westar is a small plumbing contractor with an office in Middletown, New York, apparently not far from the construction site at 307 North Street where the fatal accident occurred. Sometime in 1996, Westar contracted with Rowley Building Products, Inc. (“Rowley”), to construct a sewer line from the City of Middletown’s existing sewer line beneath the surface of North Street to a building owned by Rowley at the rear of 307 North Street. Westar in turn subcontracted with 5L to perform the necessary excavation work. The entire project was expected to take only two to three days, and the total length of the new sewer line was to be approximately 400 feet.

Work on the project began on July 16, when the 5L backhoe operators, principally Chad Loiodice and, in relief, James Loiodice, dug an excavation in North Street for the purpose of installing a manhole and tying the new sewer line into the existing sewer main. The excavation was dug to a depth of approximately eight feet. Estimates of its surface dimensions varied, from 8 feet wide by 14.4 feet long to 10 feet by 10 feet. The walls of the excavation were vertical, and, as found by the judge, “no protection such as shoring was installed along the sides.” Because the excavation had been dug directly above an existing sewer line in previously disturbed soil, the walls of the excavation could not have been classified as any more stable than “Type B soil,” which under the terms of OSHA’s cave-in

¹Both sets of citations that are at issue before us (in Docket Nos. 97-0226 and 97-0227, respectively) include an item alleging a willful serious violation of section 1926.652(a)(1) and an item alleging a serious violation of section 1926.651(k)(1).

protection standard, must be sloped to an angle no greater than 45 degrees or protected by other means such as shoring.²

After digging the excavation, Chad Loiodice used the backhoe to lower a manhole into it. Also on July 16, the backhoe operators began excavating the trench³ where the cave-in occurred the next day. They dug from the excavation in the North Street right-of-way through the adjacent sidewalk and into the Rowley parking lot, and the work crew laid either one or two sections of pipe in the trench, connecting the piping to the sewer main.⁴ The excavation was then backfilled, and steel plates were laid over the excavation and the sidewalk area before the crew left for the night. In conjunction with this work, at least two

²29 C.F.R. § 1926.652(a)(1) provides that “[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.” Paragraph (b) of section 1926.652 is captioned “Design of sloping and benching systems.” Paragraph (c) is captioned “Design of support systems, shield systems and other [installed or constructed] protective systems.” For ease of reference, we use the phrase “sloping or shoring” to refer generically to the various alternative methods of cave-in protection allowed under the standard.

³For purposes of the standards cited in the items on review, OSHA defines the term “excavation” as meaning “any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.” 29 C.F.R. § 1926.650(b). A “trench” is “a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet (4.6 m). . . .” *Id.*

⁴As part of the street closing on July 16, Westar stationed an employee, Frank Malloy, at a nearby intersection (North Street and Low Avenue) to act as a traffic flagman. Malloy spent the entire day at this location, diverting oncoming traffic off of North Street, where the excavation work was taking place, and onto Low Avenue, turning in either direction. Two of the citation items at issue in Docket No. 97-0227 are based on Westar’s undisputed failures to provide Malloy (a) with an orange warning garment and (b) with instructions and training in the recognition and avoidance of hazards associated with flagging vehicular traffic. On review, only the appropriateness of the assessed penalties (\$2250 for each of these two items) remains at issue.

laborers, Westar employee Ed Reilly and 5L employee Martin Grenzhauser, entered the excavation and trench to perform such tasks as leveling the ground prior to installing the manhole, tamping the earth that was used to backfill the excavation, and making the connections of the newly-installed piping to the previously-installed sewer main. Westar president Roger W. (“Bill”) Reagan, Jr., also entered the excavation on July 16, although the record does not disclose either the reason for his entry or the length of time he remained in the excavation.

According to James Loiodice, the 5L backhoe operators, upon returning to the worksite on July 17, “continue[d] digging . . . the ditch where we were going to put the sewer line,” starting “[a] few feet into the parking lot where we had left off the night before.” As the backhoe proceeded, lengthening the trench, Westar’s Reilly and 5L’s Grenzhauser followed along behind it, working in the trench to lay and connect sewer pipes. As found by the judge, the trench in which the employees worked, like the excavation they had worked in the previous day, was “approximately 8 feet deep” with “vertical” sides, and “no other protective means was in use.” The width of the trench varied from three feet to three feet six inches, *i.e.*, roughly the width of the backhoe bucket. The soil samples taken following the fatal accident showed that the trench had been dug primarily in “Type C soil,” which under the cave-in protection standard must “be protected by sloping at an angle of 34 degrees or by other means such as shoring.” The soil excavated from the trench was placed along the edge of the south wall of the trench, creating a soil bank that, according to OSHA compliance officer (“CO”) Kay Coffey, “contained soil and rocks of considerable size.”⁵

⁵One of the citation items at issue in Docket No. 97-0226 is based on Westar’s undisputed failure to ensure that this soil bank was prevented from falling or rolling into the trench by keeping the excavated materials at least two feet away from the edge or by using a retaining device, as required by 29 C.F.R. § 1926.651(j)(2). Only the appropriateness of the assessed penalty for this item (\$2250) remains at issue on review.

During the morning of July 17, the excavating and pipe-laying work apparently continued without incident, moving along the line previously marked by Westar on the parking lot asphalt, until the backhoe came upon an unmarked water pipe that crossed over the trench's planned route.⁶ The pipe connected the sprinkler system in the main building of the Rowley complex to an unmarked water main. That larger (4-inch) cast iron pipe ran 2-1/2 to 3 feet below the surface of the parking lot, parallel to the main building and thus parallel also to the trench that was being excavated.

Sometime later, the backhoe uncovered a section of that water main in the trench's north wall. At that point, work was stopped, and both company president Reagan and City of Middletown plumbing inspector Richard Brannan were called to the site to examine the situation.⁷ After conferring, Brannan approved Westar's proposed alteration in the course of its trench, and Reagan issued instructions to the backhoe operator to continue digging but to move the trench further away from the water main. Plumbing inspector Brannan gave no indication whether there might be a need to shut off the water in the pipe or to take any other precautionary measures.

At approximately 2:00 p.m., a 15-foot-long segment of the north bank of the trench caved in, apparently without warning. Part of the cast iron water main also separated from the remainder of the line and fell into the trench along with the collapsing trench wall. The two events occurred so closely together that witnesses and investigators could not determine

⁶Prior to beginning work on the project, Westar had called the Underground Facilities Protective Organization ("U.F.P.O.") and requested the marking of previously-installed underground utility lines. Both the gas company and water company had responded by marking the location of certain utility lines. The water lines discovered on July 17, however, had either been mismarked or not marked at all.

⁷The plumbing inspector had also been to the site the previous day, although the record does not reveal the reason for his visit or how far the work had progressed before his arrival. The record does establish that, prior to beginning work on the Rowley project, Westar had submitted its excavation plans to the plumbing inspector and received his approval.

which occurred first. For example, James Loiodice, who observed the collapse, told police that he didn't know "if the water main broke causing the ditch to fill in or if the ditch collapsing caused the water main to break." In either event, it is clear that the trench immediately began filling with water. Between 150,000 and 155,000 gallons of water eventually spilled out of the broken pipe before the water was finally shut off approximately an hour after the break occurred.

At the time of the cave-in, the two workers laying pipe in the trench (Reilly and Grenzhauer) were almost eleven feet apart. The cave-in covered both workers with collapsed soil to about waist level. One or both of the workers were further immobilized by being caught under the collapsed water pipe. Even though immediate rescue efforts were begun by Westar and 5L employees, the water level rose so rapidly that, by the time city police lieutenant Joseph Valentia arrived at the site about 2:15 p.m., both workers were already under water.

OSHA's investigation of the accident and inspection of the work site began the next day, July 18, and led to the simultaneous issuance of the two separate sets of citations in the cases before us. The merits of each of the items are not on review. Rather, the issues before us are the appropriateness of separate citations for violations of the same standard, the willful classifications, and penalties.

II. Separate Citations for Violation of the Same Standard

A. The Cave-In Protection Standard

Item 1 of citation no. 2 that was contested in Docket No. 97-0227 alleges that Westar committed a willful serious violation of 29 C.F.R. § 1926.652(a)(1) in that "[o]n or about 07/16/96, no cave-in protection system was being used in the right-of-way of North Street, near 307 North Street, Middletown, N.Y., thus exposing employees to a possible cave-in

while tamping backfill and inspecting work in an excavation 8 feet deep with vertical walls.” Item 1 of citation no. 2 that was contested in Docket No. 97-0226 alleges that Westar committed a willful serious violation of 29 C.F.R. § 1926.652(a)(1) in that “[o]n or about 07/17/96, an employee was working laying sewer pipe in a trench that was 3.5 feet wide x 116 feet long x 7.5 feet deep which had vertical walls and no cave-in protective system had been provided.” The Secretary proposed penalties of \$63,000 for each violation.

In affirming both of the contested citation items as serious and assessing separate penalties for each violation, as proposed, the judge expressly rejected Westar’s contention that, “because both docket numbers involve the same work site and the same trench,” the Secretary “exceeded her authority in issuing two citations alleging a violation of the same standard.” Based on evidence “that the excavated area cited in No. 97-227 was backfilled at the end of the day on July 16 and that the excavated area cited in No. 97-226 was newly dug on July 17,” the judge found that “the two dockets in this case involve two different excavation sites, each requiring a distinct abatement.” She accordingly concluded that “the Secretary’s issuance of two separate citations in this matter was not inappropriate” under *Andrew Catapano Enterps., Inc.*, 17 BNA OSHC 1776, 1995-97 CCH OSHD ¶ 31,180 (No. 90-0050, 1996)(“*Catapano*”).

On review, Westar challenges the judge’s reliance on *Catapano*, arguing that “[t]he Commission rejected Catapano’s due process claim because of the facts of that case . . . [but] the facts herein are dramatically different.” In particular, Westar disputes the judge’s finding that the two contested citations at issue here relate to “two different excavation sites,” pointing out that “[t]he trench, at the same location [as] the excavation, was a continuation of the excavation. They were not two separate and distinct worksites.” In response, the Secretary supports the judge’s resolution of this issue, contending that “[t]he facts here are strongly analogous to *Catapano*.”

On the record before us, we agree with Westar that the circumstances here are factually different from the circumstances that existed at the worksites in *Catapano*. The

multiple citations under review in *Catapano* arose from multiple inspections of multiple worksites. Here, in contrast, the two citations in question arose from what Westar contends was a single inspection of a single construction worksite. Despite these factual differences, however, we conclude that, consistent with *Catapano*, abatement of one of the violative conditions here would not have abated the other violative condition. We therefore conclude that the Secretary acted within the scope of her authority in issuing two citations of the cave-in protection standard. As the Commission found in *Hoffman Constr. Co.*, 6 BNA OSHC 1274, 1275, 1977-78 CCH OSHD ¶ 22,489, p. 27,120 (No. 4182, 1978) (“*Hoffman*”),⁸ “the Secretary was justified in issuing separate citations” because “the charges” were “not duplicative.”

Although, unlike the separate scaffolds in *Hoffman*, the excavations here were not “entirely different and separate,” we conclude that there were sufficient distinctions between the two alleged violations of section 1926.652(a)(1) to warrant the conclusion that the Secretary acted within the scope of her discretion in treating them as separate violations of the standard and of the Act. *See id.* (“[t]he Secretary chose to cite Hoffman for separate violations of the same standard, and under these circumstances, it is within his discretion as the prosecutor under the Act to do so”). Essentially, the distinctions we rely on are the ones identified by CO Coffey as the basis of OSHA’s decision to issue the two separate citations: the excavation at issue in Docket No. 97-0227 and the trench at issue in Docket No. 97-0226 had been dug on two separate days in two different locations; with some relatively minor exceptions, the excavation had been backfilled and that operation had been completed before digging of the trench began; and, again with relatively minor exceptions, the work and the

⁸Like the instant cases, *Hoffman* involved the issuance of two citations for violation of the same standard resulting from a single OSHA inspection of a single construction worksite. The Commission noted, however, that “[t]he citations were directed towards separate locations at the worksite and involved two different scaffolds.” 6 BNA OSHC at 1275 n.2, 1977-78 CCH OSHD at p. 27,120 n.2.

work environment differed significantly on July 16 and July 17 (digging a rectangular excavation and installing a manhole in it, as compared to digging a long, narrow trench and laying and connecting piping in it). In addition, as emphasized by the Secretary in her arguments on review, abatement of the cave-in hazard that existed in the excavation on July 16 would not have abated the cave-in hazard that existed in the trench on July 17. Under these circumstances, we conclude that the two contested citations clearly “do not involve ‘the same offense,’ ” as in *Catapano*, 17 BNA OSHC at 1779, 1995-97 CCH OSHD at p. 43,605, and that the Secretary accordingly acted within the scope of her authority in issuing them.

B. The “Competent Person” Inspection Standard

Also at issue in these cases are two citation items alleging serious violations of 29 C.F.R. § 1926.651(k)(1),⁹ each carrying a proposed penalty of \$6300. Item 3 of citation no. 1 that is at issue in Docket No. 97-0227 alleges that Westar violated the “competent person” inspection standard in that, “[a]t the jobsite on or about 07/16/96, an employee was allowed to work in an 8 feet x 13 feet x 8 feet deep excavation which had not been inspected by a competent person.” Item 3 of citation no. 1 that is at issue in Docket No. 97-0226 alleges that Westar violated this same standard in that, “[a]t the jobsite on or about 07/17/96, an

⁹The cited standard provides that:

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

The term “competent person” as used in the cited standard is defined as meaning “one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.” 29 C.F.R. § 1926.650(b).

employee was allowed to work in a trench 3.5 feet wide x 116 feet long x 7.5 feet deep which had not been inspected by a competent person.” In her decision, the judge affirmed both citation items, assessing separate penalties for each violation, as proposed. However, even though Westar had challenged the Secretary’s issuance of two citations for violation of this standard as well as for violation of section 1926.652(a)(1), the judge did not address Westar’s arguments with respect to these two citation items. Westar again raises the issue before us.

Westar’s challenge to the issuance of separate citations for violation of the competent person inspection standard cites that part of the Commission’s decision in *Catapano* where the Commission vacated all but one of the seven citations alleging training violations of 29 C.F.R. § 1926.21(b)(2),¹⁰ based on the Commission’s conclusion that this was “[t]he one area where the Secretary exceeded his discretion.” 17 BNA OSHC at 1780, 1995-97 CCH OSHD at p. 43,606. In essence, the Commission found, based on its review of the record evidence, that the Secretary had cited *Catapano* seven times for the same violation. In particular, the Commission could not perceive any difference among the seven citation items in terms of the identity of the untrained employees or the content of the training that *Catapano* had failed to provide. The only apparent distinction was in the respective dates of the alleged violations. In light of the record, the Commission concluded, “only a single citation and penalty assessment” was permissible “under the language of section 1926.21(b)(2).” 17 BNA OSHC at 1780, 1995-97 CCH OSHD at p. 43,607.

Based on the facts of the cases before us, we conclude that the Secretary acted within her authority when she issued two citations for Westar’s failure to have a competent person inspect its worksite on July 16 and July 17. We find that the basis of the violations at issue here is not just Westar’s failure to have an adequately-trained competent person present at the Rowley construction site but also its failure to have its excavation inspected by a

¹⁰That standard provides that “[t]he employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.”

competent person on July 16 and its trench inspected by a competent person on July 17 prior to allowing employees to enter into them. While Westar’s failure to provide competent person training to its own employees, or alternatively to obtain the services of a competent person from outside of the company, was clearly an element of these alleged violations, it was not the only element. An equally important element was Westar’s failure to comply with the inspection requirements of the cited standard, *see supra* note 9, including in particular the requirement that “[d]aily inspections of excavations . . . be made . . . prior to the start of work . . . when[ever] employee exposure can be reasonably anticipated.”¹¹

Our conclusion regarding the bases of the instant violations turns on the language of the contested citations, which described the alleged violations as Westar’s “allow[ing]” its employee “to work in” an excavation (on July 16) and a trench (on July 17) “which had not been inspected by a competent person.” Consistent with this description, CO Coffey testified that the basis of the alleged violation at issue in Docket No. 97-0226 was Westar president Reagan’s statements to him “that neither he [n]or anyone in his employ could make the qualifications of a competent person for excavation and [that] Westar Mechanical and Mr. Reagan did not employ any other outside competent person *to inspect that trench before employees entered it*” (emphasis added). Similarly, CO Coffey testified that the alleged violation at issue in Docket No. 97-0227 had been classified as a serious violation:

¹¹Because the cited standard at issue here contains both of these requirements, we conclude that, contrary to Westar’s argument, it is easily distinguishable from the training standard that was at issue in *Catapano*. Thus, if *Catapano* had provided its employees the training that is specified in 29 C.F.R. § 1926.21(b)(2), it would have *fully* complied with its obligation under that standard. In contrast, if Westar had provided one or more of its employees with the training necessary to make them “competent person[s]” within the meaning of section 1926.651(k)(1), it would *not* have *fully* complied with its obligations under the cited standard because it still would have been required to ensure that a competent person was present at the Rowley worksite to inspect the excavation prior to allowing employee entry on July 16 and again present to inspect the trench prior to allowing employee entry on July 17.

[b]ecause the excavation . . . was eight feet [deep], there was no competent person in the employ of Westar Mechanical . . . [and] no outside person that they employed to be a competent person at the excavation site and employees were exposed to a possible cave-in while working in the excavation. *They were allowed to enter the excavation prior to any inspection being made by a competent person.*

(Emphasis added).

In sum, we conclude that the two citation items that are before us in Docket Nos. 97-0226 and 97-0227 do not allege “the same offense” and that they are not “duplicative.” Accordingly, the Secretary did not exceed her authority in separately citing Westar’s two separate violations of the competent person inspection standard.¹²

III. The Allegation of Willfulness

A violation is willful if committed with intentional, knowing, or voluntary disregard for the requirements of the Act, *or* with plain indifference to employee safety. *E.g.*, *A. Schonbek & Co. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539, 1991-93 CCH OSHD ¶ 29,617, p. 40,101 (No. 86-0360, 1992) (consolidated). “A willful violation is differentiated by a heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference.” *E.g.*, *Williams Enterps., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-0355, 1987). Item 1 of Citation 2 in each docket number alleged that the violations of section 1926.652(a)(1) were willful. At issue on review is the judge’s reclassification of these two cave-in protection items as serious.

¹²Chairman Rogers notes that, while the Commission upheld the Secretary’s issuance of two separate citations for violation of the same standard in *Hoffman*, it also upheld in that same case the judge’s assessment of a single, combined penalty for the two separately-cited violations. Similarly, in the instant cases, to the extent Westar raises legitimate concerns about the overlapping of the Secretary’s citations, Chairman Rogers would address them by assessing combined penalties, where appropriate. Accordingly, Chairman Rogers would uphold the judge’s assessment of two separate penalties for Westar’s two violations of section 1926.652(a)(1), but assess only a single, combined penalty for Westar’s two violations of section 1926.651(k)(1).

In her decision, the judge expressly noted the Secretary's contention that the section 1926.652(a)(1) violations were willful "because Respondent demonstrated a careless disregard of and plain indifference to employee safety." She concluded that the Secretary's argument was based on the following evidence: (a) testimony and exhibits that assertedly established Westar president Reagan's presence at an all-day "excavation safety seminar" that had included a brief presentation (20 minutes or less) on federal and state cave-in protection requirements; (b) the testimony of a former Westar employee, Christopher Michaels, that Reagan had subsequently described the seminar to him as "just a bunch of bullshit"; and (c) statements made by Reagan to CO Coffey during a recorded opening conference interview.

The judge concluded that neither the specific evidence relied upon by the Secretary, nor the record as a whole, "demonstrated that the violations at issue were willful." In particular, she found that the Secretary had failed to establish by a preponderance of the evidence that Reagan had "actually attended the excavation seminar" where the presentation on cave-in protection requirements had been made. Alternatively, she found that, even if Reagan had attended, the presentation would not have given him "knowledge of OSHA's excavation standards." As for Reagan's "alleged statement" to the former employee following the seminar, the judge concluded that the Secretary's reliance on that statement as "support[ing] a finding of an attitude toward employee safety that would rise to willful under the Act" was "[e]qually unpersuasive." The judge also disagreed with the Secretary's reliance on Reagan's recorded interview by the CO. Based on her own review of the recording and transcript of the interview, she concluded that the interview "indicates [Reagan's] ignorance of the [OSH] Act and the excavations standard." She further found that the interview "indicates . . . that [Reagan] did not fail to act in the face of a known duty and that he did not have a heightened awareness the cited conduct was illegal."

A. Scope of Review

In challenging the judge's conclusion that Westar's violations of the cave-in protection standard were not willful, the Secretary argues before us that she met her burden of proving willfulness under either or both prongs of the Commission's test, as set forth above, by establishing both Westar's conscious disregard of a known safety requirement and its plain indifference to employee safety. In response, Westar correctly points out that, in the post-hearing brief she filed with the judge, the Secretary argued *only* that she had established willfulness under the plain indifference prong of the Commission's test. Citing Commission Rule 92(c), 29 C.F.R. § 2200.92(c), Westar contends that the Secretary is therefore precluded from arguing willfulness on review under the intentional disregard prong because she failed to first present that argument before the judge.

We disagree. Commission Rule 92(c), which is captioned "Issues not raised before Judge," provides, in pertinent part, that "[t]he Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon." Here, there can be no doubt that the judge had "the opportunity to pass upon" the issue of whether Westar intentionally, knowingly, or voluntarily disregarded the requirements of the cave-in protection standard since that issue was repeatedly raised before her (both directly and indirectly, *i.e.*, through the testimony and exhibits). For example, in their Joint Prehearing Statement, the parties described the willfulness issue that was to be tried in Docket No. 97-0227 as follows: "Whether the Respondent demonstrated intentional, knowing or voluntary disregard for the requirements of the Act or plain indifference to employee safety on July 16, 1996, in failing to protect its employees working in the excavation in the right of way of North Street from cave-ins by the use of any protective system. . . ." The parties used this same alternative test language in describing the willfulness issue that was to be tried in Docket No. 97-0226.

Not only did the judge have the *opportunity* to pass on the intentional disregard issue; she, in fact, *did* pass on it, implicitly holding (in her findings concerning Reagan's knowledge and state of mind) that the Secretary had failed to prove willfulness under the intentional disregard prong of the Commission's test. As the Secretary correctly points out,

Rule 92(c) cannot be invoked to prevent her from challenging the judge's findings and conclusions on the willfulness issue. *See Peavey Grain Co.*, 15 BNA OSHC 1354, 1358 n.8, 1991-93 CCH OSHD ¶ 29,533, p. 39,872 n.8 (No. 89-3046, 1991) (“[r]eview necessarily includes any matter essential to accepting or rejecting a judge’s resolution of a citation item”), and cases there cited. We accordingly conclude that both of the Secretary’s alternative theories of willfulness are properly before us on review.

While we agree with the Secretary that the scope of our review encompasses both of her alternative arguments on the willfulness issue, the Commission is unable to reach agreement on the merits of those arguments.¹³ For the reasons stated in Part III.B, *infra*, Chairman Rogers agrees with the judge that the Secretary failed to prove willfulness under either the “intentional disregard for the requirements of the Act” or the “plain indifference to employee safety” prong of the Commission’s willfulness test. For the reasons stated in Part III.C, *infra*, Commissioner Eisenbrey agrees with the Secretary that she met her burden of proving willfulness under either or both prongs of the Commission’s test. Under section 12(f) of the Act, 29 U.S.C. § 661(f), official action can be taken by the Commission with the affirmative vote of at least two members. To resolve their impasse over this classification issue, and permit a more speedy resolution of these cases, Chairman Rogers and Commissioner Eisenbrey have agreed to affirm the judge’s decision to classify Westar’s serious violations of 29 C.F.R. § 1926.652(a)(1) as nonwillful, but to accord the nonwillful classification of the judge’s decision the precedential value of an unreviewed judge’s decision. *See Life Science Products Co.*, 6 BNA OSHC 1053, 1977-78 CCH OSHD ¶ 22,313 (No. 14910, 1977), *aff’d sub nom. Moore v. OSHRC*, 591 F.2d 991 (4th Cir. 1979). *See also St. Regis Paper Co.*, 11 BNA OSHC 2208, 2210, 1984-85 CCH OSHD ¶ 27,032, p. 34,805 (No. 77-1385, 1984).

¹³We agree that the violations were “serious” within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(k), as found by the judge. *See infra* note 24.

B. Chairman Rogers' Views

Under Commission precedent and applicable appellate court case law, a violation is willful within the meaning of section 17(a) of the Act, 29 U.S.C. § 666(a), if committed with intentional, knowing or voluntary disregard for the requirements of the Act, *or* with plain indifference to employee safety. *E.g.*, *A. Schonbek & Co.*, 646 F.2d at 800. Chairman Rogers agrees with the judge that, based on the record, the Secretary failed to meet her burden of proving that Westar's violations of section 1926.652(a)(1) were willful under either prong.¹⁴

1. Intentional Disregard for the Requirements of the Act Not Proven

To prove that a violation was willful under the intentional disregard prong, the Secretary must establish that the employer knew of the applicable standard prohibiting the condition and that it consciously disregarded it. *E.g.*, *Williams Enterps.*, 13 BNA OSHC at 1257, 1986-87 CCH OSHD at p. 36,589; *see Branham Sign Co.*, 18 BNA OSHC 2132, 2134, 2000 CCH OSHD ¶ 32,106, p. 48,263 (No. 98-0752, 2000). At the hearing, the Secretary sought to establish Westar president Reagan's (and thus Westar's) actual knowledge of the OSHA cave-in protection standard by introducing evidence of an "excavation safety seminar" that Reagan had assertedly attended almost two and one-half years before the cited violations. During this all-day seminar, which was co-sponsored by the Underground Facilities Protective Organization and devoted primarily to presentations on the importance of having underground utility lines identified and marked prior to beginning excavation projects, *see supra* note 6, New York State safety and health inspector Thomas Shiel gave a 16- or 20-minute presentation on federal and state cave-in protection requirements. In her decision, the judge concluded that the Secretary had failed to establish by a preponderance

¹⁴Insofar as courts have recognized that the requisite knowledge for purposes of willfulness can be established by showing the deliberate avoidance of such knowledge, the Chairman would find that the Secretary likewise fails to meet her burden on the record here. *See U.S. v. Ladish Malting Co.*, 135 F.3d 484 (7th Cir. 1998) (construing "willful" under section 17(e) of the Act, 29 U.S.C. § 666(e)).

of the evidence that Reagan had actually attended the U.F.P.O. seminar. Alternatively, she concluded, even if she could find that Reagan had attended the seminar, she was not “persuade[d]” by her review of Shiel’s videotaped presentation that that presentation would have given Reagan “knowledge of OSHA’s excavations standard.”

On review, the Secretary vigorously challenges both of these findings. However, having examined the record, Chairman Rogers concludes that, at best, the Secretary established Reagan’s presence at the U.F.P.O. program during the presentations by the utility companies on underground markings.¹⁵ The record is devoid of any evidence linking Reagan to attendance at Shiel’s presentation on protection against cave-ins.¹⁶

¹⁵Reagan’s statements to former employee Christopher Michaels and to CO Coffey about the “excavation safety seminar” focused on the utility company presentations concerning the marking of underground facilities. Thus, for example, Michaels testified that, after Reagan described the seminar to him as “just a bunch of bullshit,” he (Michaels) asked Reagan to explain his comment. Reagan responded that the seminar “was just Orange and Rockland, which, again, is our utility company, their regulations about how they wanted the contractor to work around their gas lines, electric lines buried in the ground; those types of regulations. How far you’re supposed to be with a backhoe from these electric lines and gas; things of that nature.” Reagan’s focus on that part of the program is hardly surprising since the U.F.P.O. representative (Robert Foster) called by the Secretary to testify about the seminar described U.F.P.O.’s entire “education component,” including its co-sponsorship of this particular event, as an effort to “get[] people to use the service and call before they excavate” so that damage to underground facilities could be minimized. Although the program was titled “excavation safety seminar,” it seems clear from the evidence presented that any discussion of either employee safety or cave-in hazards during the course of the presentations was merely peripheral to the program’s primary agenda.

¹⁶The Chairman notes that CO Coffey expressly acknowledged on cross-examination that he had *not* based his claim of Westar’s “knowledge” of the OSHA standard on the U.F.P.O. safety seminar because he had had no proof that Reagan had actually seen Shiel’s presentation.

Alternatively, the Secretary argues, she established Reagan's (and thus Westar's) actual knowledge of the cited standard by introducing into evidence (in both recorded and transcribed forms) the opening conference interview between Reagan and CO Coffey. In particular, the Secretary emphasizes Reagan's response to two questions, as follows:

Q. . . . At about what depth did you think that you should have some sort of shoring or sloping or some sort of protective system?

A. [W]e always considered 5 to 6 feet * * * And then . . . we try to keep it wider at the top.

*

*

*

Q. [Y]ou stated earlier that you needed . . . something at 5 or 6 feet . . . [so] at 7 and 8 feet why weren't you providing some sort of protection? For your employees?

A. . . . I don't have a reason for that.

According to the Secretary, "[e]ven if no reference is made to the information communicated during the disputed safety seminar attendance," Reagan's knowledge of the conditions at the time of the alleged violations (based on his presence at the worksite on both July 16 and 17), combined with his above-quoted responses to CO Coffey's questions, are "enough" to establish Westar's conscious disregard of a known safety requirement.

Considering this same argument in her decision, the judge disagreed. Based on her review of company president Reagan's interview in its entirety, she concluded that the interview "indicates [that] he was not knowledgeable in the OSHA excavations standard, that he did not fail to act in the face of a known duty, and that he did not have a heightened awareness the cited conduct was illegal"; that it "reveals no evidence that Mr. Reagan or anyone who worked for him was aware of what the excavations standard required"; that it "also reveals he had never had an OSHA inspection before"; and ultimately that it "indicates his ignorance of the Act and the excavations standard."

Having reviewed the evidence in question, Chairman Rogers again is unable to find any error in the judge's evaluation of it. In particular, given the ambiguity of both the question and the answer quoted above, she cannot agree with the Secretary that Reagan's statement that "we always considered 5 to 6 feet * * * And then . . . we try to keep it wider at the top" constitutes an admission that he (Reagan) knew that cave-in protection was required at those depths under the cited OSHA standard.¹⁷ Instead, she views that exchange in the context of Reagan's prior statements to CO Coffey (during the same interview) that he had "[n]ot really" heard anything about the "new" OSHA excavation standard (that went into effect in 1990) and that he didn't know any OSHA excavation requirement well enough "to quote you a rule or a chapter or verse." Cf. *C.E.M. Plumbing, Inc.*, 17 BNA OSHC 2080, 2081, 1995-97 CCH OSHD ¶ 31,242, p. 43,820 (No. 95-0676, 1997) (Commission concluded it had "no basis for reversing" a judge who "relied primarily" on the company president's "lack of specific familiarity with OSHA regulations"¹⁸ and on his statement "that he would

¹⁷Reagan seems to have construed the question as a request for information about Westar's general practice or policy with regard to shoring or sloping. The phrasing of the question is such that he could reasonably have interpreted it in that manner, and his answer to the question certainly appears to be an assertion that Westar generally considered whether sloping was needed once an excavation reached a depth of five to six feet. The Chairman further notes that, while the Secretary emphasizes Reagan's statement that he didn't "have a reason" for not "providing some sort of protection" to the employees in the excavation and trench at issue, Reagan did indicate at another point in the interview that the trench had not been sloped because of the space constraints created, for example, by a guard house and a pre-existing gas line in the center of the Rowley parking lot, as well as the water main once it was discovered ("everything was tight and . . . we were working around a lot of utilities"). The interview gives no indication that Reagan was familiar with any form of cave-in protection other than sloping.

¹⁸The judge in that case found, for example, that the company president, "although
(continued...)

have complied with the regulation had he been aware of it” in finding that a plumbing contractor’s violation of the cave-in protection standard was not willful).

Under the Commission’s precedent, “[a] willful violation is differentiated by a heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference.” *E.g., Williams Enterps., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,589. On the record now before the Commission, the Chairman concludes that the evidence relied on by the Secretary to show willfulness was simply insufficient to establish company president Reagan’s actual knowledge of the cited

¹⁸(...continued)

generally familiar with soil types and available safety measures, was not familiar with specific OSHA regulations, was unaware of OSHA soil classifications and completely misunderstood OSHA sloping and trenching requirements.” *Id.* The judge also found that C.E.M Plumbing “had no history of prior OSHA citations” and that C.E.M.’s president erroneously “believed that the trench cited in [that] matter did not require shoring” and that “there was no danger of cave-in.” *Id.* Having reviewed the record in the instant cases, the Chairman concludes that there are strong parallels between *C.E.M. Plumbing* and these cases, both in terms of their respective evidentiary records and the common rationale of the judges’ decisions at issue before the Commission.

OSHA standard. *A fortiori*, she would be unable to find that Reagan (and thus Westar) had a heightened awareness of the illegality of the cited conditions and the requisite intentional disregard.

2. Plain Indifference to Employee Safety Not Proven

The Secretary argues that Westar's violations of the cave-in protection standard demonstrated its plain indifference to employee safety. On the record before the Commission, however, Chairman Rogers is unable to conclude that the Secretary has met her burden to show plain indifference.

At the outset, the Chairman notes the following exchange between Westar president Reagan and CO Coffey during the opening conference interview:

- Q. [Y]ou are the . . . president of a company and you are looking at a trench that has your people working in it that has vertical sides -- 8 to 7 to 6 feet deep and you didn't do anything at all, nothing registered as to, that we need protection, that this is a life threatening situation [?]
- A. I didn't see it as a life threatening situation at the time.
- Q. You didn't see it as a hazardous situation?
- A. No, if I did I would have done something. I was there [in the excavation] working myself, the day before [the cave-in].

The Secretary asserts that these above-quoted statements are a clear indication of Reagan's "cavalier attitude to employee safety." Chairman Rogers concludes, however, that another inference is equally plausible, if not more so, on the record in this case, *i.e.*, that Reagan's statements are evidence that he failed to appreciate the hazard presented to him and his employee (Reilly) by the violative conditions.

Thus, the Chairman construes Reagan's statements in the context of the evidence introduced by the Secretary in support of the two alleged violations of 29 C.F.R. § 1926.651(k)(1). *See supra* Part II.B. In affirming those citation items, the judge relied primarily on Reagan's admission to CO Coffey that "neither he nor his foreman, Mr.

Countryman, had the training or knowledge necessary to be a competent person.”¹⁹ When the CO asked Reagan why his foreman wasn’t qualified as a “competent person,” Westar’s president answered that “[w]e’re basically not in the excavating business. . . . [W]e use subcontractors to excavate.” He further claimed that only a small part of Westar’s business (“10% maybe”) involved working in excavations.

Chairman Rogers also views Reagan’s statement that he “didn’t see [the cited conditions] as a life threatening situation at the time” in the context of a record that contains no evidence that anyone who observed the unshored and unsloped excavation and trench at issue in these cases recognized the hazard they presented to the employees working within them. In particular, she notes that neither the testimony nor the written statements (given to the police) of the two backhoe operators, Chad and James Loiodice, provide any indication that either backhoe operator foresaw the possibility of a cave-in prior to its occurrence. On the contrary, both witnesses indicated that the collapse of the trench wall had occurred without any prior warning and had taken them entirely by surprise.²⁰ Nor is there any indication in the record that the city plumbing inspector, who observed the violative

¹⁹The judge correctly pointed out that, in order to be a “competent person” within the meaning of the OSHA excavation standard, “one must . . . be knowledgeable about[] soils analysis, the use of protective systems, and the requirements of this standard.” Yet, during his interview, Reagan stated that he had no idea what type of soil was in the excavation and trench at issue, suggested that the only form of cave-in protection he had had any experience with was sloping, and further indicated that he did not know any of the specific requirements of the OSHA excavation standard.

²⁰Westar president Reagan suggested during his interview that, because Westar itself did not dig excavations or trenches, he relied heavily on Westar’s subcontractors to dig excavations and trenches that were safe. In this instance, however, it appears that reliance was misplaced. Thus, CO Coffey testified that OSHA had not only cited Westar but also 5L “for their failure to have a competent person” at the worksite. *See supra* note 9. Coffey further testified that he had “no knowledge of any competent person looking at the excavation or inspecting the excavation at all.”

conditions on July 17 and possibly on July 16 as well, gave any warning to Westar (or indeed recognized himself) that the unshored and unsloped trench might collapse.²¹

In *Propellex Corp.*, 18 BNA OSHC 1677, 1684, 1999 CCH OSHD ¶ 31,792, p. 46,592 (No. 96-0265, 1999) (“*Propellex*”), the Commission held “that the Secretary [had] failed to establish that the violations [at issue on review] were willful [because the] evidence [did] not show that Propellex had a heightened awareness of the violations.” With respect to one of the two supervisory employees whose knowledge and state of mind were at issue, the Commission concluded that the record did not establish that he “had the requisite heightened awareness for a willful violation” because the evidence was “insufficient to show that . . . he [had] appreciated the hazards those conditions presented.” *Id.* With respect to the other supervisor, who had believed the violative conditions to be “safe” and either authorized or permitted by higher-level management, the Commission held that, even though she had “exercised poor judgment in permitting the hazardous conditions to exist,” it could not “conclude that she [had] acted willfully.” *Id.* For essentially these same reasons, Chairman Rogers concludes that Westar president Reagan lacked the “heightened awareness of the violations” that would have supported a finding of “plain indifference to employee safety.”

²¹In the parallel state court criminal proceedings that arose out of the same incident that led to the instant OSH Act proceedings, a New York State appellate court emphasized the role of the city plumbing inspector with respect to the incident in affirming a lower court’s decision to dismiss several of the charges brought against Westar’s president Reagan, Westar, and 5L. *People v. Reagan et al.*, 1998 WL 885020 (N.Y.A.D. 2 Dept. Dec. 17, 1998). That decision is part of the record in these cases. More generally, the court noted that:

[t]here was no evidence presented that anyone at the scene, including the participants, contractors, plumbers, laborers, excavators, or the City, objected to the procedure [agreed upon during the conference between Reagan and Brannan], or went ahead recklessly (i.e., with heightened awareness of a substantial and unjustifiable risk of collapse, let alone a risk of drowning). They all continued, believing the prescribed approach to be both appropriate and officially approved. All of this not only fails to support, but negates the element of recklessness that the defendants were aware of and “consciously disregard[ed]” a “substantial and unjustified risk.”

Chairman Rogers would therefore affirm the judge's conclusion that Westar's violations of the cave-in protection standard were not willful.

C. Commissioner Eisenbrey's Views

In order to avoid an impasse and resolve these cases, Commissioner Eisenbrey joins in the decision to affirm the judge, though he believes Westar's violations of section 1926.652(a)(1) were willful. In Commissioner Eisenbrey's view, the record displays an attitude of obstinate, studied indifference to employee safety on the part of Westar and its president, Roger Reagan. Although in the business of laying pipe and underground lines for many years, Westar provided no training in excavation safety to its employees, had no safety program, and rarely, if ever, used any protective measures in deep trenches. A former supervisor testified that all of the excavations deeper than five feet in which he worked during the two and a half years immediately prior to the accident, including one that was fourteen feet deep, had vertical walls and were unshored. Westar routinely sent its employees into excavations that had not been inspected by a competent person for soil composition, hazards, or the need for protective measures.

There should be no dispute that Westar's violations in the instant cases were knowing and intentional: both Westar's foreman, Ray Countryman, and Reagan were at the site and observed the employees in the unshored excavations. They had the opportunity to remove the employees and provide protections but chose not to. When asked why, Reagan did not claim that he did not know that the narrow, 8-foot deep trench needed shoring or a protective system. Rather, while admitting that he knew protective measures were required at five to six feet in depth, he stated that he didn't use any such measures here because he "just didn't feel the safety, uh, we had a wide ditch and, we were, you know, everything was tight and it went in and out quick, we were working around a lot of utilities and we just didn't." When asked specifically what was "going through [his] mind" when he chose not to provide protection in the cited trench despite knowing that protection was needed at five to six feet, all Reagan could say was "I don't have a, I mean, I don't have a reason for that." On this

record, Commissioner Eisenbrey would find that the Secretary has proved by a preponderance of the evidence that Reagan was aware of his obligation to protect his employees and knowingly chose not to do so.²²

Despite Reagan's admissions in his tape-recorded interview with the compliance officers, Westar now argues that its managers and supervisors were so ignorant of OSHA and its requirements that they did not know that the unshored excavation and trench were unsafe. Commissioner Eisenbrey disagrees and would find that the COs' interview shows that Reagan did know there were hazards in trenches like the one that collapsed and killed Martin Grenzhauer and Edward Reilly. Reagan admitted that he knew from newspaper reports that unsafe trenches can cause serious injuries. Without knowing "chapter or verse," he nevertheless knew that OSHA has excavation safety requirements and believed there was a set of OSHA's regulations on site -- he just never cared enough about his employees' safety to learn the standards in detail or call OSHA. The Secretary has proved that Reagan knew enough to know he should have protected his employees once the trench was dug deeper than six feet. "In evaluating willfulness, a primary consideration is the employer's attitude toward the Act and the standards adopted under it." *Williams Enterps., Inc.*, 13 BNA OSHC at 1257,

²²Commissioner Eisenbrey finds these cases distinguishable from *C.E.M. Plumbing, Inc.*, 17 BNA OSHC at 2081, 1995-97 CCH OSHD at p. 43,820, where the Commission found that the employer's violation for failure to shore a six-foot deep trench was not willful. In *C.E.M.*, the employer had previously used shoring for "deeper jobs" than the cited trench -- those "over six or seven feet." *Id.* (emphasis added). Moreover, the judge found, and the Commission apparently agreed, that the company president "believed that the trench . . . did not require shoring, that there was no danger of cave-in because of the cohesive clay soil, and an extensive root system supporting the soil." *Id.* Here, in contrast, Reagan admitted knowing that shoring was required in *shallower* excavations than those for which Westar was cited. Reagan never claimed that he believed that shoring was unnecessary. Although Reagan denied that he thought the trench was life-threatening or hazardous, unlike the company president in *C.E.M.* he provided no objective basis for his erroneous belief. Accordingly, in Commissioner Eisenbrey's view, *C.E.M.* provides no support for finding that Westar's violations were not willful.

1986-87 CCH OSHD at p. 36,589. Reagan's attitude has been to pretend the law does not apply to him, and is exemplified by his comment to Michaels that the excavation safety seminar was "a bunch of bullshit."²³

The Commission has always distinguished between the kind of merely careless, accidental, or negligent conduct that characterizes serious violations, and willful conduct that should be more harshly punished. Commissioner Eisenbrey finds that Reagan's utter and deliberate indifference to employee safety is more than merely negligent. It constitutes the kind of reckless disregard for the law and his employees' safety that makes the violations in these cases willful. In *U.S. v. Ladish Malting Co.*, 135 F.3d 484 (7th Cir. 1998), in discussing criminal willfulness under section 17(e) of the Act, the court explained that employers may not shield themselves from liability by hiding their heads in the sand. "Knowledge may be proved by showing deliberate indifference to the facts or the law . . . , or by showing awareness of a significant risk coupled with steps to avoid additional information . . . , but in either event what must be proved beyond a reasonable doubt is actual rather than constructive knowledge." *Ladish Malting*, 135 F.3d at 490. It makes no sense here to search for Westar's "heightened awareness" of the hazardousness of the situation since Westar has made a deliberate effort to know and be aware of as little as possible. Reagan is not *less* culpable for having cared so little that he did nothing to learn more about excavation safety or his legal duty than he would have been if he had cared enough to learn precisely what the standards require.

In accord with *Ladish Malting*, the Supreme Court has construed the word "willful" for purposes of the Age Discrimination in Employment Act and the Fair Labor Standards Act to encompass not just knowledge of a legal duty, but an attitude of indifference to the duty --

²³In Commissioner Eisenbrey's view, the judge was plainly wrong in finding that the Secretary failed to prove that Reagan attended the seminar. Reagan, himself, admitted to the compliance officers that he did attend the seminar, and foreman Michaels testified without rebuttal that Reagan told him that he attended the seminar.

an avoidance of knowledge. The Court has held that an employer acts willfully if “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute” *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), citing *TWA, Inc. v. Thurston*, 469 U.S. 111 (1985). In *Thurston*, the Court said its definition of “willful” is consistent with its prior cases, such as *U.S. v. Murdock*, 290 U.S. 384 (1933), where the Court held that willful conduct is “marked by careless disregard [for] whether or not one has the right so to act.” *Thurston*, 469 U.S. at 127. In Commissioner Eisenbrey’s view, Westar’s and Reagan’s conduct shows precisely this reckless disregard for whether it was meeting its legal duty to protect its employees.

Finally, there is no evidence that the City plumbing inspector’s approval of the change in course of the trench had anything to do with Reagan’s decision to send employees into the unsafe trench on July 17. The trench walls were not vertical and unshored because the City inspector somehow lulled Reagan into thinking they were safe. The walls were vertical and unshored because that was how Westar *always* worked, even when a trench was 14 feet deep. Even Westar does not suggest that Reagan or his foreman intended to shore this trench, slope its walls, or install a trench box, but for the actions of the City plumbing inspector. Commissioner Eisenbrey concludes that Westar had already willfully violated the Act by intentionally exposing its employees to the hazards of the unprotected trench before the inspector was even called to the site to examine the water line. Accordingly, he would find that Westar’s violations of section 1926.652(a)(1) were willful, as alleged.

IV. Penalties

Under section 17(j) of the Act, 29 U.S.C. § 666(j), the Commission has the authority to assess penalties based on due consideration of the employer’s size, the gravity of the violation, the employer’s good faith, and the employer’s history of previous violations. In her decision, the judge assessed penalties of \$6300 per citation item for Westar’s two serious violations of the cave-in protection standard and its two serious violations of the competent person inspection standard. She assessed penalties of \$2250 per citation item for Westar’s

two serious violations of two different vehicular traffic flagging standards and its serious violation of the spoil piles placement standard.²⁴ *See supra* notes 4 & 5 and accompanying text. The penalties assessed by the judge for the two cave-in protection standard violations were reduced to reflect the judge’s rejection of the Secretary’s allegation that the violations were willful. Otherwise, the judge’s penalty assessments were identical to the Secretary’s penalty proposals.

On review, Westar generally challenges all of the assessed penalties as being punitive rather than remedial. In addition, it raises two specific challenges to the judge’s decision to assess the proposed penalties, arguing that “[t]he compliance officer and his area director abused their discretion [1] by applying the maximum GBP²⁵ and [(2) by] refusing to give the respondent an adjustment for size of his business.” In response, the Secretary argues that any errors OSHA may have made in calculating its proposed penalties are irrelevant “at this stage of the proceeding” since it is the judge’s penalty assessments and not the Secretary’s penalty proposals that are before us on review. We agree. OSHA’s procedures for determining a

²⁴There is no dispute over the judge’s classification of any of the seven violations at issue on review as serious. Under section 17(k) of the Act, 29 U.S.C. § 666(k):

a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

²⁵The “GBP” or “Gravity-Based Penalty” is the starting point in OSHA’s penalty computations, a figure (based on the gravity of the alleged violation) that is then adjusted downward (where appropriate) to reflect credits for the other three statutory penalty criteria. CO Coffey testified that OSHA used the statutory maximum of \$7000 (for a serious violation) as its GBP in computing the proposed penalties for four of the alleged violations at issue on review (the two cave-in protection violations and the two competent person inspection violations). Westar argues that OSHA thereby violated a provision of its Field Inspection Reference Manual (“FIRM”) requiring that such decisions be made by the Area Director, with the reasons for the decision “documented in the case file.”

Gravity-Based Penalty and the amounts it selects have no bearing on the Commission's penalty assessments.

However, we agree with Westar that the judge erred in failing to give due consideration to the size of Westar's business in determining appropriate penalties for the seven violations at issue on review. Section 17(j) provides that:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

Citing that provision, the Commission concluded in *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2212-14, 1991-93 CCH OSHD ¶ 29,964, pp. 41,031-33 (No. 87-2059, 1993), that the judge in that case had erred in not calculating penalty amounts based on the four statutory factors. The Commission accordingly remanded the case with instructions to the judge to reconsider the penalty amounts "based on specific factual findings relating to the penalty assessment criteria for each individual instance" 15 BNA OSHC at 2214, 1991-93 CCH OSHD at p. 41,033.

Here, as in *J.A. Jones*, we conclude that "the judge has failed to state an adequate factual basis" for her decision not to consider two of the four statutory penalty assessment criteria. 15 BNA OSHC at 2213-14, 1991-93 CCH OSHD at p. 41,033. Thus, in reference to Westar's two violations of the cave-in protection standard, the judge concluded that "no credit for size or good faith is due in light of the high gravity of the violations and in order to achieve a deterrent effect." With respect to each of the other five violations at issue on review, she concluded that "no credit for size or good faith is due because of the high gravity of the violation." However, based on our review of the record, we are not persuaded that either rationale stated by the judge justifies her failure to give "due consideration" to two of the four statutory penalty criteria. Here, as in *J.A. Jones*, the judge's own findings, which "indicate[d] that there [was] a wide variation in the magnitude of the gravity factor among the various . . . citation items," contradict her conclusion that an across-the-board refusal to

consider Westar's size and good faith is warranted due to the "high gravity of the violations." 15 BNA OSHC at 2214, 1991-93 CCH OSHD at p. 41,033.

We have accordingly reconsidered each of the seven assessed penalties at issue in light of the record evidence relating to all four of the statutory penalty assessment criteria. Insofar as the gravity of the violations is concerned, we conclude that the judge's findings are fully supported by the record. With respect to all seven of the citation items at issue, the judge found that, in the event the violation led to an accident, the severity of the resulting injuries would be high (death or serious physical harm). However, she distinguished among the seven items in terms of the probability of an accident occurring as a result of the violation. Thus, she found that there was a high probability of a cave-in as a result of Westar's two violations of the cave-in protection standard and/or its two violations of the competent person inspection standard. There was a much lesser probability that Westar employee Malloy would be struck by a motor vehicle as a result of either or both of Westar's violations of the two vehicular traffic standards. Similarly, there was only a lesser probability that Westar's violation of the spoil piles placement standard would lead to employee injury from rocks or soil falling or rolling from the spoil pile into the trench. Accordingly, we agree with the judge that the high gravity of Westar's violations of the cave-in protection standard and the competent person inspection standard calls for penalties at or near the statutory maximum for those violations, while the lower gravity of the other three violations calls for the assessment of substantially lower penalties for those violations. *See J.A. Jones Constr. Co., id.* ("generally speaking, the gravity of a violation is the primary element in the penalty assessment").

We agree with the judge's decision to give Westar no credit for good faith. Indeed, we conclude that the record is devoid of any evidence of good faith efforts by Westar to comply with the requirements of the Act and/or to protect the safety and health of its employees. Concerning history of previous violations, Westar had never previously been inspected by OSHA. With respect to size, the judge found that "Westar is a small company,

with eight to ten employees.” We conclude that Westar’s very small size is a factor that warrants consideration of a reduction in the amounts of the assessed penalties.

Even considering these other factors, however, we view gravity as far outweighing the other factors under the circumstances here. Accordingly, considering all of these factors, we assess, as the judge did, the following penalties: \$6300 for each of Westar’s two cave-in protection standard violations, \$2250 for each of its violations of the two vehicular traffic flagging standards, and \$2250 for its violation of the spoil piles placement standard.

With respect to Westar’s violations of the competent person inspection standard, we agree with the judge that \$6300 is an appropriate amount within the meaning of section 17(j). The Commission, however, is unable to reach agreement on whether that amount should be assessed as the penalty for both violations combined or as the penalty for each violation.

Commissioner Eisenbrey concludes that the record in these cases provides no justification for the Commission to exercise its discretionary authority to assess a single, combined penalty for violations involving similar conduct. Westar failed to make any appreciable effort to comply with its obligations under the cited standards and the Act generally. It has a history of exposing its employees to life-threatening hazards on what appears to have been a regular and recurring basis. And the consequences of its failures to take even rudimentary precautions to protect the workers at the Rowley construction project were the death of two employees. In view of the pivotal role of the competent person inspection requirement in relation to OSHA’s overall program for protecting employees from trenching and excavation hazards, Commissioner Eisenbrey would affirm the judge’s assessment of separate penalties of \$6300 each for Westar’s two distinct violations of section 1926.651(k)(1), on July 16 and again on July 17, 1996.

Chairman Rogers agrees that the Secretary acted within the scope of her prosecutorial discretion in issuing two separate citations alleging violations of the competent person inspection standard. But, nevertheless, she believes that a combined penalty of \$6300 should be assessed for the two competent person items in light of the Commission’s wide discretion

to assess a single, combined penalty for interrelated or overlapping violations involving similar conduct. *See, e.g., A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2013, 1991-93 CCH OSHD ¶ 29,223, pp. 39,134-35 (No. 85-0369, 1991); *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1049, 1981 CCH OSHD ¶ 25,712, pp. 32,056, 32,059 (No. 76-4765, 1981).

Under section 12(f) of the Act, 29 U.S.C. § 661(f), official action can be taken by the Commission with the affirmative vote of at least two members. To resolve their impasse over this penalty assessment issue, and permit a more speedy resolution of these cases, Chairman Rogers and Commissioner Eisenbrey agree to affirm the judge's decision to assess penalties of \$6300 each for Westar's two cited violations of 29 C.F.R. § 1926.651(k)(1) but to accord that portion of the judge's decision the precedential value of an unreviewed judge's decision. *See Life Science Products Co.*, 6 BNA OSHC at 1053, 1977-78 CCH OSHD at pp. 26,870-71. *See also St. Regis Paper Co.*, 11 BNA OSHC at 2210, 1984-85 CCH OSHD at p. 34,805.

Order

We affirm as serious the violations of section 1926.652(a)(1) alleged in item 1 of citation no. 2, in both Docket No. 97-0226 and Docket No. 97-0227, and we assess penalties of \$6300 for each violation. We affirm item 3 of citation no. 1 in both Docket No. 97-0226 and Docket No. 97-0227, each alleging a serious violation of section 1926.651(k)(1), and we assess penalties of \$6300 for each violation. In Docket No. 97-0226, we assess a penalty of \$2250 for the serious violation of section 1926.651(j)(2) alleged in item 2 of citation no. 1. In Docket No. 97-0227, we assess penalties of \$2250 each for the serious violation of section

1926.21(b)(2) alleged in item 1 of citation no. 1 and the serious violation of section 1926.201(a)(4) alleged in item 2 of citation no. 1.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

Dated: November 8, 2001

/s/
Ross Eisenbrey
Commissioner

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

WESTAR MECHANICAL, INC.,

Respondent.

DOCKET NOS. 97-0226 and 97-0227

Appearances: Steven Riskin, Esquire
Office of the Solicitor
U.S. Department of Labor
New York, New York
For Complainant

Risa Sugarman, Esquire
446 North Street
Middletown, New York
For Respondent

Before: Administrative Law Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). Respondent, Westar Mechanical, Inc. (“Westar”), at all times relevant to this action maintained a job site at 307 North Street, Middletown, New York, where it was engaged in performing plumbing work, construction and maintenance activities. Respondent admits that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and that it is subject to the requirements of the Act. Roger W. Reagan, Jr., is the president and sole owner of the Respondent corporation.

Procedural History

On July 18, 1997, the Occupational Safety and Health Administration (“OSHA”) conducted two separate inspections of a construction site at 307 North Street in Middletown, New York, pursuant to a report of two employee fatalities in an excavation at the site. As a result of the inspections, on January 6, 1997, OSHA issued Respondent two sets of citations alleging willful, serious and “other” violations and proposing penalties totaling \$148,500.00. Respondent timely contested both sets of citations, bringing these matters before the Commission. The Secretary filed her Complaints on April 17, 1997, Respondent filed its Answers on November 17, 1998, and the cases were subsequently consolidated. Upon motion of Respondent, a stay of the proceedings was entered on January 7, 1998; the stay was in effect until May 12, 1999, when it was lifted. The hearing in this matter was held in New York City on January 4-6 and February 17-18, 2000. At the beginning of the hearing, the Secretary’s motion to withdraw Citation 3, Items 1 and 2, in No. 97-227, and Citation 1, Item 1, and Citation 3, Items 1 and 2, in No. 97-226, was granted. (Tr. 7-8). Remaining in issue are Citation 1, Items 1 through 3, and Citation 2, Item 1, in No. 97-227, and Citation 1, Items 2 and 3, and Citation 2, Item 1, in No. 97-226, with proposed penalties totaling \$145,350.00. Counsel for the parties have submitted post-hearing briefs, and this matter is ready for disposition.²⁶

²⁶The parties stipulated to the following in Section IV of their Joint Prehearing Statement:

1. Respondent, Westar Mechanical, Inc., is a New York corporation. At the time of the subject inspections, the Respondent maintained an office at 446 North Street, Middletown, New York.

2. During the one-year period preceding July 17, 1996, the Respondent employed a maximum number of 14 employees, including Respondent's president, Roger W. Reagan, Jr.

3. On July 16, 1996, and all times hereinafter mentioned, the Respondent was engaged in performing plumbing work and related activities.

4. On July 16, 1996, and all times hereinafter mentioned, the Respondent was engaged in construction and maintenance work.

5. During 1996, the Respondent contracted with Rowley Building Products, Inc., to construct a sewer line from the City of Middletown’s existing sewer line beneath the right-of-way of North Street to a building owned by Rowley at the rear of 307 North Street, Middletown, New York.

6. Respondent subcontracted with 5L Enterprises, Inc., to perform the excavation work in
(continued...)

Facts

Rowley Building Products (“Rowley”) contracted with Westar to install a sewer line on the Rowley property located at 307 North Street, Middletown, New York. Westar subcontracted 5L Enterprises, Inc. (“5L”), to perform the excavation necessary for the sewer line installation. Rowley retained Clark Patterson Associates (“CPA”), a professional architectural, engineering and surveyance design firm, to prepare a plan for the proposed sewer line and manhole installation. The plan for the project was provided to Mr. Reagan, Westar’s president, and the plan included a plan sheet indicating the part of the property on which the proposed sewer line was to be located. (Tr. 104; Ex. C-5).

According to the plan, the proposed sewer line was to begin at the North Street right of way at a point northeast of the northeast corner of the main Rowley building, where the first proposed manhole was to be installed and the new line connected to an existing sewer line. The proposed line would then extend southeast through the Rowley property for about 170 feet, parallel with the side of the main building, to the second proposed manhole at the back of the property, at which point the line would branch off in two directions. The existing sewer line at the North Street right of way was at a depth of 8 feet, which was determined by the depth of the invert immediately north and south of the first proposed manhole site.²⁷ The second proposed manhole was to be at a depth of about 5.2 feet, based on a projected 1.25-foot rise every 100 feet because of the slope of the ground; in addition, a minimum slope was required to facilitate liquid flow and a minimum depth of 4 to 5 feet was necessary to prevent frost penetration and damage by heavy traffic. (Tr. 106, 116-21, 124, 132).

Work on the project, which was to take two to three days, began on July 16, 1996, with the excavation of the North Street right of way and the insertion of a manhole. Chad

²⁶(...continued)
connection with the construction of the sewer line.

7. The sewer line was to be constructed in accordance with a plan prepared by Clark Patterson Associates dated July 9, 1996.

²⁷“*Invert*” refers to the elevation of the bottom of the inside of the sewer pipe. (Tr. 112).

Loiodice, an employee of 5L, dug the excavation with a backhoe. James Loiodice, another 5L employee, operated the backhoe for short periods on July 16, 1996, when it was necessary to relieve Chad Loiodice, his brother. Edward Reilly, a Westar employee, leveled the surface for the installation of the manhole, after which the backhoe was used to place the manhole into the trench. The backhoe was then used to dig from the right of way onto the sidewalk adjacent to the parking lot of the Rowley property so that the road did not have to be closed down the next day. The right of way of was then backfilled and metal plates were placed over the trench covering the sidewalk adjacent to the Rowley parking lot. (Tr. 138-41, 150, 161, 178-79, 182-86, 287; Ex. C-1, R-F1, R-F3).

On July 17, the excavation resumed where it had left off the day before, which was a few feet into the parking lot, with Chad Loiodice digging with the backhoe. That morning a pipe was discovered running perpendicular to the trench, and sometime later a pipe was discovered in the north wall of the trench. Mr. Reagan was called to the site, as was the Middletown plumbing inspector. The pipe was 3.5 to 4 feet below grade, and, after the inspector assessed the situation, Chad Loiodice was told to alter the line of the excavation to move it away from the pipe in the wall. Edward Reilly and Martin Grenzhauser, a 5L employee, were installing pipe in the excavated area when, at about 2:05 p.m., part of the north wall of the trench collapsed, burying Mr. Grenzhauser up to his waist and one of Mr. Reilly's legs. The Loiodice brothers tried to get them out, but water began to fill the trench, covering Mr. Grenzhauser and Mr. Reilly and then overflowing onto the parking lot.²⁸ Police and fire personnel carried out an extensive rescue and recovery operation, and shoring material was put in the excavation to facilitate the emergency personnel's recovery of the bodies.²⁹ Mr. Reilly's body was recovered at about 5:40 p.m., and Mr. Grenzhauser's body was recovered at about 6:20 p.m. (Tr. 41-47, 52, 154-60, 165, 185-94, Ex. C-10, R-A-D).

²⁸Water flowed into the trench for over an hour, totaling 150,000 to 155,000 gallons before it was shut off. (Tr. 41-42, 46, 488).

²⁹The emergency personnel worked in teams, with as many as eight persons in the trench at one time. (Tr. 46-47).

Detective Warren Wagner, a member of the forensic unit of the Middletown Police Department (“MPD”) arrived at the scene at about 3:05 p.m. He took various photos of the site, and, after the bodies had been recovered, took measurements of the trench and prepared a diagram. Detective Wagner measured the total length of the trench to be 135.5 feet. He also measured the width of the trench in the areas where Mr. Reilly and Mr. Grenzhauser had been at the time of the accident; those widths were 4 feet and 6 feet, 7 inches, respectively. Detective Wagner additionally measured the depth of the trench on the north side where Mr. Reilly’s body had been recovered. That measurement, which he made to the top of the boots Mr. Reilly had worn, was 69 inches. Sergeant Nicholas DeRosa of the MPD interviewed Chad and James Loiodice and wrote out their statements at the police station on the afternoon of July 17, 1996. Chad and James Loiodice signed their respective statements, which described the work that was done on the excavation that day. (Tr. 27-30, 34, 58, 63; Ex. C-1).

The Albany OSHA Area Office learned of the accident the afternoon of July 17, 1996. Compliance Officer (“CO”) Kay Coffey went to Middletown the next day. He first obtained the information the MPD had gathered the day before and then went to the site, arriving at about 10:30 a.m. and accompanied by CO Teri Wigger. During the inspection, CO Coffey videoed the accident site, and he measured the trench at the same locations Detective Wagner had taken his measurements. CO Coffey’s depth measurement at the location of Mr. Reilly’s boots was 70 inches, while his width measurements of the locations of Mr. Reilly and Mr. Grenzhauser were 4 feet, 6 inches and 6 feet, 7 inches, respectively. CO Coffey asked the MPD to take soil samples from the trench’s north and south sides, near the top and bottom, where Mr. Reilly and Mr. Grenzhauser had been at the time of the accident. The samples were collected under the supervision of MPD’s Lieutenant Joseph Valencia, who marked the samples, indicating that they were taken from the following locations of the excavation: top north, top south, south side and north side. (Tr. 301-13, 336-44, 405-07, 411, 418, 422).

That same day, and after their inspection, CO’s Coffey and Wigger went to Westar’s office to hold an opening conference. CO Coffey interviewed Mr. Reagan, who gave him permission to record the interview; Debra Reagan, Mr. Reagan’s wife, was also present at

the interview.³⁰ During a break in the interview, Mrs. Reagan told CO Coffey they had tried to contact their attorney but he was out of town. CO Coffey said it was his opinion they did not need an attorney but that if they wanted one he would stop the interview. The interview then proceeded without objection.³¹ (Tr. 322-24, 435-39, 447-48, Ex. C-10).

The Secretary's Burden of Proof

In order to establish a violation of an OSHA standard, the Secretary must show (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994). The Secretary bears the burden of proof on each of these elements by a preponderance of the evidence. *See Olin Constr. Co. v. OSHRC*, 525 F.2d 464 (2d Cir. 1975); *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2131 (No. 78-6247, 1981).³²

The Willful Citations

Willful Citation 2 in No. 97-227 alleges a violation of 29 C.F.R. 1926.652(a)(1) for the condition of the area excavated on July 16, 1996, while Willful Citation 2 in Docket No.

³⁰CO Coffey used the audio function of his video camera to record the interview, and he pointed the video camera at a window during the interview. (Tr. 323, 438-40).

³¹ Respondent's counsel raised Fifth and Sixth Amendment objections as to this interview taking place without the presence of counsel. (Tr. 332-33). Although Respondent did not address this issue in its post-hearing briefs, I note the Commission lacks authority to rule on questions of the constitutionality of provisions of the Act on which no court has yet ruled; the Commission can do no more than apply judicial precedent regarding the Act's constitutionality. *See McGowen v. Marshall*, 604 F.2d 885, 892 (6th Cir. 1979); *Daniel Int'l Corp.*, 9 BNA OSHC 1980, 1985 (No. 15690, 1981), *order set aside on other grounds*, 683 F.2d 361 (11th Cir. 1982); *Bomac Drilling*, 9 BNA OSHC 1681, 1699 (No. 76-2131, 1981).

³²A preponderance of evidence is that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false. *Ultimate Distribution Sys., Inc.* 10 BNA OSHC 1568 (No. 79-1269, 1982).

97-226 alleges a violation of 29 C.F.R. 1926.652(a)(1) for the condition of the area excavated on July 17, 1997. Westar contends that the Secretary exceeded her authority in issuing two citations alleging a violation of the same standard because both docket numbers involve the same work site and the same trench. (R.Brief, p. 13). However, Commission precedent recognizes the Secretary's authority under the Act to issue separate citations to an employer for violations of the same standard in appropriate circumstances. *Andrew Catapano Enter., Inc.*, 17 BNA OSHC 1776 (No. 90-0050, 1996) (upholding the Secretary's decision to issue nine sets of citations to an employer replacing underground water mains based on one set of citations for each of nine separate trenches at a single project). The record shows that the excavated area cited in No. 97-227 was backfilled at the end of the day on July 16 and that the excavated area cited in No. 97-226 was newly dug on July 17. (Tr. 142-43, 150, 183-85, 272-78, 284-90). In view of the above decision, I conclude that the two dockets in this case involve two different excavation sites, each requiring a distinct abatement. I further conclude that the Secretary's issuance of two separate citations in this matter was not inappropriate. Westar's contention is accordingly rejected.

Docket No. 97-227: Willful Citation 2, Item 1

29 C.F.R. 1926.652(a)(1), the cited standard, provides as follows:

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

The citation alleges as follows:

On or about 7/16/96, no cave-in protection system was being used in the right-of-way of North Street, near 307 North Street, Middletown, N.Y., thus exposing employees to a possible cave-in while tamping backfill and inspecting work in an excavation 8 feet deep with vertical walls.

As noted *supra*, the excavation that is the subject of this citation item is the area that was backfilled at the end of the day on July 16. Westar contends that this citation item must be vacated because the record contains no evidence that an actual depth measurement was

made of the excavation that day. However, I find that the Secretary has proven by a preponderance of the evidence that the trench in which the employees were working was approximately 8 feet in depth. Specifically, I find that the testimony of Gary Chumard, the CPA engineer who supervised the preparation of the plan for the project, provides an accurate indication of the depths at which the sewer line and manholes were to be installed. Under this plan, the invert in the location of the first proposed manhole was 8 feet deep, which required an excavation in excess of that depth. (Tr. 103-23; Ex. C-5). During his interview with CO Coffey on July 18, 1996, Mr. Reagan acknowledged that he was following this plan and that the manhole depth on July 16 had an invert of 8 feet. (Ex. C-10).

The approximate depth of the excavation was corroborated by Brent DeWitt and William Evans, two individuals who were employed by Westar at that time and who arrived at the site around 4:00 p.m. on July 16. Mr. DeWitt testified that upon his arrival, he observed Edward Reilly leveling the surface in the trench in preparation for setting the manhole. Mr. DeWitt recalled that an 8-foot ladder was in the trench, that the ladder exceeded the top of the surface by about a foot, and that the sides of the excavation were vertical. (Tr. 284-89). Mr. Evans testified he observed Edward Reilly, Brent DeWitt and another employee in the trench after the manhole had been lowered into it. He also testified that he saw an 8-foot ladder in the trench, that the walls of the trench were vertical, and that he determined this by the way the ladder was situated, that is, by the fact it was not sloped at all. (Tr. 272-83).

The evidence of record also establishes that the trench was not protected as required. It is undisputed the soil in the trench was not stable rock, and Dr. Alan Peck, the Secretary's soil expert, testified without rebuttal that an excavation directly above an existing sewer line would be in previously disturbed soil, which could be no better than Type B soil.³³ (Tr. 198, 202-03, 225). The standard requires that excavations in Type B soil be sloped at a maximum angle of 45 degrees or protected by other means such as shoring. The record shows that the

³³Soil Types A, B and C are defined in Appendix A of the standard, with Type A being the most stable soil type.

walls of the excavation were vertical and that no protection such as shoring was installed along the sides of the trench. (Tr. 92, 147, 182, 188, 277, 288).

In view of the foregoing, the Secretary has demonstrated the applicability of the cited standard and noncompliance with its terms. She has also demonstrated employee exposure to the violative condition, in that employees were working in the unprotected excavation and it was reasonably predictable they would be in the zone of danger. (Tr. 280-83, 287-88). Finally, the Secretary has demonstrated that Westar had actual knowledge of the violative condition. Mr. Reagan, the company president, was at the excavation site on July 16. (Tr. 276, 285-86). Moreover, during his interview with CO Coffey, Mr. Reagan acknowledged that he had been in the excavation; he also acknowledged that he had always considered an excavation of 5 to 6 feet as one which required shoring or sloping. (Ex. C-10). Based on the record, Westar was in violation of the cited standard on July 16, 1996.

Docket No. 97-226: Willful Citation 2, Item 1

This citation item also alleges a violation of 29 C.F.R. 1926.652(a)(1), as follows:

On or about 7/17/96, an employee was working laying sewer pipe in a trench that was 3.5 feet wide X 116 feet long X 7.5 feet deep which had vertical walls and no cave-in protective system had been provided.

This citation item relates to the area of the trench where the accident occurred on July 17. Although Westar contends otherwise, I find that the most reliable information in regard to the depth of this area of the trench is contained in Exhibits C-2 and C-3, the statements of Chad and James Loiodice; according to their statements, which they gave MPD within hours of the cave-in, the excavation was approximately 8 feet deep.³⁴ In crediting these statements, I note that they were made independently, that they corroborate each another, and that they appear very forthright. I also note that the statements describe the events leading up to the accident in great detail and that the descriptions are unchallenged in the record. Finally, I find

³⁴I find that these statements are more persuasive and outweigh the evidence that Westar contends would lead to a different conclusion, *i.e.*, that the plans called for the pipe to rise 1.55 feet in 70 feet and that the 10-foot-long trench box put into the trench after the accident was the same distance outside of the trench as it was inside. (R.Brief, pp. 29-30).

the statements to be trustworthy because both employees were present at the site that day. In particular, Chad Loiodice was operating the backhoe, and James Loiodice was standing at the top of the trench and looking down at what Mr. Reilly and Mr. Grenzhauser were doing. (Tr.159-60, 193-94). I am aware that neither brother was able to testify about the depth of the trench at the time of the trial.³⁵ However, this does not alter my opinion about the validity of their statements, especially since they are supported by circumstantial evidence such as the measurements made to the top of Mr. Reilly's boots after the accident and Mr. Reagan's concession that he was following CPA's plan for the project. (Tr. 33, 383; Ex. C-10).

As in the preceding item, the Secretary has met her burden of showing a violation of the standard. As noted *supra*, the soil in the trench was not stable rock, and the testimony of Dr. Alan Peck establishes that the previously-disturbed soil in that area could be no better than Type B. Dr. Peck also examined the soil samples taken from the trench walls after the accident. His analysis indicated that the soil was Type C, and he testified that the samples were representative, with a reasonable degree of scientific certainty, of the soil inside the excavation before it was flooded with water. (Tr. 202-03, 212-19, 227-29; Ex. C-6). The standard requires the walls of trenches with Type C soil to be protected by sloping at an angle of 34 degrees or by other means such as shoring. However, the record shows that the sides of the approximately 8-foot-deep trench were vertical and that no other protective means was in use. Moreover, at the time of the cave-in, Mr. Reilly and Mr. Grenzhauser were assembling pipe in the excavation. Finally, Westar had actual knowledge of the trench's condition, in that Mr. Reagan and Ray Countryman, Westar's foreman, had both been present at the site that day prior to the accident. (Tr. 39, 147-50, 158, 180, 188-89, 385; Ex. C-10). In view of the record, Westar was in violation of the standard on July 17, 1996.

The Willful Classification

³⁵I observed the respective demeanors of these individuals on the witness stand, and I conclude that their lack of memory and candor as they testified was due to factors such as the passage of time and bias-related influences.

A violation is willful if committed with intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). Thus, the focus of a willful classification is the employer's state of mind at the time of the violation. *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987); *Monfort of Colorado, Inc.*, 14 BNA OSHC 2055, 2062, (No. 87-1220, 1991). The Secretary must show the employer had a "heightened awareness" of the illegality of the conduct at issue. *Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1955 (No. 92-3788, 1997); *Williams Enter., Inc.*, 13 BNA OSHC at 1256-57. An employer who knows an employee is exposed to a hazard and fails to correct or eliminate the hazard commits a willful violation if the employer knows of the legal duty to act, in that the failure to act in the face of a known duty demonstrates the knowing disregard that characterizes willfulness. *See Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1613 (No. 87-2007, 1992); *A. Schonbek & Co.*, 9 BNA OSHC 1189, 1191 (No. 76-3980, 1980), *aff'd*, 646 F.2d 799, 800 (2d Cir. 1981); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541 (No. 86-360, 1992). The Secretary can also establish willfulness by showing that the employer had a state of mind such that, if informed of the duty to act, it would not have cared. *Morello*, 809 F.2d at 164.

The Secretary contends that the foregoing violations were willful because Respondent demonstrated a careless disregard of and plain indifference to employee safety. In this regard, she relies upon evidence indicating Mr. Reagan attended a seminar on excavation safety in February 1994 and his admission to CO Coffey that he knew cave-in protection was needed in trenches more than 5 feet deep. (Tr. 234-65; Ex. C-7, C-10). She also relies upon the responses of Mr. Reagan when CO Coffey asked why there was no protection in the trench; specifically, Mr. Reagan stated "I don't have a reason for that" and "I didn't see it as a life-threatening situation." (Ex. C-10). Finally, the Secretary relies on an alleged statement of Mr. Reagan that the excavation safety seminar was "just a bunch of bullshit." (Tr. 260).

My review of C-10, Mr. Reagan's statement, indicates he was not knowledgeable in the OSHA excavations standard, that he did not fail to act in the face of a known duty, and

that he did not have a heightened awareness the cited conduct was illegal.³⁶ His statement

³⁶ Ex. C-10 provides in pertinent part as follows:

Coffey: How long have you been familiar with OSHA?

Reagan: Um, I'm not real familiar with it even now. It's a big mystery I guess, or a big gray area exactly.

Coffey: Have you read articles in the newspaper about OSHA?

Reagan: You always see them whenever there's something happens, you never really hear anything when everything is going smooth. I mean. ***

Coffey: Have you ever read or are you knowledgeable of the excavation standard that went into effect in 1990. A new excavation standard, have you heard anything about that?

Reagan: Not really.

Coffey: Have you heard about any excavation rule or standard that OSHA has something to do with?

Reagan: Reading about other accidents and whatnot? I mean yeah. I don't really know any of them to quote you a rule or a chapter or verse. Ok.

Coffey: Sure at about what depth did you think that you should have sort of shoring or sloping or some sort of protective system.

Reagan: Um, we always considered 5 to 6 feet. ***

Coffey: So then we started ... Started at ... What I am getting at is you knew the excavation was 8 feet or 7 feet or 6 feet, why didn't, why didn't you have some sort of protective system in place?

Reagan: I guess we just didn't feel the safety, uh, we had a wide ditch and, we were, you know, everything was tight and it went in and out quick, we were working around a lot of utilities and we just didn't. ***

Coffey: I guess I'm a little bit curious is that we had an excavation there that is the same excavation that I looked at today and there is many feet of vertical walls that are maybe 3 feet wide, or maybe 2.5 to 3 feet and the sides are vertical for 6 to 7 feet, you know. I believe you stated earlier that you needed, you needed something at 5 or 6 feet and I guess what I was after is what was going through your mind is, you know, at 7 and 8 feet why weren't you providing some sort of protection? For your employees?

Reagan: I don't have a, I mean, I don't have a reason for that. ***

Coffey: Or seeing the OSHA manual or whatever? Have you ever attended any seminars or schools or anything that have to do with safety and health, have you seen any videos or anything like that?

Reagan: I attended the utility company seminar for underground markings, and ***

Coffey: UFPA people. ***

Reagan: Yeah, they came down here.

Coffey: But they talked about trenching and excavation?

Reagan: They were more talking about markings.

(continued...)

reveals no evidence that Mr. Reagan or anyone who worked for him was aware of what the excavations standard required. It also reveals he had never had an OSHA inspection before, and although he stated he believed he had the OSHA standards on site he was never able to locate them. I conclude that Mr. Reagan's interview with CO Coffey indicates his ignorance of the Act and the excavations standard. I also conclude that the Secretary, despite the above-noted testimony of several witnesses, has not shown by a preponderance of the evidence that Mr. Reagan actually attended the excavation safety seminar held in February 1994. Even if he did, the 20-minute presentation at the seminar, by Thomas Shield of the New York State Department of Labor, on which the Secretary especially relies, does not persuade me of Mr. Reagan's knowledge of OSHA's excavations standard. In fact, Exhibit C-8, a video of the presentation, does not discuss the 5-foot depth that triggers the standard's requirements, and Mr. Shield's own testimony indicates that his presentation made no reference to that depth. (Tr. 254-55). Equally unpersuasive is the Secretary's argument that Mr. Reagan's alleged statement about the seminar supports a finding of an attitude towards employee safety that

³⁶(...continued)

Coffey: Markings. And making sure that the underground utilities were identified before you dig? ***

Reagan: Right. That was. ***

Coffey: So, I guess what I'm looking at, and if this is not a fair statement I want you to tell me, you are the owner of a company or president of a company and you are looking at a trench that has your people working in it that has vertical sides - 8 to 7 to 6 feet deep and you didn't do anything at all, nothing registered as to, that we need protection, that this is a life-threatening situation.

Reagan: I didn't see it as a life-threatening situation at the time.

Coffey: You didn't even see it as a hazardous situation ?

Reagan: No, if I did I would have done something. I was there working, myself, the day before.

would rise to willful under the Act. Based on the record, the Secretary has not demonstrated that the violations at issue were willful.³⁷ The violations are therefore affirmed as serious.³⁸

Penalty Assessment

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and the employer's size, history and good faith. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J. A. Jones, supra*. I assess the severity of the violations in this case as high and the probability as greater, particularly in view of the fact that the unprotected trench at the site resulted in employee fatalities. I conclude that an adjustment for history is warranted; however, no credit for size or good faith is due in light of the high gravity of the violations and in order to achieve a deterrent effect.³⁹ A penalty of \$6,300.00 each is assessed for these citation items.

Docket No. 97-226: Serious Citation 1, Item 2

29 C.F.R. 1926.651(j)(2), the cited standard, provides as follows:

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

³⁷See *Branham Sign Co.*, 18 BNA OSHC 2132 (No. 98-752, 2000).

³⁸A violation is "serious" if there is "a substantial probability that death or serious physical harm could result." It is clear that a cave-in in an 8-foot-deep trench could cause, and did cause in this case, death or serious physical harm. See *DiGioia Bros. Excavating, Inc.*, 17 BNA OSHC 1181, 1183 (No. 92-3024, 1995). See also *Calang Corp.*, 14 BNA OSHC 1789, 1794 (No. 85-319, 1990).

³⁹Westar is a small company, with eight to ten employees.

are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The citation alleges as follows:

At the jobsite on or about 7/17/96, employees were working installing sewer piping in a trench which had near vertical sides, was approximately 116 feet long, 7.5 feet deep and 3.5 feet wide. The spoil from the excavation process was placed at the edge of the trench along the south wall.

The preamble to the standard states that its intent is to protect employees from materials, equipment and spoil piles that might fall into excavations. The preamble notes that “[o]bviously, materials such as excavated soil ... can superimpose loads on the walls of an excavation ... [that] can be the cause of cave-ins.” The preamble further notes that “employers who encounter site conditions that do not permit a 2-foot set-back must use retaining devices to prevent materials or equipment from falling into the excavation.” 54 Fed Reg. 45894, 45925 (1989).

The record establishes that the soil being removed from the trench was being placed along the length of the trench. (Tr. 187). Lieutenant Joseph Valentia testified that when he arrived at the site at 2:15 p.m., he could see only the northern edge of the trench; he said water was running out of that edge as the south side of the trench had soil piled on the edge. (Tr. 96). Detective Wagner testified that when he arrived at 3:05 p.m., rescue efforts were ongoing; he saw an area where it appeared that soil had fallen from the sides back into the trench, and he saw rocks and soil fall into the trench while he was there. Detective Wagner took photos of his observations. (Tr. 17-18, 25, 42-45, 50-53; Ex. R-A-D). CO Coffey also took photos of the spoil pile along the trench’s south side, and he testified that there was a “pretty large area” where the trench had caved in. (Tr. 315-16, 321, 388-89; Ex. C-9-A-B).

The foregoing testimony and photographic evidence clearly establishes that the spoil pile on the south side of the excavation was not 2 feet from the edge as required, and it is undisputed that no retaining devices were in use. The foregoing also establishes that the employees who were working in the excavation that day were exposed to the hazard of being struck by rocks or soil falling or rolling from the spoil pile into the trench. Mr. Reagan and

Mr. Countryman, Westar's foreman, were at the site that day, and the condition was in plain view; thus the Secretary has met her burden of showing that Westar had either actual or constructive knowledge of the condition. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-0862, 1993); *Dun-Par Eng'd Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986).

Based on the record, this citation item is affirmed. I find that it is properly classified as a serious violation, since rocks and soil falling into an excavation could result in injuries ranging from multiple fractures to death. In regard to an appropriate penalty, I find the severity of the violation to be high because of the nature of the injuries that could occur but the probability to be lesser since it was not as likely that injuries would occur. An adjustment for history is warranted, but no credit for size or good faith is due because of the high gravity of the violation. I conclude that a penalty of \$2,250.00 for this item is appropriate.

Docket Nos. 97-226 and 97-227: Serious Citations 1, Items 3

29 C.F.R. 1926.651(k)(1), the cited standard, provides as follows:

Daily inspections of excavations, the adjacent areas, and protective systems were not made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions.

The citations in Docket Nos. 97-226 and 97-227 allege, respectively, as follows:

At the jobsite on 7/17/96 an employee was allowed to work in a trench 3.5 feet wide X 116 feet long X 7.5 feet deep which had not been inspected by a competent person.

At the jobsite on or about 7/16/96, an employee was allowed to work in an 8 feet X 13 feet X 8 feet deep excavation which had not been inspected by a competent person.

29 C.F.R. 1926.650(b) defines a "competent person" as:

[O]ne who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

The preamble to OSHA's excavations standard sets out the qualifications of a "competent person" as follows:

In order to be a "competent person" for the purposes of this standard one must have had specific training in, and be knowledgeable about, soils analysis, the use of protective systems, and the requirements of this standard.

The record establishes that there was no competent person to perform inspections of the subject excavations on either July 16 or July 17, 1996. Mr. Reagan acknowledged that neither he nor his foreman, Mr. Countryman, had the training or knowledge necessary to be a competent person, and there is no evidence in the record that Westar hired anyone else to perform this function. (Tr. 392; Ex. C-10). The record also establishes that Westar's employees were in the cited excavations, that the conditions were in plain view and that Westar, had it exercised reasonable diligence, could have known of these conditions.

On the basis of the record, these citations items are affirmed, and they are properly classified as serious. The conditions presented cave-in hazards that could have caused serious injuries or fatalities. The severity of the conditions was high due to the nature of the possible injuries, and the probability was greater in view of the cave-in that did in fact occur on July 17. As in the foregoing items, an adjustment for history is warranted, but no credit for size or good faith is appropriate. A penalty of \$6,300.00 each is assessed for these two items.

Docket No. 97- 227: Serious Citation 1, Items 1 and 2

Item 1 alleges a violation of 29 C.F.R. 1926.21(b)(2), which provides that:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Item 1 alleges a violation of 29 C.F.R. 1926.21(b)(2), as follows:

At the jobsite on or about 7/16/96 employee(s) did not receive instruction in the recognition of hazards associated with flagging vehicular traffic.

The Commission recently addressed this standard in *O'Brien Concrete Pumping, Inc.*, 18 BNA OSHC 2059, 2061 (No. 98-0471, 2000), and stated the following:

To prove a violation of § 1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on “(1) how to recognize and avoid the unsafe conditions which they may encounter on the job and (2) the regulations applicable to those hazardous conditions.” *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1020 (No. 94-200, 1997); *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1619 (No. 89-2019, 1992).

The record establishes that Frank Malloy, an employee of Westar at the time, flagged traffic on July 16 at the intersection of North Street and Low Avenue to divert vehicles from North Street due to the construction work taking place. The record also establishes that Westar did not instruct him in how to recognize and avoid unsafe conditions or about the regulations applicable to flagging vehicular traffic. (Tr. 286-87, 291-95, 372). Applicable OSHA standards require that signaling directions by flagmen conform to the Manual on Uniform Traffic Control Devices for Streets and Highways, ANSI Standard D6.1-1971, and that flagmen be provided with and wear warning vests while flagging. *See* 29 C.F.R. 1926.201(a)(2)-(4). In doing this work, Mr. Malloy was exposed to the hazard of being struck by traffic. Westar had knowledge of the condition, as Mr. Reagan assigned Mr. Malloy the job and drove by him two to three times while he was flagging traffic. (Tr. 293-94).

Item 2 alleges a violation of 29 C.F.R. 1926.201(a)(4), which provides that:

Flagmen shall be provided with and shall wear a red or orange warning garment while flagging. Warning garments worn at night shall be of reflectorized material.

Item 2 alleges a violation of 29 C.F.R. 1926.201(a)(4), as follows:

At the jobsite on or about 7/16/96 at the intersection of North Street & Low Avenue, an employee who was flagging traffic was not provided with an orange warning garment.

The record shows Frank Malloy was not provided a red or orange warning garment on July 16 and that he wore only a dark blue T-shirt and blue jeans. As noted above, Mr. Reagan assigned Mr. Malloy the job and drove by him two to three times that day. (Tr. 294).

The record establishes the alleged violations, and the violations were appropriately classified as serious. The failure to instruct Mr. Malloy and the further failure to provide him with a warning garment exposed him to the hazard of being struck by vehicular traffic, which

could have caused serious bodily injury or death. I assess the severity of these items as high, due to the nature of the possible injuries, and the probability as lesser as the traffic in the subject location was traveling relatively slowly and was not coming from behind him. An adjustment for history is warranted, but no credit for size or good faith is due because of the high gravity of the violations. A penalty of \$2,250.00 each is assessed for these items.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing, it is hereby ORDERED that:

Docket No. 97- 226

1. Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. 1926.100(a), is VACATED.

2. Item 2 of Citation 1, alleging a serious violation of 29 C.F.R. 1926.651(j)(2), is AFFIRMED, and a penalty of \$2,250.00 is assessed.

2. Item 3 of Citation 1, alleging a serious violation of 29 C.F.R. 1926.651(k)(1), is AFFIRMED, and a penalty of \$6,300.00 is assessed.

4. Item 1 of Citation 2, alleging a willful violation of 29 C.F.R. 1926.652(a)(1), is AFFIRMED as a serious violation, and a penalty of \$6,300.00 is assessed.

5. Items 1 and 2 of Citation 3, alleging “other” violations of 29 C.F.R. 1910.1200(e)(1) and 29 C.F.R. 1910.1200(h), are VACATED.

Docket No. 97-227

1. Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. 1926.21(b)(2), is AFFIRMED, and a penalty of \$2,250.00 is assessed.

2. Item 2 of Citation 1, alleging a serious violation of 29 C.F.R. 1926.201(a)(4), is AFFIRMED, and a penalty of \$2,250.00 is assessed.

3. Item 3 of Citation 1, alleging a serious violation of 29 C.F.R. 1926.651(k)(1), is AFFIRMED, and a penalty of \$6,300.00 is assessed.

4. Item 1 of Citation 2, alleging a willful violation of 29 C.F.R. 1926.652(a)(1), is AFFIRMED as a serious violation, and a penalty of \$6,300.00 is assessed.

5. Items 1 and 2 of Citation 3, alleging “other” violations of 29 C.F.R. 1910.1200(e)(1) and 29 C.F.R. 1910.1200(h), are VACATED.

/s/

Covette Rooney
Judge, OSHRC

Dated: July 21, 2000
Washington, D.C.