United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. INSULATION-N-COATINGS d/b/a FORCE ENTERPRISES, Respondent.	OSHRC Docket No. 16-0275

Appearances:

Jennifer A. Casey, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado
For Complainant

Aaron A. Dean, Esq., Moss & Barnett, Minneapolis, Minnesota
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

While on their way to another inspection, CSHO Kevin McElvany and trainee Wanlipa Quade saw an active, open trench in Bismarck, North Dakota. (Tr. 66). Pursuant to Complainant's National Emphasis Program (NEP) on trenches, CSHO McElvany opened an inspection of the worksite. During the inspection, CSHO McElvany noticed the spoil pile sat at the very edge of the trench. (Ex. C-2 at 1–2). This prompted him to take measurements, conduct interviews, and collect samples. Prior to leaving the worksite, CSHO McElvany asked Respondent's foreman, Adam Galindo, to make sure to push the spoil pile back from the edge of the trench before any employees re-entered. (Tr. 405).

Based on CSHO McElvany's findings, Complainant issued to Respondent a serious, two-item Citation and Notification of Penalty with a grouped penalty of $1,200. The Citation alleges Respondent committed two violations of the Occupational Safety and Health Act: (1) Respondent failed to keep the spoil pile more than two feet away from the edge of the trench, in violation of 29 C.F.R. § 1926.651(j)(2); and (2) Respondent's competent person failed to remove employees from the trench when those employees were exposed to a hazardous condition, in violation of 29 C.F.R. § 1926.651(k)(2). Respondent filed a Notice of Contest, contending Complainant failed to prove it violated either standard, and, alternatively, that the existence of any violation was caused by unpreventable employee misconduct.

This case was originally designated for Simplified Proceedings under Subpart M of the Commission Rules. *See* 29 C.F.R. § 2200.200 *et seq*. After a pre-trial conference revealed significant factual disputes requiring discovery, the Court removed the matter from Simplified Proceedings on May 16, 2016. A trial was held February 22–24, 2017, in Bismarck, North Dakota. Both parties timely submitted post-trial briefs for the Court's consideration.

II. Stipulations and Jurisdiction[1]

The parties' stipulations can be found in the parties' *Joint Stipulation Statement*, which was filed with the Court on September 13, 2016. (Tr. 11). Amongst the parties' stipulations and undisputed facts, the parties agreed that: (1) the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c); and (2) Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

1. For the sake of brevity, the remaining stipulations and undisputed facts will not be reproduced herein; however, subsequent references to stipulations and undisputed facts will take the following form: (Stip. No. ___) and (UF No. __).

III. Factual Background

Respondent is a contractor that specializes in the installation and repair of underground utilities, such as water, sewer, and storm sewers, for developers and municipal entities. (Tr. 850). The particular project at issue in this case, known as the Trillium Project, was located just behind the Sam's Club located at Rock Island Place and Burlington Drive in Bismarck, North Dakota. (Tr. 85; Ex. C-3). The Trillium project involved the installation of a new sewer line for developers in the area. (Tr. 287). As far as digging trenches is concerned, this was a fairly uncomplicated job: the sewer line was being dug in an open field with very few (if any) obstructions either above or below ground. (Tr. 148). On the morning of November 3, 2015, Respondent's crew had already been digging and laying down sewer line for approximately one week. (Tr. 288).

At some point after lunch that same day, CSHO McElvany and his trainee pulled up to the Trillium worksite. (Tr. 68). From a vantage point located roughly 200 feet away, CSHO McElvany observed and recorded an idle excavator and a man who appeared to be handing a piece of pipe down into a trench. (Tr. 74–75, 560; Ex. C-1, seg. 1). In light of his observations, CSHO McElvany decided to open an inspection pursuant to the trenching NEP. (Tr. 66). After his initial recording, CSHO McElvany turned off his camcorder and geared up to conduct an inspection. (Tr. 75).

Roughly seven minutes later,[2] CSHO McElvany walked up to the actual worksite and began recording again. (Tr. 75; Ex. C-1, seg. 2). The excavator was no longer idle and was digging at one end of the trench. (Tr. 77; Ex. C-1, seg. 2). As he walked up, CSHO McElvany noted in the video recording that he saw someone come out of the trench. (Ex. C-1, seg. 2). Shortly after,

2. This time frame is predicated on the stop time from the first video segment in CSHO McElvany's recording to the start time of the second segment. (Tr. 656; Ex. C-1). Although the time stamp on the video is clearly incorrect, nobody questioned whether the time elapsed was inaccurate.

CSHO McElvany introduced himself to Adam Galindo, who identified himself as the foreman for Respondent. (*Id.*). After introducing himself, CSHO McElvany initiated the inspection and began to discuss the excavation with Galindo, take measurements and samples, and conduct interviews with the workers that he observed coming out of the trench near the ladder on the west side of the trench. (Tr. 76, 115, 119, 138–39; Ex. C-1).

The trench was roughly 10 feet deep, 7 feet across at the bottom, and 34 feet across the top. (Tr. 76, 123–24, 316, 738; Ex. C-2 at 11). Respondent did not use shores or trench boxes, but instead sloped the sides of the trench, which CSHO McElvany determined to be compliant based on the soil type.[3] (Tr. 120, 133). Galindo told McElvany the two employees he saw exiting the trench had been installing a section of pipe to the end of the existing line and pointed to various tools and footprints at the bottom of the trench to show where they had been. (Tr. 89–90; Ex. C-1, seg. 2). After that section had been installed, Galindo testified the two employees exited the trench, and Respondent's excavator operator, Kyle Stewart, covered the recently installed pipe section and began widening the immediately surrounding area to accommodate a manhole. (Tr. 484). The manhole was six feet in diameter and required more space at the bottom of the trench than the eight-inch sewer line. (Tr. 489, 492). Stewart also had to ensure that a tamping device, known as a sheep's foot, was able to fit in the area surrounding the manhole. (Tr. 803). Because the bottom was widened, Stewart also had to push back the walls and top edge of the trench to ensure the slope remained compliant. (Tr. 785).

While the trench, itself, was compliant, CSHO McElvany was concerned with the spoil piles that were stacked along the east side of the trench. For a distance of roughly 30 feet, which extended from the area where the employees were last working to the ladder, the spoil pile directly

3. The parties independently determined the soil was Type C but did not stipulate to such.

abutted the sloped wall of the trench. (Tr. 140; Ex. C-2). Although he did not directly observe Johnie Shearry and James Gorneau in the bottom of the trench, CSHO McElvany determined they had been exposed to the hazard, because, according to the video recording and his testimony, he observed "someone" come out of the trench as he was walking up to the worksite. (Tr. 76; Ex. C-1, seg. 2). During that period of time, McElvany noted the excavator did not disturb the soil above or below the east wall of the excavation, nor did he see the excavator move from its position. (Tr. 116–17, 128–29). According to McElvany and the photographs he took, the lion's share of Stewart's digging appeared to be focused on the area immediately in front of the excavator. (Tr. 98, 126; Ex. C-2 at 2, 4, 5, 11, 13, 15).

On the face of it, CSHO McElvany laid out a fairly clear case that Respondent violated the cited standard. However, Respondent contends its employees were never in the trench when the spoil pile was in a noncompliant condition. Galindo, Stewart, Shearry, and Ernie Miller (Respondent's "top man") testified that all work in the bottom of the trench ended at least 10 to 15 minutes before McElvany and his trainee arrived at the worksite and certainly before Stewart began altering the width of the trench. (Tr. 481, 599, 782). Depending on who was asked, Shearry and Gorneau were either sitting on the slope of the trench at a safe distance from the excavator and opposite from the noncompliant spoil piles, or they were on the grass just outside the trench while Stewart was digging. (Tr. 355, 591–92, 751; Ex. R-47, R-48, R-50). At least one witness testified that, although the spoil pile rested at the precipice of the trench during the inspection, a gap had existed before CSHO McElvany arrived. (Tr. 835). In support of this claim, Stewart and Galindo testified the gap was covered when Stewart removed dirt from the spoil pile to use as cover for the installed sewer line and when he widened the trench for the installation of the manhole. (Tr. 487–90, 762; Ex. R-51, R-52). During this time, Shearry and Gorneau were purportedly sitting on the

slope of the trench, just out of CSHO McElvany's view as he approached the worksite from the west. In essence, Respondent alleges the workers stopped working and sat on the wall of the trench to take a break at or before the time when the excavator started up and started to dig.

IV. Discussion

Many basic facts in this case are not in serious dispute. Neither party had contradictory evidence regarding the dimensions of the trench, its slope, or its soil composition. There is no disagreement that Shearry and Gorneau worked in the bottom of the trench at some point prior to CSHO McElvany walking up to the worksite. The photographs and video reveal the spoil pile was not pushed back from the trench by the minimum required two feet at the time of the inspection. (Ex. C-2 at 11). As illustrated above, however, the parties dispute whether Shearry and Gorneau were inside of the trench *when* the spoil pile was in a noncompliant condition. Complainant argues that Shearry and Gorneau must have been exposed because CSHO McElvany saw them exit the trench almost immediately before stepping onto the worksite. Respondent, on the other hand, contends Shearry and Gorneau were out of the trench long before McElvany arrived and that the once-compliant spoil pile along roughly 30 feet of the east wall was undone purposefully to accommodate a manhole.

Notwithstanding the volume of testimony Respondent put forth on the subject, the Court finds Complainant's version of the facts is more credible and comports with the objectively verifiable photographic and videographic evidence. Respondent's theory of the case, on the other hand, requires a fairly labored interpretation of those same facts and was facilitated, in part, by testimony given in response to leading questions.[4] In the end, the Court was left with a simple

4. A leading question is "one which puts the answer in the mouth of the witness by suggesting the desired answer." Charles B. Gibbons, Federal Trial Objections 326 (4th ed. 2012) (citing *Roy v. Austin Co.*, 194 F.3d 840 (7th Cir. 1999)). The following transcript pages reflect a small sample of such questions during Respondent's case-in-chief: 492, 590–93, 742–44, 747, 835.

question: what is the more likely explanation for CSHO McElvany's observations? Based on what follows, the Court finds the most likely explanation, based on a preponderance of the evidence, is that Respondent violated the standard governing spoil piles in Item 1a. That said, the Court also finds Item 1b shall be vacated because it is essentially a duplicate of the allegations in Item 1a.

A. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.651(j)(2): Employees were not protected from excavated or other materials or equipment that posed a hazard by falling or rolling into excavations and protection was not provided by placing and keeping such material or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.
>
> (a) On or about November 3, 2015 for employees exposed to struck by hazards while laying pipe in a trench with the spoil pile on the edge of the excavation near Rock Island Place and Burlington Drive in Bismarck, North Dakota.

Citation and Notification of Penalty at 6.

To establish a violation of an OSHA standard pursuant to Section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the

> mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

i. The Cited Standard Applies

The scope and application paragraph for subpart P states, "This subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches." 29 C.F.R. § 1926.650(a). Because there is no explicit dispute regarding the application of the standard, the Court finds Respondent's trench qualifies as an excavation according to the definitions provided at 29 C.F.R. § 1926.650(b). Thus, the standard applies.

ii. The Terms of the Standard Were Violated

Though the parties dispute whether the two employees were inside the trench when the spoil pile was noncompliant, they do not dispute CSHO McElvany's photographs show a spoil pile that has no visible separation from the edge of the trench. In order to protect employees inside the trench, Respondent is required to ensure that spoil piles and other equipment are placed no less than two feet back from the edge of the trench or are otherwise restrained by a device. 29 C.F.R. § 1926.651(j)(2). At the time of CSHO McElvany's inspection, the spoil pile on the east side of the trench was less than two feet from the edge of the trench. That fact, alone, is sufficient to establish that the terms of the standard were violated, and the Court so finds.

iii. Respondent's Employees Were Exposed to the Hazard

A finding that the terms of the standard were violated, however, should not to be confused with establishing the existence of a *prima facie* case. The standard states "employees shall be protected" from these hazards, which means a violation of the standard only exists if employees

are exposed to the hazard imposed by an improperly placed spoil pile. *Id.* Thus, it is not enough for Complainant to show proof of noncompliant conditions; rather, it is incumbent upon Complainant to prove the employees were in the trench *when* the terms of the standard were violated. But this requirement only states explicitly that which is required of every single 5(a)(2) case: proof of exposure. "The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in a zone of danger." *Rgm Constr. Co.*, 17 BNA OSHC 1229 (No. 91-2107, 1995).

Respondent has gone to great lengths to disprove what is, on its face, a very convincing set of facts. As CSHO McElvany arrived in his vehicle he observed, albeit from a distance of roughly 200 feet, an idle excavator and a person who appeared to be handing something down into the trench. (Ex. C-1, seg. 1). Roughly seven minutes later, CSHO McElvany recorded his walk up to the trench. (Ex. C-1, seg. 2). As he walked up, CSHO McElvany stated aloud that he saw someone come out of the trench. (*Id.*). Also audible in the background of the video is the formerly idle excavator, which was digging on the south end of the excavation. (*Id.*).

According to CSHO McElvany, the excavator's activity was focused on the area immediately in front of it on the south side of the trench. He testified he did not observe the excavator dig anywhere near the area surrounding the trench rod or other tools that were left in the bottom of the trench by Shearry and Gorneau.[5] Nor, testified CSHO McElvany, did he see Stewart pull any material from the spoil pile on the east side of the excavation or place any material there.

5. According to Galindo, he threw a shovel into the bottom of the excavation to mark the end of the sewer line for Stewart. (Tr. 482). Whether or not this is the case, the Court finds it interesting that so many different tools and implements were used to do the exact same thing. (Ex. C-2 at 3).

Instead, he saw Stewart widening the area immediately in front of him, and dumping material at the end of the spoil pile, directly to the right of his location. (Tr. 127; Ex. C-2 at 20). The condition of the trench and spoil pile from the area surrounding the trench rod to the ladder (roughly 25 feet) did not change from the point of CSHO McElvany's arrival on site to when he took the photographs illustrating the trench in a noncompliant state.

When he came in full view of the trench, CSHO McElvany encountered Galindo, who identified the area around the tools as the location where the employees CSHO McElvany saw exit the trench had last been working.[6] (Ex. C-1, seg. 2). Indeed, he pointed to footprints in the same area to confirm their location. (Tr. 89; Ex. C-1, seg. 2). Galindo did not dispute what CSHO McElvany claimed to have just observed, and seemed to confirm as much during his deposition. (Tr. 360, 365–66). Thus, CSHO McElvany observed an employee, whose identified area of work and means of egress exposed him to a roughly 30-foot long stretch of noncompliant spoil pile, exit a trench almost immediately before CSHO McElvany discovered the spoil pile in a noncompliant state. When coupled with the fact that CSHO McElvany observed this employee exit the trench near where the ladder is located—a fact echoed by Stewart—the foregoing evidence makes a compelling case for exposure. (Tr. 752).

Respondent's principal argument is that Complainant cannot show its employees were in the bottom of the trench when the spoil pile was noncompliant. In other words, there was no confluence of violation and exposure. While Respondent's arguments raise an interesting question about the quantum of proof necessary to establish exposure, they do not convincingly subvert Complainant's prima facie case.

6. There was some discussion about whether a particular finger doing the pointing in segment two of CSHO McElvany's video belonged to CSHO McElvany or Galindo. (Tr. 89–90, 139, 237, 366). Irrespective of who pointed and to what, the Court finds both Galindo and CSHO McElvany agreed on the location under discussion.

To start, Respondent makes much of the fact that CSHO McElvany did not physically observe the employees in the bottom of the trench while the spoil pile was noncompliant. While this is true, such is not required to establish exposure. In *Gilles & Cotting, Inc.*, the Commission rejected the "actual exposure" test, which required evidence that someone observed the violative conduct, in favor of the concept of "access", which focuses on the possibility of exposure under the conditions. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976) (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure"). The Court is permitted to make reasonable inferences based on the facts in evidence. *See Okland Construction Co*., 3 BNA OSHC 2023, 2024 (No. 3395, 1976). Included among those inferences is whether an employee could, in the regular course of their work, be exposed to a hazard caused by a violative condition. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 ("On balance, we conclude that a rule of access based on *reasonable predictability* is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure.") (emphasis added).

Galindo, Respondent's foreman and competent person, was the first person CSHO McElvany talked to when he arrived at the worksite. In the inspection video, Galindo can be heard telling CSHO McElvany that the employees that just exited the trench came from the area where the tools were located, which was also marked by footprints around and on top of the recently installed and covered pipe section. (Ex. C-1, seg. 2). Later on, during his deposition, Galindo was more clear:

> Q. All right. So tell me, to the best of your recollection, what were your folks doing when OSHA arrived onsite?
>
> A. Well, I didn't know they [OSHA] arrived, but when I seen [sic] them, the guys were getting ready to come out because the operator was going to start digging for the manhole. So therefore it was going to take a lot longer to excavate it.

(Tr. 360; Deposition of Adam Galindo at 185). In other words, Galindo's deposition testimony and his statements in the inspection video comport with CSHO McElvany's testimony and contemporaneous statements in the inspection video; namely, that the employee CSHO McElvany saw exiting the trench just completed his work at the end of the sewer line.

At some point, however, Galindo's testimony changed. Admitting that his "answers ain't going to be the same as it was in my deposition….my answers are going to be similar, but they're just not going to be exactly the same", Galindo testified that Shearry and Gorneau were out of the trench at least 15 to 30 minutes before OSHA arrived onsite. (Tr. 485). In an attempt to explain why CSHO McElvany saw someone come out of the trench, Galindo testified the two employees were sitting on the slope of the trench just below the edge, so as to place them out of McElvany's line of sight on his approach to the worksite. (Tr. 364–67; Ex. C-2 at 3a). Thus, when they rose from their resting place, it gave the appearance of emerging from the trench bottom. Shearry, Stewart, and Miller all echoed this testimony in one way or other, stating that Shearry and Gorneau were not in the trench bottom and had not been for at least 15 minutes.

Galindo's testimony is a marked departure from both his recorded statements and his deposition testimony, which placed the employees in the bottom of the trench just prior to OSHA's arrival at the worksite. The photographs of the worksite support Galindo's former testimony. In the bottom of the trench, near the location of the last installed pipe section, there were two shovels, a roll of green tape, a pry bar, a trench rod, and a bucket of lubricant. (Ex. C-2 at 3). CSHO McElvany observed footprints, confirmed by Galindo, in the area surrounding those tools, including in the dirt covering the recently installed pipe section. (Tr. 89). Although these implements, of themselves, do not indicate the time at which they were left at the bottom of the trench, their presence in the trench leads to the reasonable conclusion that employees were there

recently. Respondent attempts to discount the importance of these tools by providing explanations for their presence in the trench.

At least two different tools—a shovel and a pry bar—were purportedly left in the trench to mark the end of the pipeline for the excavator operator. (Tr. 104, 169, 482; Ex. C-2 at 3). In fact, Galindo testified he threw one of the shovels into the trench for that very purpose, notwithstanding the presence of the other markers. (Tr. 482). The tape roll, Galindo explained, is used to mark the existence of the line for future excavations, so that they can avoid hitting the pipe. (Tr. 524–25). While the Court understands the purpose of the tape, it was also the Court's understanding that it needed to be rolled out in order to be effective as a warning device for the entire length of the sewer line, else the putative future excavator would need to be digging in the exact spot of the roll for it to work. (Tr. 750). It makes even less sense that all of those tools, including a laser level/trench rod, would be left in the bottom of the trench when the area directly above it was set for reconfiguration, which would cause that area of the trench, and everything in it, to be covered.

The Court is more convinced by Galindo's video recorded statements and deposition testimony. His understanding of the facts was more or less consistent during the inspection and his deposition, and yet that understanding changed at trial.[7] Indeed, even at trial, Galindo's estimates of the amount of time that transpired ranged anywhere from 15 to as many as 45 minutes. (Tr. 485). Perhaps, as Galindo implied when he said his testimony would be "similar" but "not . . . exactly the same", his change in testimony was due to the passage of time and fading memory. Given that Galindo's two prior statements were consistent with each other and with CSHO McElvany's testimony, and were given closer in time to the events of this case, the Court finds

7. Even on a topic as benign as when the Trillium project started, Galindo wavered on the estimate of time involved. (Tr. 288).

Galindo's trial testimony to be the outlier. Accordingly, the Court gives his trial testimony on this topic no weight.

While the Court realizes Galindo was not the only one who testified that the two employees were sitting outside the trench for a period of 10 to 15 minutes prior to the arrival of OSHA, the Court finds such estimates to be equally problematic. To illustrate, a review of the timeline of events is helpful. As illustrated in the first video segment, the excavator was idle; a fact to which all parties agree. While the excavator was idle, CSHO McElvany saw a man, Miller, hand something down into the excavation and remarks as such to the camera. (Tr. 74; Ex. C-1, seg. 1). Seven minutes later, the excavator is in operation, and CSHO McElvany sees someone walk out of the excavation. Thus, even Stewart, who estimated he was digging at least 15 minutes prior to OSHA's arrival, admitted that he could not have been digging for more than seven minutes. (Tr. 799). While seven minutes is nonetheless a long enough span for an excavator to do some damage to the walls of a trench, the point is that the estimates of time provided by Respondent's employees varied wildly, from no time at all to 15 or even 45 minutes between Shearry and Gorneau's departure from the trench and OSHA's arrival.

Although the timing of Shearry and Gorneau's exit from the trench is important, equally important is the work allegedly performed by the excavator during that period of time. According to Galindo, the John Deere 270 excavator had a four-foot-wide bucket. (Tr. 487; Ex. C-1, seg. 2). In addition to moving a lot of earth, the four-foot bucket also served as the means by which Respondent created the necessary buffer between the trench and spoil pile. (Tr. 735). Galindo, Stewart, and Chip Stroschein, one of Respondent's co-owners, all testified this was standard practice.[8] (Tr. 567, 735, 870). Thus, according to practice, prior to Stewart widening the trench, a

8. They also testified that, in some instances, the excavator would drive onto the spoil pile and pull the material back from the edge of the trench. (Tr. 488).

four-foot gap existed between the trench and spoil pile along the 30-foot stretch where Shearry and Gorneau affixed the succeeding sections of pipe. Based on Stewart's testimony about when he began digging, the alleged disappearance of the four-foot gap must have occurred during the seven-minute lapse in CSHO McElvany's video segments.

Stewart testified the first thing he did after Shearry and Gorneau left the trench was take a scoop from the spoil pile and place it over the top of the last pipe section to hold it in place. (Tr. 756). This is curious for a couple of reasons. First, as testified to by CSHO McElvany, there were tools in the area surrounding that pipe section, indicating work had recently occurred in that area. Stewart, the excavator operator, and Ernie Miller, the top man, who had the best views of the trench, could have easily instructed Shearry and Gorneau to retrieve their tools from the trench before digging began in the area. They did not. This failure is intriguing because it either suggests nearly everyone on the worksite was negligent with respect to leaving tools behind, or perhaps neither Stewart nor anyone else was concerned because he was not going to be digging in that area.[9] Second, CSHO McElvany identified footprints in the dirt that had been placed over the top of the pipe. (Tr. 103, 228). While it is standard practice to tamp cover material after it has been placed on the pipe, the presence of these particular footprints does not make sense given the timeline provided by Stewart, because they would have been made *after* Shearry and Gorneau purportedly exited the trench.

After he placed cover on the pipe section, Stewart testified he needed to widen the trench to accommodate a manhole and the equipment required to install it. (Tr. 753). According to

9. Regarding those tools, Galindo testified they had an opportunity to retrieve the tools before Stewart began digging: "I said, 'Why did you forget the grade stick and you didn't mark the end of the pipe? He's going to end up burying it once he starts digging for a manhole.'" (Tr. 482). If digging had not yet commenced, the Court is somewhat confused as to why Galindo did not just send Shearry and Gorneau back into the trench to retrieve the tools. Unless, of course, there was no real reason to be concerned about them being buried.

Stewart, the sheep's foot attachment and payloader required an additional four to eight feet around the manhole, itself six feet wide, in order to properly install it. (Tr. 803–804, 810). In a series of exhibits, Stewart illustrated the areas where they expanded the trench to accommodate the manhole and the sheep's foot. (Tr. 786–91; Ex. R-50, R-51, R-52). While some of Stewart's testimony on this topic makes sense, some of his statements were inconsistent with the photographs of the worksite, and, in some cases, were plainly contradicted.

For context, the parties agree that the area of concern extended from the ladder to the area where the tools and footprints were identified. (Tr. 98). Beyond that point was the location where the manhole would be installed. Although the lion's share of Stewart's digging appeared to be located directly in front of the excavator, Stewart testified he reached a significant distance down the trench on the east wall to widen the "entire" trench. (Tr. 789). In the process, Stewart testified he scraped away the existing space between the trench and spoil pile, and managed to do so without damaging or otherwise impacting the trench rod that was propped against the east wall. (Tr. 788–89). What makes this testimony so difficult to believe is the condition of the trench bottom. In one exhibit, Stewart pointed to all of the places he dug in order to widen the trench. (Tr. 762; Ex. R-51). While the Court does not take issue with the scoops taken directly in front of the excavator, the Court is somewhat dubious about Stewart's claim that he dug in the area beyond the trench rod as shown in Exhibit R-51, or at least to the extent he claims.

The pictures reveal Stewart did most of his digging in the area where the manhole was set to be installed. The bottom of the trench in the area closest to the excavator revealed as much, because it had a significant amount of material that had sloughed off of the east wall. (Ex. C-2 at 4). However, moving north away from the excavator—where the employees had been working—there is a notable lack of sloughed material in the bottom of the trench. (*Id.*). If, as Stewart claimed,

he dug along the east wall beyond the trench rod, the Court is confused as to how virtually no material fell into the trench on that side. Footprints were still visible, and the tools only showed signs of sloughing from the west side of trench. (Ex. C-2 at 3). As noted by Complainant, Respondent would have the Court believe Stewart was able to remove a four-foot gap between the spoil pile and the trench for a span of at least thirty feet and do so without spilling any material onto the tools or work area below where he was digging. While the Court has no doubt Stewart is a skilled operator, it is not convinced he was able to move such a large amount of earth without having some fall into the excavation, especially when sloughing occurred on the west side of the excavation without any apparent intervention. (Tr. 113; Ex. C-2 at 9).

The Court also finds Stewart was less than credible when it came to describing where he placed the dirt he removed from the trench. On direct examination, Stewart claimed he put the material he removed from the trench on top of the existing spoil piles. (Tr. 773; Ex. R-52). This, he and Galindo claimed, also contributed to the disappearance of the four-foot gap. (Tr. 396–97, 567–68, 773, 783). Under cross-examination, however, when Stewart was shown photographs of the excavator turned sideways and adding spoil to the end, not the top, of the spoil pile, he had to admit that he "was placing it back behind the spoil pile, yes." (Tr. 784; Ex. C-2 at 20).

Equally confusing to the Court is Stewart's explanation for digging beyond the trench rod. Stewart testified he needed to widen the area that stretched from the trench rod to the excavator. (Tr. 786; Ex. C-2 at 4). Then, he testified he in fact dug past the trench rod in order to make the "entire trench" wider. (Tr. 789). After explaining how he was able to avoid striking the trench rod with the excavator, Stewart attempted to describe why he was digging in that area of the trench:

> Q. Okay. And so eventually, if you actually expanded the slope in the manner that you're talking about and that you've drawn here, you would dig considerably farther into the slope; correct?

A. Not back there. I was just making the top wider up here [indicating] and here [indicating]. And, yeah, and then I -- you could see where I started to dig here [indicating] and here [indicating].

Q. And why did you need to make the top wider? If your intent was to actually widen the entire trench, why just widen the top?

A. I was widening the entire trench.

Q. Okay. So eventually you were going to work your way down from the top to the bottom of the trench and widen that whole area; correct?

A. Correct.

Q. And that would have been the area where you see the shovel.

A. No.

Q. You're not going to widen from the grade rod working towards the excavator, Mr. Stewart?

A. I'm going to widen the whole excavation from where this is [indicating] all the way up here [indicating]. This is all going to be widened. And I'm widening it up here [indicating] because the -- because the amount of dirt that I have was becoming too much on top of the spoil pile to where it was becoming incompliant with OSHA. That's why I took this [indicating] swipe here, and then once I was complete digging everything out, I was going to move my machine on top of the spoil pile and dig back that spoil pile and pull it back.

Q. Okay. So I want to be clear, Mr. Stewart. From the area where the grade rod is located and angled on a slope, your intent was to widen that area from the grade rod towards the excavator.

A. Yes.

Q. Okay. And you would agree with me that between the grade rod and the excavator, you have a crow bar or a pry bar and a shovel; correct?

A. Correct.

(Tr. 789–90). The foregoing colloquy illustrates the shifting and labored explanations provided by Respondent. First, Stewart is widening the entire trench to allow for the introduction of the manhole and associated equipment. Then, he is merely taking a strip from the east side to widen the top of the excavation, but not the entire slope. Then, his rationale shifts again—the reason he

took the strip on the upper east side of the excavation was to prevent the spoil pile from becoming overloaded and, therefore, noncompliant. This, perhaps, is his most confusing explanation. In order to prevent the spoil piles from becoming noncompliant, Stewart testified he removed the existing four-foot gap separating the spoil pile from the trench wall in a single swipe. (Tr. 790, 917). But, if Stewart was planning on reestablishing the gap after he finished widening the trench, it is unclear to the Court why it would matter if that particular portion of the trench was noncompliant when there were not any employees in the trench at the time. For that matter, it is unclear to the Court, as it was to Assistant Area Director Scott Overson, why Respondent would remove the strip from between the spoil pile and the trench, as such a swipe would cause the contents of the spoil pile to spill into the trench. (Tr. 657).

To further illustrate this inconsistency, AAD Overson made an interesting observation about the mark made by the excavator in its attempt to widen the trench beyond the trench rod. (Tr. 655). According to Overson, the photograph in Exhibit C-2 at 8 shows an upside down V-shaped mark directly above the trench rod. As noted by Overson, this is not a deep cut; it did not change the position of the spoil pile or the bank. (Tr. 654). Instead, the cut appears to be on the surface and is surrounded on either side by a flush transition from spoil pile to trench, which illustrates that the spoil pile was in essentially the same condition as it was prior to the scoop being taken from that area. (Tr. 654–55; Ex. C-2 at 8c).

Based on the foregoing, the Court finds Shearry and Gorneau were exposed to the hazard imposed by the improperly set back spoil piles. Even if the Court were to accept that Stewart was able to dig in the area near the trench rod, the lack of dirt in the bottom of the trench below belies any argument that enough dirt was moved to obscure a four-foot setback over a distance of 30 feet. Based on the impressions left by the excavator in the area surrounding the trench rod, however,

the Court finds Stewart was digging into an already noncompliant spoil pile. For that matter, the noncompliant spoil pile ran from the location where Shearry and Gorneau were working back to the ladder. Thus, even if the area to the south of the trench rod (towards the excavator) was widened after the employees' departure from the trench bottom, that still left them exposed as they exited the trench along the portion of the spoil pile north of the trench rod until they reached the ladder. Accordingly, the Court finds Respondent's employees were in the zone of danger while working in the bottom of the trench.

iv. Respondent, Through its On-Site Foreman, Knew of the Hazardous Condition

"To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Central Florida Equip. Rentals, Inc.*, 25 BNA OSHC 2147 (No. 08-1656, 2016). To satisfy this burden, Complainant must show "knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard." *Id.* "Although the Secretary has the burden to establish employer knowledge of the violative conditions, when a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfied his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co.*, 16 BNA OSHC 1281 (No. 91-862, 1993); *see also Dana Container*, 25 BNA OSHC 1776 (No. 09-1184, 2015) (citing *Dover* for same proposition).

The parties agree Galindo was the foreman and competent person. Galindo, himself, testified he was the only acting supervisor on site and that it was his responsibility to ensure the conditions of the trench were safe for his employees to enter. (Tr. 252, 254). This was confirmed by his boss, Chip Stroschein. (Tr. 873). Galindo was not only obligated to ensure trench conditions

were safe and compliant, but he was also physically in position to view the conditions of the trench. (Ex. C-1, seg. 2). As noted above, Galindo testified in deposition that, just as OSHA arrived, his employees were exiting the trench. Thus, Galindo permitted his employees to work in a noncompliant trench and was directly aware of their exposure to the violative condition. According to Commission precedent, Galindo's knowledge of his employees', as well as his own, misconduct is properly imputed to Respondent.[10]

Respondent, however, has argued the conduct of Shearry, Gorneau, and Galindo was the product of unpreventable supervisory misconduct. In order to prove this defense, an employer must show it: "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). The burden of establishing this affirmative defense is "more rigorous" because the supervisor's duties include "protect[ing] the safety of employees under his supervision" and the supervisor's misconduct is "strong evidence that the employer's safety program is lax." *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001), *aff'd per curiam*, 53 Fed. Appx. 122 (D.C. Cir. 2002) (unpublished).

Complainant does not dispute Respondent had a specific work rule requiring daily inspections, which included a requirement that equipment and spoil materials be placed at least two feet back from the edge of the trench. (Ex. R-4 at 31). Respondent also introduced evidence illustrating how that rule, as well as others, was communicated to its employees. Specifically, Chip Stroschein testified that safety rules are communicated to employees through weekly

10. The Eighth Circuit, one of the circuits to which this case may be appealed, has not yet addressed the question of knowledge in the context of supervisory misconduct; however, the D.C. Circuit, another court to which this case may be appealed, cites favorably to Commission precedent. *See Daisy Const. Co.*, 527 Fed. Appx. 1 (D.C. Cir. 2013) (unpublished opinion).

workshop safety meetings and daily toolbox talks. (Tr. 852–53; Ex. R-9). As regards regular, full-time employees such as Galindo and Stewart, the Court agrees. But, as regards Shearry, who was a temporary employee on loan from Command Center, Respondent's training regime fell short of what is required.

According to Shearry, who had no prior trenching experience, he attended a single safety meeting of approximately 15–20 minutes before being assigned to work in the bottom of the trench. (Tr. 587, 595–97). Galindo testified he trained Shearry but could not remember whether he had reviewed the safety program or project manual with Shearry prior to the beginning of the day's work. (Tr. 420). This much appeared evident when Shearry testified at trial that he believed spoil material should be placed somewhere between 10 and 15 feet back from the trench wall. (Tr. 597). Thus, with respect to Shearry, at least, the Court finds Respondent failed to prove the defense of unpreventable employee misconduct.

The Court also finds Respondent failed to prove the supervisory misconduct with respect to Galindo, albeit for different reasons; namely, its failure to both take adequate steps to discover violations and to enforce the rules when such violations are found. An effective safety program requires "a diligent effort to discover and discourage violations of safety rules by employees." *Paul Betty d/b/a Betty Bros.*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981). In the absence of such evidence, the Commission has held that the employer "could not have enforced its work rules effectively." *Am. Sterilizer Co.*, 18 BNA OSHC 1082 (No. 91-2494, 1997) (citing *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (No. 86-360, 1992)).

Stroschein testified he conducted random inspections of Respondent's worksites to ensure compliance; however, he also admitted he does not document the results of his inspections, nor does he review the daily inspection sheets completed by Galindo as part of his audit process. (Tr.

866, 900). This was particularly problematic in Galindo's case, because it appears that Galindo had been improperly filling out daily reports, which identify hazards, protection methods, and other safety issues during the entire period of his work at the Trillium worksite. (Tr. 321–43; Ex. C-8). Though Stroschein claims he was at the worksite almost every other day, he did not take the opportunity to review Galindo's daily logs to ensure they tracked the actual conditions at the worksite. (Tr. 898–900). For example, on the form, Galindo indicated he used multiple forms of cave-in protection, including trench boxes and shores, even though sloping was used as the primary form of protection. (Tr. 321–43; Ex. C-8). Further, he also failed to accurately record the conditions as they existed, or as they changed throughout the day. According to Stroschein, it was not until *after* he read Galindo's deposition transcript, nearly eight months after the inspection, that he determined Galindo was failing to properly evaluate his worksite and was, in fact, using the wrong worksheet for excavation worksites. (Tr. 899).

This failure appears to have had a trickle-down effect. On cross-examination, Galindo admitted that he was "not positive about all this paperwork." (Tr. 419). "All this paperwork", as it turns out, was the employee safety manual, project manual, and disciplinary program, all of which he was responsible for implementing as a manager. (Tr. 416–19). Galindo's lack of familiarity with the documents governing his work as a foreman, coupled with Stroschein's admitted failure to effectively review Galindo's daily work logs, call into question how effective Respondent could have been in its attempts to discover and correct violations. Indeed, had Stroschein been thorough in his review, he would not have needed to wait until many months later, during Galindo's deposition, to find out Galindo had not been fulfilling his job duties. Thus, even though Stroschein made regular visits to his worksites, the Court finds such checks were not effectively performed.

Finally, the Court finds Respondent's disciplinary program was lacking. Although Galindo and Stroschein both stated they had terminated and disciplined employees in the past, there is a notable dearth of any formal disciplinary actions. (Ex. C-16). Indeed, the only "disciplinary" records admitted into evidence appear to be related to job performance, attendance, and a probationary period for a new hire. (Ex. C-16). More problematic, however, was the general attitude towards discipline. According to Stroschein, though he was aware Respondent required verbal disciplinary actions to be documented, he had not been adhering to that policy. (Tr. 903; Ex. C-11 at 15–16). Further, he also testified that Wes Kroh, another owner of Respondent, had not been documenting those instances either. (Tr. 903). Thus, as pointed out by Complainant, Respondent did not have a way to track progressive discipline for the same issue, which Stroschein admitted could result in someone being verbally reprimanded multiple times by a manager without the other managers knowing about it. (Tr. 903). Indeed, this seems to have been the case with Galindo, who testified to being verbally reprimanded twice for safety violations and yet not one of those instances was documented. (Tr. 423, 446, 903).

To prevail on the affirmative defense of employee misconduct, Respondent cannot simply rely on testimony that people were disciplined. There must be evidence that the program is effective. *See Centex Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994). "The conventional way to prove the enforcement element is for the employer to introduce evidence of a disciplinary program by which the company reasonably expects to influence the behavior of employees", such as a progressive disciplinary program. *Precast Svcs, Inc.*, 17 BNA OSHC 1454 (No. 93-2971, 1995); *see also Asplundh Tree Expert Co.,* 7 BNA OSHC 2074 (No. 16162, 1979) (employer introduced evidence of company policy calling for a stern oral or written reprimand for the first violation, followed by discharge for a second violation). The progressive disciplinary

program must be more than a "paper program", requiring "evidence of having actually administered the discipline outlined in its policy and procedures." *See, e.g., Connecticut Light & Pwr. Co.,* 13 BNA OSHC 2214 (No. 85–1118, 1989) (reprimand letters issued); *Pace Constr. Corp.,* 14 BNA OSHC 2216 (No. 86–758, 1991) (perennial verbal warnings ignored on a widespread basis).

Notwithstanding its rather thorough paper policy, there is no evidence Respondent effectively enforced it. Indeed, Stroschein admitted that neither he, nor Wes Kroh, documented disciplinary actions, whether they were minor or were so serious as to require termination. The only disciplinary records introduced do not appear related to safety matters, and are instead performance-related. (Ex. C-16). The lack of consistency, as well as Respondent's apparent inability to track progressive disciplinary problems, show that Respondent's disciplinary program is just a document. Because it does not adhere to that policy, Respondent cannot reasonably be expected "to influence the behavior of [its] employee[s]." *Precast*, *supra*. Accordingly, the Court finds Respondent failed to establish the affirmative defense of unpreventable employee (or supervisory) misconduct.

v. The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

The Court finds the violation alleged in Citation 1, Item 1a is serious. According to CSHO McElvany, an improperly set back spoil pile poses a couple of different hazards, including spoil material sliding into the excavation or a cave-in caused by additional weight on the trench wall. (Tr. 79). McElvany described how trench cave-ins represent a large number of the accidents and fatalities that OSHA investigates. (Tr. 78). AAD Overson provided additional details outlining the serious nature of this hazard. According to Overson, an average cubic yard of dirt can weigh over three-thousand pounds. (Tr. 622). Thus, "when you look at the size of these spoil piles, you've got tens of thousands of pounds of soil sitting on the edge . . . ." (Tr. 622). Those thousands of pounds of soil can cause serious damage. Overson testified about one such case wherein an employee was struck by soil that had sloughed off of the spoil pile, rolled into the trench box, and broke his leg. (Tr. 615). The evidence convincingly establishes that an accident involving these spoil piles could cause a serious injury or possibly death.

Based on the foregoing, the Court finds Complainant has established a violation of 29 C.F.R. § 1926.651(j)(2). Accordingly, Citation 1, Item 1a shall be AFFIRMED.

B. Citation 1, Item 1b

With respect to Citation 1, Item 1b, Complainant alleges a violation of 29 C.F.R. § 1926.651(k)(2), claiming Galindo failed to remove employees from the hazardous area caused by the improperly placed spoil pile. Although not specifically addressed by Respondent, the Court finds this violation to be duplicative of Citation 1, Item 1a.

According to the Commission, violations are considered duplicative "where the standards cited require the same abatement measures, *or where abatement of one citation will necessarily result in the abatement of the other item as well*." *Rawson Contractors*, 20 BNA OSHC 1078 n.5 (No. 99-0018, 2003) (emphasis added) (citing *Flint Eng. & Constr. Co.*, 15 BNA OSHC 2052, 2056–57 (No. 90-2783, 1992)).

To prove a violation of 29 C.F.R. § 1926.651(k)(2), Complainant must establish that "the competent person found evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions." To prove a violation of 29 C.F.R. § 1926.651(j)(2), Complainant must establish employees were not protected from the hazardous condition posed by the spoil piles. The hazard faced by employees under either scenario is the same. Depending on the situation, however, the abatement could be different. When viewed in isolation, the proper abatement for a violation of 1926.651(k)(2) would be removal of the employee from the excavation until such time as the hazard has been removed, as opposed to 1926.651(j)(2), which would require the proper setback of the spoil piles. Under the facts of this case, however, if Respondent had properly set back the spoil piles, there would have been no need to remove the employee from the excavation.

A nearly identical issue was addressed by ALJ Frye in *Pentecost Contracting Corp.*, 17 BNA OSHC 1429 (No. 92-3789 *et al.*, 1995). Similar to this case, the respondent company was cited for violating both 1926.651(k)(2) and 1926.652(a)(1). Citing favorably to the Commission's holding in *Capform*, 13 BNA OSHC 2219 (No. 84-556, 1989), ALJ Frye held, "If the Respondent had complied with the first standard and used proper shoring techniques to avoid the danger of cave-in, he would have also been in compliance with the second standard, because without the hazard of a cave-in, there is no need to remove the employees from the excavation." *Pentecost*, 17 BNA OSHC 1429. This case is no different. If Respondent had complied with the setback requirements for spoil piles, there would have been no need to remove the employees from the trench because there would be no hazard in the first instance. Thus, abatement of Item 1a would necessarily abate Item 1b. Accordingly, Citation 1, Item 1b is hereby VACATED.

V. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant proposed a penalty of $1,200, which is premised on CSHO McElvany's determination that the severity of any possible injury was low and the likelihood of any accident also being low. (Tr. 152). McElvany came to this conclusion because the trench was properly sloped and the spoil material was very sandy, making it unlikely that large chunks would fall into the trench. (Tr. 152–53). Further, though Complainant did not provide any discounts for history or good faith, it still provided a 60% discount on the originally assessed penalty due to the size of Respondent's business, which only had seven employees. (Tr. 153–54). The Court agrees with Complainant's assessments of gravity and the application of the appropriate reductions. Accordingly, the Court finds the penalty of $1,200 is appropriate and shall be assessed.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1a is AFFIRMED as a serious violation of the Act, and penalty of $1,200 is ASSESSED.
2. Citation 1, Item 1b is VACATED.

SO ORDERED

/s/

Peggy S. Ball

Judge, OSHRC

Date: August 2, 2018
Denver, Colorado