

SECRETARY OF LABOR,

Complainant,

v.

RAWSON CONTRACTORS, INC.,

Respondent.

OSHRC Docket No. 99-0018

DECISION

Before: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

This case arose out of an inspection by two compliance officers of the Occupational Safety and Health Administration (“OSHA”) of a Rawson Contractors, Inc. (“Rawson”) work site on June 18, 1998. The compliance officers were driving along Cold Spring Road in Greenfield, Wisconsin, when they noticed a large spoil pile near 47th Street. They stopped at the work site and observed two employees working inside a trench approximately 20 feet deep. The walls of the trench were nearly vertical, but the employees in the trench were not protected against the effects of a cave-in. In addition, there was a tree located a foot from the edge of the trench, and the roots of the tree extended into the side wall of the trench.

Based on these conditions, OSHA cited Rawson among other things for a willful violation of 29 C.F.R. § 1926.652(a)(1) and a serious violation of 29 C.F.R. § 1926.651(a). Rawson contested the citations. A hearing was held before Administrative Law Judge Robert A. Yetman, who affirmed both violations and assessed a total penalty of \$41,500 for the two violations. For the reasons set forth below, we affirm the judge’s decision as to both violations but reduce the total penalty assessed to \$21,500.

Background

On the day of the inspection, Rawson was installing a steel-reinforced concrete buttress to protect a water main. Rawson employees performed most of the work from outside the trench and from a 4-foot and an 8-foot trench box set on top of each other inside the trench. When the employees reached the southeast corner of the trench, they could not complete the installation because the reinforcement bars (“rebars”) and wood forms would not fit inside the trench with the trench box in place. Rawson’s foreman, who also was the designated competent person on site, had the trench boxes removed and sent two employees into the unprotected trench to complete the installation. He did so knowing it was contrary to company policy and OSHA’s regulations. After the OSHA inspection, Rawson disciplined the foreman giving him a 3-day suspension without pay.

Alleged Violation of 29 C.F.R. § 1926.652(a)(1)

The evidence is clear that the trench configuration did not comply with the terms of section 1926.652(a)(1).¹ The trench was approximately 20 feet deep, and had nearly vertical walls — the north wall consisting of Type A soil and the south wall consisting of Type B soil. The trench lacked any of the protective systems referred to in the standard. At issue on review is whether the Secretary established that Rawson had the requisite

¹ That standard provides:

§ 1926.652 Requirements for protective systems.

- (a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
- (i) Excavations are made entirely in stable rock; or
 - (ii) Excavations are less than 5 feet (1.54m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

knowledge of the violation and whether the violation was willful.² We answer both questions in the affirmative.

On the issue of knowledge, Rawson in essence argues that the foreman, an hourly-paid union employee with no vacation and holiday benefits, is too remote from management to have his knowledge imputed to Rawson. In support of its argument, Rawson points out that the foreman has neither the title of supervisor nor the authority to hire or fire employees. However, this argument is inherently flawed and, equally significant, ignores a critical responsibility bestowed by the employer upon the foreman.

Taking the latter point first, we find decisive significance in the fact that the foreman was Rawson's designated competent person on site — a designation for which to qualify he received substantial additional training and which among other things meant that he was responsible for compliance with OSHA regulations.³ As the on-site competent person assigned and authorized by the company, it was the foreman's duty to identify and take prompt corrective measures to eliminate hazards.

In addition, our precedents establish that job titles are not controlling and that the power to hire and fire is not the *sine qua non* of supervisory status, which can be established on the basis of other indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf. See *Iowa S. Utilities Co.*, 5 BNA OSHC 1138, 1139, 1977-78 CCH OSHD ¶ 21,612, p. 26,945 (No. 9295, 1977)

²To establish a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence: (1) that the cited standard applies; (2) noncompliance with the terms of the standard; (3) employee exposure or access to the hazard created by the noncompliance; and (4) that the employer knew, or with the exercise of reasonable diligence could have known, of the condition. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The first three elements of the Secretary's *prima facie* case are not disputed.

³A competent person is defined for purposes of excavations as “one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.” 29 C.F.R. § 1926.650(b).

(substance of an employer's delegation of authority over other employees is of primary importance when determining if knowledge can be imputed to the employer); *Dover Elevator Co., Inc.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993) (for purposes of imputing knowledge, substance of delegation of authority is controlling, not employee's formal title). Here, the judge found that the foreman was assigned by Rawson to supervise the work activities of his crew, to take all necessary steps to complete job assignments, and to ensure that the work was done in a safe manner. Thus, the fact that the foreman was not formally designated a supervisor and that he did not have the authority to hire and fire employees does not diminish either his status as the on-site competent person or the other indicia of supervisory authority that he clearly possessed.

Accordingly, we find the foreman's knowledge is properly imputed to Rawson. See *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 373 (7th Cir. 1997) (foreman's conduct as the competent person was properly imputed to the employer); *Dover Elevator*, 16 BNA OSHC at 1286, 1993-95 CCH OSHD at p. 41,480 (supervisor's knowledge is imputable to employer); *Propellex Corp.*, 18 BNA OSHC 1677, 1679-80, 1999 CCH OSHD ¶ 31,792, p. 46,589 (No. 96-0265, 1999) (knowledge of bargaining unit leadperson who did not consider herself to be a management supervisor and could not hire and fire was imputed to employer); *Kern Bros. Tree Serv.*, 18 BNA OSHC 2064, 2068-69, 2000 CCH OSHD ¶ 32,053, pp. 48,004-05 (No. 96-1719, 2000) (knowledge of crew leader who was responsible for seeing that the work was done safely and properly was imputed to employer even though he had no authority to actually discipline an employee).

Rawson also argues that the item should be vacated because the foreman's actions were a result of unpreventable employee misconduct. To establish this affirmative defense, the employer must show that it: (1) has established work rules designed to prevent the violation; (2) has adequately communicated the rules to its employees; (3) has taken steps to discover violations of the rules; and (4) has effectively enforced the rules

when violations were detected. *Propellex*, 18 BNA OSHC at 1682, 1999 CCH OSHD at p. 46,589. *See also Dover Elevator*, 16 BNA OSHC at 1286-87, 1993-95 CCH OSHD at p. 41,480. Reviewing the record evidence on these factors, we find that Rawson has not established the affirmative defense.

The record shows that Rawson had work rules designed to prevent the violation. Rawson's "Safety Handbook" provides that "[e]mployees working in excavations or trenches must always stay within the protective system (trench shield, shoring, sloping)." The handbook further provides that "[w]alls and faces trenched 5 feet or more in depth and all excavations in which employees are exposed to danger from moving ground or cave-in must be guarded by shoring, sloping or benching." Rawson adequately communicated these rules to its foreman who testified that he knew both the company's rules and OSHA's requirements for trenching. He had attended a competent person class and refresher classes where he learned about OSHA trenching requirements. He also gave toolbox talks to other employees on excavations and trenching. The record further shows that Rawson took reasonable steps to discover violations of its work rules. Rawson's president testified that he made regular visits to the company's work sites, including a visit to the subject work site on the morning of the inspection. Rawson also hired an outside consultant who made more than 100 unannounced safety visits to Rawson worksites over a period of five years. The foreman testified that the outside consultant had visited his work sites 10-15 times and found only minor violations.

Rawson, however, has failed to show that it enforced its work rules when violations were discovered. Rawson's "Written Disciplinary Action Policy and Procedures for Safety Violations" provides for progressive discipline only for "minor" violations, but the evidence does not show that there was any progressive discipline. The foreman testified that he had never been disciplined for the minor violations discovered by the outside consultant. Rawson's president testified that employees have been disciplined, and even "written up," but he could not recall nor provide any evidence of such discipline. We agree with the judge that Rawson's argument fails without any

specific evidence to corroborate its assertion that employees were disciplined. Based on this void in the evidence, we find that Rawson has failed to demonstrate that the violation was the result of the foreman's unpreventable employee misconduct.

The judge affirmed the Secretary's characterization of the violation as willful. A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Great Lakes Packaging Corp.*, 18 BNA OSHC 2138, 2140-41, 2000 CCH OSHD ¶ 32,094, p. 48,186 (No. 97-2030, 2000), *citing Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHD ¶ 30,059, p. 41,330 (Nos. 89-2883 and 89-3444, 1993). It is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *Great Lakes*, 18 BNA OSHC at 2141, 2000 CCH OSHD at p. 48,186, *citing General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991).

Here, the Secretary has established that Rawson's foreman acted with conscious disregard of the requirements of the standard. The foreman, who had been trained as a competent person to identify trenching hazards and was authorized to eliminate them, admitted that he knew the condition was in violation of OSHA standards when he made the decision to remove the trench boxes and send employees into the trench. By knowingly disregarding the requirements of the Act, the foreman willfully violated the trenching standard. *See Globe Contractors*, 132 F.3d at 373 (willful violation based on competent person's plain indifference to violations of OSHA standard, which is attributable to employer).

Good faith efforts at compliance can negate willfulness provided that they were objectively reasonable under the circumstances. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541, 1991-93 CCH OSHD ¶ 29,617, p. 40,104 (Nos. 86-360 and 86-469, 1992). The record shows that in many respects Rawson had a good safety program for the construction industry. It had rules governing the conditions cited here and communicated

the rules to its employees, in particular to the foreman. Rawson also hired an outside consultant to monitor compliance with its safety rules. However, in the absence of any evidence that Rawson enforced those safety rules prior to the events of this case, we find that its efforts were insufficient to negate willfulness and affirm the cited violation as willful.

Alleged Violation of 29 C.F.R. § 1926.651(a)

The Secretary alleged that the tree located near the edge of the trench presented a hazard to Rawson's employees in violation of the requirements of section 1926.651(a).⁴ At issue on review is whether the Secretary has carried her burden of establishing a violation of the standard. As the judge noted, the language of the cited standard by its own terms requires proof of exposure to a hazard before compliance with the standard is required. *See Rockwell Int'l Corp.*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶ 24,979 (No. 12470, 1980). Section 1926.651(a) requires that precautions be taken "as necessary" to safeguard employees from surface encumbrances which are located so as to create a hazard. Therefore, the Secretary must prove that the cited tree was located so as to create a hazard to employees.

We agree with the judge that the Secretary has carried that burden. The tree was located on the north side of the trench in Type A soil. Rawson's outside consultant acknowledged that, in the event of a cave-in, the cited tree would collapse with the soil and fall into the trench. As the judge correctly noted, in enacting the trenching standards, OSHA recognized that trenches in Type A soil require sloping and/or shoring because such soils pose cave-in hazards. Rawson admitted that the north wall of the trench did not comply with OSHA standards, and it therefore posed a danger of collapse or cave-in.

⁴That standard provides:

§ 1926.651 Specific excavation requirements.

(a) *Surface encumbrances.* All surface encumbrances that are located so as to create a hazard to employees shall be removed or supported, as necessary, to safeguard employees.

In addition, the location of the tree posed a hazard to employees working in the unprotected trench. The record also shows that Rawson had knowledge of the condition through its foreman.

In sum, the Secretary has established the elements of a violation: that the standard applied; that its terms were not met; that employees were exposed to the hazard; and that Rawson knew of the hazard. We also agree with the judge's finding that the violation was serious. Clearly, death or serious physical harm could result in the event an accident took place. Accordingly, we affirm the cited violation as serious.⁵

Penalty

The judge assessed a penalty of \$40,000 for the trenching violation⁶ and assessed the Secretary's proposed penalty amount of \$1,500 for the violation involving the tree. The Commission, pursuant to section 17(j) of the Act, 29 U.S.C. § 666(j), must give due consideration to four factors in assessing penalties: (1) the size of the employer's business; (2) the gravity of the violation; (3) the employer's good faith; and (4) the employer's prior history of OSHA violations. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). Rawson is a small employer with approximately 45 employees. Rawson has a previous history of

⁵In its Petition for Discretionary Review, Rawson argues for the first time that the tree violation is duplicative. Under Commission Rule 92(c), 29 C.F.R. § 2200.92(c), the Commission will normally not review an issue that was not argued before the judge. *See, e.g., Peavey Co.*, 16 BNA OSHC 2022, 2025 n.6, 1993-95 CCH OSHD ¶ 30,572, p. 42,323 n.6 (No. 89-2836, 1994). We decline to review Rawson's argument here. Even if we were to consider it, we note that violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in the abatement of the other item as well. *Flint Eng. & Constr. Co.*, 15 BNA OSHC 2052, 2056-57, 1991-93 CCH OSHD ¶ 29,923, p. 40,855 (No. 90-2873, 1992). Neither of those circumstances is present here.

⁶The Secretary grouped two willful violations (Citation 2, Items 1a and 1b) for penalty purposes and proposed a penalty of \$49,000. The judge affirmed one of these violations (§1926.652(a)(1)), and he vacated the other violation, which is not on review.

violating the same trenching standard.⁷ As to gravity, two employees were exposed to the hazardous condition for about an hour to ninety minutes. For the trenching violation, the likelihood of an accident and the severity of injuries were both high because of the depth of the trench. For the tree violation, the probability of an accident appears lower (since the tree was located on the side of the trench with Type A soil), but the severity of injuries remains high.

We note the steps that Rawson has taken to provide a safe work environment. Employees are trained through courses conducted by trade associations and Rawson's outside safety consultant. Employees also attend a yearly all-inclusive safety meeting and weekly toolbox talks. Some employees, including foremen, attend courses to become certified as competent persons. Foremen also attended additional monthly meetings. Along with its president's regular work site visits, Rawson took the additional step of hiring an outside consultant to monitor compliance with its safety rules by making unannounced visits to its work sites. Based on these efforts, we find that Rawson is entitled to some credit for good faith.

For these reasons, we find that a penalty of \$20,000 is appropriate for the willful violation of § 1926.652(a)(1). We further find the judge's assessment of a \$1,500 penalty for the serious violation of § 1926.651(a) to be appropriate.

⁷ In 1993, Rawson was cited for allowing two employees to work in an 8-foot deep trench without adequate protection. The citation was affirmed by an administrative law judge and upheld by the Seventh Circuit Court of Appeals. *Rawson Contractors, Inc.*, 16 BNA OSHC 1759, 1993-95 CCH OSHD ¶ 30,409 (No. 93-1759, 1994) (ALJ), *aff'd without published opinion*, 43 F.3d 1474 (7th Cir. 1994).

Order

Accordingly, the judge's decision finding a willful violation of 29 C.F.R. §1926.652(a)(1) and a serious violation of 29 C.F.R. § 1926.651(a) is affirmed, and a total penalty of \$21,500 is assessed.

SO ORDERED.

/s/

W. Scott Railton
Chairman

/s/

Thomasina V. Rogers
Commissioner

/s/

James M. Stephens
Commissioner

Dated: April 4, 2003

SECRETARY OF LABOR,

Complainant,

v.

RAWSON CONTRACTORS, INC.,

Respondent.

OSHRC DOCKET NO. 99-0018

APPEARANCES:

For the Complainant:

Steven E. Walanka, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

Mark M. Camp, Esq., Pfannerstill and Camp, Wauwatosa, Wisconsin

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Rawson Contractors, Inc. (Rawson), at all times relevant to this action maintained a place of business at Hales Corner, Wisconsin, where it was engaged in the construction business. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act. (Tr. 16). On June 18, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Rawson's worksite located at Greenfield, Wisconsin. As a result of that inspection, Rawson was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Rawson brought this proceeding before the Occupational Safety and Health review Commission (Commission). After a hearing on the merits, the parties submitted briefs on the issues and the matter is ready for disposition.

Background

On June 18, 1998 Respondent was engaged in installing a steel reinforced concrete buttress along the outside of a 45 degree bend in a 54" underground water main. The pipeline had been installed three weeks prior to the June inspection (Tr. 323) by Respondent pursuant to a contract with the city of Milwaukee, Wisconsin. The purpose of the buttress is to prevent the pipe from shifting or bursting when pressurized water is introduced to the system. Respondent's foreman, Mark Tranberg, and his crew excavated a trench accessing the pipeline (Tr. 327). Although there are varying

estimates regarding the depth of the pipeline below the surface, there is general agreement that the trench was approximately twenty feet deep. Blueprints supplied by the city of Milwaukee placed the pipe at a depth of 24 feet six inches below the surface (Tr. 183,189, Exh. C-37,C-38) and compliance officers at the site measured the depth to be 25 feet at the northeast end of the excavation (Tr. 179). Mr. Tranberg, however, stated that the depth of the trench was 19 feet (Tr. 337).

Upon digging the trench and exposing the pipeline, Tranberg and his crew placed two trench boxes in the trench to protect employees working in the trench. One trench box was 24 feet long, eight feet high and eight feet wide (Tr. 342). A second trench box which was four feet high and eight feet long, was placed on top of the first box providing walls twelve feet high on each side of the pipe (Tr. 342). Tranberg and his crew attempted to place the wood forms for the concrete buttress and the reinforcement bars in place; however, the trench boxes prevented the employees from completing the task (Tr. 349-350). At that point, Tranberg ordered that the trench boxes be removed and directed two of his crew members, Brown and Vnuk, to enter the trench and complete the placement of the forms and the rebars (Tr. 347-351).

Compliance officers Nishiyama-Atha (Atha) and Brooks arrived at the worksite while the employees were working inside the unprotected trench. They testified that the excavation ran in a north-south direction and the north wall had a clay-like appearance with some gravel and was essentially vertical with a slight slope back at the top of the wall (Tr. 42-43). The south wall was also sloped somewhat at the top and consisted of previously disturbed soil (Tr. 42,43,59,155,175). Some sloughing and fissuring of the soil was also observed (Tr. 63). By visual observation, the compliance officers classified the trench wall soils as type B and C (Tr., 85,204).⁸

⁸ Appendix A to 29 CFR 1926.652 defines type B and C soils as follows:

Type B means:

- (i) Cohesive soil with an unconfined compressive strength greater than 0.5 tsf (48 kPa) but less than 1.5 tsf (144 kPa); or
- (ii) Granular cohesionless soils including: angular gravel (similar to crushed rock), silt, silt loam, sandy loam and, in some cases, silty clay loam and sandy clay loam.
- (iii) Previously disturbed soils except those which would otherwise be classed as Type C soil.
- (iv) Soil that meets the unconfined compressive strength or cementation requirements for Type A, but is fissured or subject to vibration; or
- (v) Dry rock that is not stable; or
- (vi) Material that is part of a sloped, layered system where the layers dip into the excavation on a slope less steep than four horizontal to one vertical (4H:1V), but only if the material would otherwise be classified as Type B.

Type C means:

- (i) Cohesive soil with an unconfined compressive strength of 0.5 tsf (48 kPa) or less; or
- (ii) Granular soils including gravel, sand, and loamy sand; or
- (iii) Submerged soil or soil from which water is freely seeping; or
- (iv) Submerged rock that is not stable, or
- (v) Material in a sloped, layered system where the layers dip into the excavation on a slope of four horizontal to one vertical (4H:1V) or steeper.

Foreman Tranberg testified that he knew that the trench did not comply with safety regulations and should have been sloped or provided with appropriate shoring (Tr. 333,401,460,473). However, in his opinion, he could not install the southeast corner of the rebar and finish erecting the concrete forms with the trench boxes in place (Tr. 347,348,358). Moreover, Tranberg maintained that the north wall of the trench was type A soil.⁹ Tranberg's assertion was supported by the testimony of Harry Butler, a professional civil engineer and safety consultant hired by Respondent to test the soils. Butler's conclusion is based upon penetrometer, shear torvane and thumb tests performed on the undisturbed soil of the north wall one day after the OSHA inspection.¹⁰ Both Tranberg and Butler acknowledged, however, that a trench dug in type A and B soils should have the trench walls sloped or shored to comply with OSHA regulations (Tr. 333,401,460,473).

Alleged Violation of §1926/651(a)

Serious citation 1, item 1 alleges:

29 CFR 1926.651(a): All surface encumbrances that were located so as to create a hazard to employees were not removed or supported, as necessary, to safeguard employees.

- (a) A large tree that was 16" from the edge of the trench was not supported to prevent a cave-in.

Facts

CO's Atha and Brooks testified that they observed a large unsupported tree approximately 14 inches in diameter in close proximity to the north edge of the Rawson trench, with severed roots extending into the excavation (Tr. 74,174,207; Exh. C-14). Atha believed that the weight of the tree

⁹ Type A soil is defined as follows:

Type A means cohesive soils with an unconfined compressive strength of 1.5 ton per square foot (TSF) (144 kPa) or greater. Examples of cohesive soils are: clay, silty clay, sandy clay, clay loam and, in some cases, silty clay loam and sandy clay loam. Cemented soils such as caliche and hardpan are also considered Type A. However, no soil is Type A if:

- (I) The soil is fissured; or
- (ii) The soil is subject to vibration from heavy traffic, pile driving, or similar effects; or
- (iii) The soil has been previously disturbed; or
- (iv) The soil is part of a sloped, layered system where the layers dip into the excavation on a slope of four horizontal to one vertical (4H:1V) or greater; or
- (v) The material is subject to other factors that would require it to be classified as a less stable material.

¹⁰ CO Brooks took three soil samples from spoil pile at the site, which were sent to OSHA's Salt Lake City laboratory for analysis (Tr. 138-39,204,206). Alan Peck, a physical scientist for the U.S. Department of Labor, conducted tests on the soil samples submitted by CO Brooks (Tr. 261, Exh. C-47 through C-50). Peck testified that the first sample consisted of 16% gravel, 36% sand and gravel, and 64% silt and clay, a cohesive sandy clay (Tr. 265-66). Peck classified the sample as Type B because it broke up easily when disturbed (Tr. 266, Exh. C-48). The second sample was classified as a Type C sandy gravel (Tr. 270, Exh. C-49). The third sample was classified as a Type B sandy clay (Tr. 271; Exh. C-50).

Peck testified that it is standard procedure to obtain soil samples from the spoil pile, and that generally they are considered representative of the soil excavated from a trench (Tr. 276). Here, however, the testimony establishes that the soil *excavated* may not have been representative of the undisturbed soils comprising the north trench wall.

bearing on the trench wall could cause the unsupported wall to collapse, causing the tree to fall into the trench resulting in the injury or death of employees in the trench (Tr. 75,76). Brooks likewise testified that instability of the soil might cause the trench wall to collapse (Tr. 207). As noted above, Atha testified that the north wall of the trench was vertical for most of its height, though it was sloped slightly at the top (Tr. 42-43). Although neither compliance officer observed any soil sloughing off the north side of the trench, Brooks testified that utilities had been installed close to the tree; thus, the soil on the north side had been previously disturbed (Tr. 208). Both Atha and Brooks classified the soil in the trench as Types B and C, based on their observations (Tr. 85,204). Respondent, however, maintains that the north side of the trench was composed of Type A soils (Tr. 331-32). Tests performed by Rawson's expert, Harry Butler, on the undisturbed soil at the site confirm that the soil comprising the north side of the trench was Type A cohesive clay with an unconfined compressive strength in excess of 3 tons per square foot (Tr. 454-57).¹¹ Moreover, Foreman Tranberg testified that they had not cut any of the cited tree's structural roots; therefore, he did not believe the tree would fall (Tr. 376). Butler also testified that he did not believe that the tree posed a hazard to employees in the trench because its root structure was not significantly damaged (Tr. 453). Butler admitted, however, that in the unlikely event that the north side of the trench failed, the tree would have gone with it (Tr. 453,458).

Discussion

The cited standard provides:

(a) *Surface encumbrances*. All surface encumbrances that are located so as to create a hazard to employees shall be removed or supported, as necessary, to safeguard employees.

Most occupational safety and health standards include requirements or prohibitions that by their terms must be observed whenever specified conditions, practices or procedures are encountered. These standards are predicated on the existence of a hazard when their terms are not met. Therefore, the Secretary is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation. *Austin Bridge company*, 7 BNA OSHC 1761, 1979 CCH OSHD ¶23,935 (76-93, 1979). Certain standards, however, contain requirements or prohibitions that by their terms need only be observed when employees are exposed to a hazard described generally in the standard. *See, Rockwell International Corporation*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶24,979 (No. 12470,

¹¹ OSHA soil testing is of little or no use in determining whether the cited tree posed a hazard to employees. OSHA's witness, Peck, admitted that a soil's compressive strength cannot be determined by testing disturbed, dried spoils because unconfined compressive strength differs with moisture content (Tr. 273,283-287). Peck stated that compressive strength tests must be performed on undisturbed soil, and that he did not perform such tests (Tr. 279,287). Moreover, it is clear that the soil on the north and south walls of the trench differed greatly, and it was not determined from which side of the trench the soil samples originated.

1980) [in order for the Secretary to prove a violation of §1910.212(a)(3)(ii), she must establish that the operation of the machine exposed employees to injury]; *Pratt & Whitney Aircraft v. Donovan and OSAHRC*, 715 F.2d (2nd Cir. 1983)) [To show violation of §1910.94(d)(7)(iii) Secretary must show that substances cited, either alone or in combination, pose significant fire, explosion or chemical reaction hazard]. Section 1926.651(a), the standard cited here, is of the latter type. By its own terms, the standard requires that precautions be taken "as necessary" to safeguard employees. In order to prove a violation, therefore, the Secretary must prove that the cited tree was located so as to create a significant hazard to employees.

The Secretary has met that burden. In enacting trenching regulations that require the sloping and/or shoring of type A soils, OSHA recognizes that such soils pose cave-in hazard. Rawson has admitted that the north wall of its trench did not comply with OSHA regulations, and so posed a danger of collapse. Rawson further acknowledged, through its expert, Butler, that should a cave-in occur, the cited tree would collapse with the soil and fall into the trench. Thus, the location of the tree posed a hazard to employees working in the unshored trench. Accordingly the violation is affirmed.

Penalty

With respect to the penalty, the statutory requirements are applied as follows; Rawson is a medium sized company, with approximately 45 employees (Tr. 519). Two employees were exposed to the hazard posed by the unsupported tree for approximately 1/2 hour. Although Butler testified that with the shields in place, there was no danger to employees (Tr. 459-60), the probable injuries the employees would have suffered without shields in the event of a trench wall collapse would be severe, from contusions up to and including death. The violation was correctly classified as "serious," because if a collapse were to occur, and employees were struck by the tree, there would be a substantial probability that death or serious physical harm would result. Because of the gravity of the violation, the penalty proposed by the Secretary in the amount of \$1,500.00 is appropriate, and is assessed.

Alleged Violation of §1926.651(b)(4)

Serious citation 1, item 2 alleges:

29 CFR 1926.651(b)(4): While the excavation was opened, underground installations were not protected, supported or removed as necessary to safeguard employees.

(a) Metal storm sewer line and PVC sewer line was not supported, protected or removed as necessary to prevent the line from falling into the work area or causing a cave-in.

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

Facts

While excavating the cited trench, Rawson exposed a 15" or 18" corrugated metal sewer drain pipe or culvert (CMP) , and a 6" PVC pipe. The pipes ran from the north to the south wall of the trench (Tr. 43,60,174,209, Exh. C-3, C-6,C-11) and neither pipe was supported in the trench (Tr. 76; Exh. C-3). Two employees in the trench were observed walking under the unsupported pipes as they exited the trench (Tr. 79). The length of the exposed pipes was approximately 20 feet (Tr. 213). CO Atha opined that where, as here, more than five feet of pipe is exposed, the pipe can collapse under its own weight (Tr. 77-78). He also stated that an employee struck by a collapsing pipe could suffer broken bones, contusions, and/or death (Tr. 79). In addition, CO Brooks stated that soil released when the pipe collapsed or the contents of the pipe itself, could pose a potential hazard to exposed employees (Tr. 213,218). According to CO Ather, the PVC pipe, in particular, was in danger of collapsing because it consisted of two separate sections of pipe held together near the center of the trench by a "Fernco" joint section, a rubber boot with hose clamps that secure it to the pipe on either side (Tr. 78,212,226; Exh. C-11). A Fernco is used to repair a broken pipe, or, in this case, form a bend in the pipe (Tr. 210-11,367). Brooks testified that he had experience with Ferncos pulling away from, and slipping off the pipes they were holding together (Tr. 209,217). He also stated that he noticed dark areas in the soil under the Fernco joint and expressed his opinion that the 6" PVC was leaking at that point (Tr. 212; Exh. C-13), although he did not know the purpose of the pipe (Tr. 253).

Mark Tranberg testified that the PVC pipe was a roof drain for the adjacent apartment building; thus, the only time the pipe would have anything in it was when it rained (Tr. 368,370). Tranberg stated that each section of PVC is 13 feet long, weighs two pounds (Tr.368) and was supported by a three to four foot bench on the north side of the excavation and embedded five to six feet into the south wall (Tr. 369). Harry Butler testified that he would be concerned about a Fernco joint, which is a weak link in a joined pipe; however, the hazard depended on the totality of the circumstances (Tr. 448). Butler did not believe that the 6" PVC pipe cited was a hazard because it is very light weight, and was embedded on both ends (Tr. 452). Furthermore, Mr. Tranberg stated, without contradiction, that the corrugated metal pipe was an abandoned storm drain (Tr. 364). He testified that the standard length is 20 feet, and approximately five feet of pipe were embedded at each end (Tr. 365-67). Brooks and Atha acknowledged that the corrugated steel pipe appeared to be in excellent condition and demonstrated no sagging (Tr. 140,216-17).

Discussion

The cited standard provides:

While the excavation is open, underground installations shall be protected, supported or removed as necessary to safeguard employees.

The cited standard, by its own terms requires that the described measures be taken only "as necessary to safeguard employees." In order to prevail, therefore, Complainant must establish that the unsupported and exposed pipes posed a hazard to employees working in the trench. The evidence fails to support that conclusion.

The evidence establishes that, at the time of the OSHA inspection, neither of the cited pipes were in use. Although approximately 20 feet of the pipes were exposed and unsupported, CO Atha was unaware of any standard practice in the construction industry establishing how much of the pipe must be exposed to create a hazard to employees and requiring support (Tr. 143-44). Both Brooks and Atha agreed that the corrugated pipe was firmly embedded in the trench walls at both ends and appeared to be in good shape. Similarly, the roof drain pipe was firmly embedded in each wall of the trench and, weighing two pounds, was unlikely to collapse of its own weight. The testimony is un rebutted that both pipes were empty. Moreover, there is no evidence in this record establishing the extent to which either pipe must be unsupported in order to present a hazard to employees. Although there is testimony that the manufacturer of the pipes could provide that information, no attempt was made by the Secretary to contact the manufacturers to determine the point at which unsupported pipe creates a hazard. Accordingly, since the Secretary has failed to establish a hazard, the citation must be vacated.

Alleged Violation of §1926.652(a)(1)

Willful citation 2, item 1a alleges:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(I) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal).

- (a) Employees working in a 25 feet deep trench were not protected from cave-ins with a protective system.

Discussion

Rawson does not dispute the existence of the cited violation. Rawson's foreman, Tranberg, admitted that he knowingly and voluntarily disregarded what he knew to be the requirements of the Act. Moreover, Respondent, at the hearing in this matter and in its posthearing brief does not dispute the Secretary's contention that Tranberg's actions were "willful" as defined by the Commission, *See Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶24,419 (No. 76-3743, 1980). Rawson argues, however, that it should not be held accountable because foreman Tranberg's actions were

unforeseeable and the violation was the result of unpreventable employee misconduct, *Gem Industrial, Inc.*, 17 BNA OSHC 1861.

In support of the employee misconduct defense, Respondent asserts that it had established work rules which were "supplemented with foremen's meetings, weekly safety meetings between the foremen and their crew . . . and a safety handbook" (Respondent's brief pg. 7). Compulsory safety meetings were held to discuss safety standards and designated "competent persons" were required to attend safety classes to renew their certification every two years. An outside safety consultant was employed by Respondent to conduct unannounced inspections of worksites and report safety and health deficiencies. Respondent asserts that in excess of 100 inspections were conducted by the safety consultant (Tr. 438, Respondent's brief pg. 7,8).

During the morning of the inspection which resulted in the issuance of the citation, Respondent's owner, Mr. Servi, instructed foreman Tranberg to excavate the water line and install the concrete buttress described above. Trench boxes were on site and Servi directed Tranberg to use the trench boxes and "work safe." Respondent asserts that Tranberg was the competent person on site and possessed twenty years experience in trenching and excavation operations. Contrary to Mr. Servi's instructions, and company safety rules, Tranberg removed the trench boxes from the excavation and ordered two laborers into the trench to construct the concrete forms for the buttress (Tr. 353).

Respondent also argues that foreman Tranberg was not a member of management and, therefore, his knowledge of the violation cannot be imputed to Rawson. In support of this argument, Respondent asserts that Tranberg was an hourly paid employee, he received no vacation time or pay nor holiday pay. Tranberg had no authority to hire or fire employees and in the event of a strike, Tranberg would honor the picket line as a union member. However, the record reveals that foreman Tranberg supervised the work activities of his crew at the worksite and was responsible for their safety (Tr. 3011,316). He also had the authority and obligation to report instances of misconduct at the worksite (Tr. 386). Moreover, there is no evidence in the record indicating that Tranberg was subject to constant on-site supervision by management personnel.

In order to establish that Respondent failed to comply with the aforesaid standard, the Secretary must prove that (1) the standard applied, (2) the employer failed to comply with the terms of the standard, (3) employees had access to the cited conditions and (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative conditions, *Astra Pharmaceutical Products, Inc.* 1981 CCH OSHC ¶25,578, aff'd 681 F.2d 69 (1st Cir 1982); *Secretary of Labor v. Gary Concrete Products*, 15 BNA OSHC 1051, 1052, 1991 OSHD ¶29,344 (1991) *Carlisle Equip. Co., v. Secretary of Labor* 24 F.3d 790 (1994). Respondent acknowledges that the Secretary has met her

burden for the first three elements. Respondent insists, however, as stated above, that Complainant failed to establish that it knew, or with the exercise of reasonable diligence, could have known of the violative condition.

In addition, Complainant alleges that the violation was willful within the meaning of the statute. Thus, although Respondent is remarkably silent regarding this element of proof in its posthearing memorandum of law and appears to have conceded the allegation by failing to address the issue at the hearing,¹² the record must be reviewed to determine whether sufficient evidence exists to establish that the violation was willful within the meaning of the statute.

Although not defined in the Act, "willful" has been defined by the courts as "conscious and intentional disregard of the conditions," "deliberate and intentional misconduct," "utter disregard of consequences" and other similar descriptions. *See, Brock v. Morello Brothers Construction, Inc.*, 809 F.2d 161 (1st Cir. 1987). In order to establish a willful violation, it is necessary to determine the "state of mind" of the employer at the time of the violations. The standard of proof requires that the Secretary produce evidence establishing that the Respondent displayed an intentional disregard for the requirements of law and made a conscious, intentional, deliberate and voluntary decision to violate the law or was plainly indifferent to the requirements of the statute. *A. Schenbek and Company v. Donovan*, 646 F.2d 799, 800 (2nd Cir. 1981); *Morello Brothers Construction supra* at 164; *Georgia Electric Co. v. Marshall*, 595 F.2d 309, (5th Cir. 1979). Willful violations are distinguished by a "heightened awareness of illegality - of the conduct or conditions - and by a state of mind-conscious disregard or plain indifference." *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶27,893. The Tenth Circuit has determined that an employer's failure to comply with a safety standard under the Act is "willful" if done knowingly and purposely by an employer who having a free will or choice, either intentionally disregards the standard or is plainly indifferent to the requirements, *United States v Dye Construction Co.*, 510 F.2d 78,81 (10th Cir. 1975).

Complainant's burden to establish a willful violation has been defined by the Commission as follows:

To establish that a violation was willful, the Secretary bears the burden of proving the violation was committed with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶27,893, p. 36,589 (No. 85-355, 1987). There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1215, 1993 CCH OSHD 30,046, p. 41,256 (No. 89-433, 1993) A Violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these

¹² Respondent denied the willful allegation in its answer to Complainant's complaint.

purposes is an objective one - whether the employer's belief concerning a factual matter, or concerning the interpretation of a rule was reasonable under the circumstances. *General Motors Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD 29,240, p. 39,168 (No. 82-630, 1991).

Secretary of Labor v. S.G. Loewendich and Sons, 16 BNA OSHC 1954, 1958 (1994).

Based upon the record in this matter, there is no doubt that the requirements of the cited standard were violated as admitted by foreman Tranberg and Respondent's owner, Mr. Servi. A trench, approximately twenty feet deep without adequate sloping or shoring of the trench walls was created by Respondent's foreman and employees were required to enter the trench without adequate protection. Foreman Tranberg is an experienced worker and was the designated competent person on site. He acknowledged that the trench was not in compliance with the cited standard when he ordered members of his crew to enter the trench. Thus, Tranberg intentionally and knowingly disregarded the requirements of the standard and, on that basis, the violation must be characterized as willful within the meaning of the Act.

Respondent argues that it was not aware of the violation and, since Tranberg is not a member of management, his knowledge of the violation cannot be imputed to the employer. Respondent appears to argue that it was perfectly proper for Mr. Servi to instruct his experienced work crew at the beginning of the day and leave the worksite confident that the work assignment will be accomplished in a safe manner.

The first issue to be resolved is whether Mr. Tranberg's knowledge of the violative condition may be imputed to Respondent. It is well established that the knowledge of a foreman or other supervisory employee can be imputed to the employer, *A. P. O'Horo Co.* 14 BNA OSHC 2004 (1991). The Review Commission has stated that "[a]n employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer" *id* at 2007. *See also, Tampa Shipyards*, 15 BNA OSHC 1533 (1998). The record in this case clearly establishes that Mr. Tranberg was assigned by Respondent to supervise the work activities of his crew members and to take all necessary steps to complete the job assignment. He was also assigned the task of ensuring that the work was completed in a safe manner. Thus, as the first line supervisor, Mr. Tranberg's knowledge of the violative conditions must be imputed to Respondent.

Moreover, Tranberg was the designated "competent person" on site. Even if Tranberg was specifically told that he had no supervisory authority, his status as a competent person for excavations

required that he possess a certain level of expertise in that activity. The term "competent person" for purposes of excavations, is defined at 29 CFR 1926.650(b) as follows:

Competent person means 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.

Thus, Tranberg, as the assigned competent person on site was required to identify hazards relating to excavations and, by virtue of his assignment, had authority to correct or eliminate those hazards. Accordingly, Mr. Tranberg's knowledge, as the competent person on site, is imputed to his employer. *Ormet Corp* 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶25,566 *Access Equipment Systems, Inc.* 1991-1993 CCH OSHD ¶29,993. Therefore, Complainant has met her burden establishing that Respondent had constructive knowledge of the violation.

Notwithstanding the foregoing, Respondent urges that the violation be dismissed because of unpreventable employee misconduct. The burden to establish the affirmative defense of unpreventable employee misconduct falls upon Respondent. In order to establish the defense, the employer must show that (1) it had established work rules designed to prevent the violation; (2) had adequately communicated those work rules to its employees (including supervisors); (3) had taken steps to discover violations of those work rules, and (4) effectively enforced those work rules when they were violated. *Wheeling-Pittsburg Steel Corp.* 1993-95 OSHD CCH ¶30,445

The record reveals that Respondent had in place a safety and health program. Each new employee was provided with a packet of written safety materials including a safety handbook entitled *Excavation and Trenching*. Respondent's owner conducted regular foremen meetings and tool box training was conducted by foremen on a weekly basis. Excavations and trenching were the topics of a tool box meeting approximately three months prior to the OSHA inspection and protective trenching systems were discussed prior to the July inspection. In addition, Respondent retained the services of an independent safety consultant to conduct unannounced periodic inspections of its worksite.

Ken Servi testified that Rawson has a progressive disciplinary system, which is set forth in their safety manual (Tr. 577; Exh. R-25, p.5). The program provides that the first minor infraction is to be noted in the supervisor's log. Second infractions of the same safety rule or third infractions of different rules are to be written up and referred to the safety director or the general superintendent. Records are kept of disciplinary actions taken against employees, and employees have been written up in the past year. Servi testified that disciplinary records are kept in the employees' personnel files (Tr.

578). However, the only disciplinary actions kept in the personnel records were warnings he had written (Tr. 578). Respondent was asked both during the OSHA inspection and during discovery to produce the alleged disciplinary records, however, no records were produced during discovery or at the hearing.(Tr. 579-580; Exh. C-54). Mark Tranberg was suspended for three days without pay following the inspection (Tr. 382,409,536).

The evidence supports the conclusion that Rawson had a safety program in place which included rules requiring trench walls in excess of five feet to be guarded by sloping or shoring. Since the three employees involved knew that the trench did not comply with OSHA regulations, it is reasonable to infer that the rule had been effectively communicated to Respondent's employees. Notwithstanding this knowledge, foreman Tranberg and his crew decided to complete their work assignments in an unprotected trench. Their actions indicate a lack of concern for repercussions that may occur in the event that management personnel became aware of their violation of company policy. The Review Commission has held that unanimity of noncomplying conduct, as in this case, indicates ineffective enforcement, *Gem Industrial, Inc. Ibid.*

Furthermore, Respondent has failed to demonstrate that it effectively enforced its work rules. Safety consultant Butler stated that he had discovered safety infractions during his inspections; however, Respondent failed to produce any evidence indicating that employees had been disciplined for violating safety rules prior to this incident. Moreover, Mr. Servi's admonition to Tranberg to "work safe" does not constitute a safety warning. The Commission has found that a program consisting only of pre-inspection verbal warnings is insufficient as effective enforcement *Precast Services, Inc.* 17 BNA OSHC 1454 (1995).

For these reasons, Respondent has failed to sustain its burden to establish the elements of the employed misconduct defense. Accordingly, the violation is affirmed as a willful violation.

With respect to the penalty, the record supports the conclusion that employees in the trench were exposed to serious injury or death. Although only two employees were exposed, the extent of the violation in terms of the depth of the trench was great. Moreover, Respondent had received two previous citations which became final orders, for violating the trenching standards. For these reasons a penalty in the amount of \$40,000.00 is assessed.

Alleged Violation of §1926.651(c)(2)

Willful citation 2, item 1b alleges:

29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

- (a) Safe means of egress was not provided for employees in a 25 foot deep trench.

Shortly after the compliance officers arrived at the worksite, two of Respondent's employees, Vnuk and Brown, who were working at the bottom of the trench exited the excavation by climbing a ladder to the surface (Tr. 26). The ladder was placed on a surface level with the water main (Tr. 98). The top of the ladder was leaning against a steel corrugated pipe (Tr. 157) approximately three feet below the surface (Tr. 99). Upon reaching the top of the ladder the employees scrambled up the slope of the south wall to reach the surface (Tr. 97,221). The compliance officer stated that the aforesaid means of existing the trench was not safe "because of the distance and the location of the ladder, and the ladder being short" and the employees using their hands and knees to get up . . . to the surface (Tr. 221). On cross examination, the compliance officer stated that the employees "stepped on to the slope" above the ladder in order to reach the surface (Tr. 158). On these facts, complainant asserts that there is "no doubt" the ladder provided "inadequate egress" within the meaning of the standard (Secretary's brief p. 9).

Contrary to the Secretary's assertion, based upon the record, there is considerable doubt as to whether Respondent violated the terms of the cited standard. There is no doubt that the excavation was more than four feet in depth and there is equally no doubt that Respondent had placed a ladder in the trench as a means of egress which, as observed by the compliance officers, was used by Respondent's employees to exit the trench. There is no evidence, however, that employees were required to travel twenty-five feet or more laterally in order to reach the ladder. Moreover, the mere allegation that the ladder failed to provide a "safe" means of egress is insufficient to sustain the violation. There is no evidence in this record, and the Secretary has proved no basis in her brief for concluding that the ladder failed to provide a "safe" means of egress. *See, C. J. Hughes Construction Co.* 1995-97 CCH OSHD §31,129. Moreover, the fact that employees were required to exist the trench in part via a sloped trench wall is similarly insufficient to establish an unsafe means of egress. *Kenko, Inc.* 1998 CCH OSHD §31,617. Since the Secretary has failed to provide any evidence that the means of egress provided by Respondent was "unsafe," this item must be vacated.

Findings of Fact and Conclusions of Law

All findings of fact relevant and necessary to a determination of the contested issues have been made above Fed.R.Civ.P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

1. Serious citation 1, item 1 alleging a violation of 29 CFR 1926.651(a) is AFFIRMED and a penalty in the amount of \$1,500.00 is ASSESSED.
2. Serious citation 1, item 2 alleging a violation of 29 CFR 1926.651(b)(4) is VACATED.
3. Willful citation 2, item 1(a) alleging a violation of 29 CFR 1926.652(a)(1) is AFFIRMED and penalty in the amount of \$40,000.00 is ASSESSED.
4. Willful citation 2, item 1(b) alleging a violation of 29 CAR 1926.651(c)(2) is VACATED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: March 27, 2000