

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

Secretary of Labor,
Complainant,
v.
T. E. Stevens Company, Inc.,
Respondent.

OSHRC Docket No. **16-1274**

Appearances:

Emily O. Roberts, Esquire, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For the Secretary

Jason A. Stuckey, Esquire, Moses & Moses, P.C., Birmingham, Alabama
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

T.E. Stevens Company, Inc. (Stevens) is a construction company performing erosion control, grading, storm sewer and other related work in the Birmingham, Alabama area. Two employees of the Occupational Safety and Health Administration (OSHA) were driving by Stevens's worksite in Vestavia, Alabama on April 28, 2016. They stopped and commenced an investigation because they were concerned about the safety of workers who appeared to be in a several foot deep trench. The investigation led to the issuance of a Citation and Notification of Penalty (Citation) for allegedly committing a serious violation of 29 C.F.R. § 1926.652(a)(1) by permitting employees to work in a trench lacking sufficient cave-in protection.

Stevens timely contested the Citation, bringing the matter before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act). A hearing was held on February 3, 2017, in Birmingham, Alabama. Both parties filed post-hearing briefs. For the following reasons, the Citation is AFFIRMED and a \$5,390.00 penalty is ASSESSED.

JURISDICTION

Stevens is a civil construction company operating in and around Birmingham, Alabama (Tr. 194). It stipulated it is an employer engaged in a business affecting interstate commerce and the Commission has jurisdiction (Tr. 9; Stip. 1-3).¹ Based upon the parties' stipulations and the record, Stevens is a covered business and the Commission has jurisdiction.

BACKGROUND

Stevens's work includes construction projects relating to sewers, water lines, and other related utilities (Tr. 21, 194). Hudson Construction retained Stevens to install drain lines at a construction site for a grocery store in Vestavia, Alabama (Tr. 22, 122, 211). The drain lines were to be installed in trenches created by drilling and blasting (Tr. 185, 211, 234). To assist with the blasting work, Stevens hired Atlas Blasting Company (Atlas) (Tr. 204, 208, 212). After Atlas blasted the area where the trench at issue here was located, Stevens's employees continued excavating the ground further with a backhoe (Tr. 208, 211-13).

Two employees were working in the completed trench on April 28, 2016, when OSHA Compliance Safety and Health Officer William Glasscock (CSHO) and Assistant Area Director Hector Julian-Camacho (AAD) drove past the site (Tr. 15, 23, 117-19). They stopped to inspect the site pursuant to OSHA's National Emphasis Program on trenching and excavations, which was established to address the risks and accidents associated with this type of work, and requires OSHA employees to conduct inspections whenever they identify excavations (Tr. 15-17, 117-19; Exh. C-7).

During the investigation, the CSHO learned Stevens employed the two workers he had seen in the trench (Tr. 23-24). One of the workers observed was a laborer and the other was the site superintendent as well as the competent person (Tr. 24). In addition to speaking with the two workers seen in the trench, the CSHO and AAD also spoke to a third employee, measured the trench, and took a soil sample (Tr. 23-29; Exh. R-9). This sample was taken to confirm the stability of the soil in the trench (Tr. 29, 128). The stability of the soil in an excavation impacts the amount of cave-in protection required. *See e.g.*, 29 C.F.R. § 1926.652(a)(1). The excavation standard sets forth a hierarchy of stability for rock and soil going from Stable Rock, to Type A, to Type B, to the least stable, Type C. *Id.* Testing of the soil at Stevens's Vestavia worksite confirmed it was "Type B" soil² (Stip. 6-7; Exhs. C-5, C-6; Tr. 29).

¹ The parties' stipulations are set forth in the Joint Pre-Hearing Statement and were made part of the record at the hearing (Tr. 10).

When working in Type B soil, employers generally must take various precautions, as the soil is more prone to collapse than Stable Rock or Type A soil (Tr. 178-79). For example, trenches in Type B soil deeper than five feet must be protected from cave-ins. 29 C.F.R. § 1926.652(a)(1). The protection method the employer selects must comply either with § 1926.652(b) or § 1926.652(c). *Id.* Section 1926.652(c) permits the installation of supports or shields to protect workers from cave-ins, while § 1926.652(b) permits the use of sloping and benching for protection. Stevens alleges it followed § 1926.652(b)'s sloping requirements. (Stevens's brief, pp. 3-4). To be compliant, the slope of the trench at issue here could not exceed a 45-degree angle. Table B-1, App. B. to Sub. P of Pt. 1926.652 (Table B-1); *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2216-17 (No. 09-0004, 2014) (consolidated) (discussing the sloping requirements for excavations in Type B soil), *aff'd*, 811 F.3d 922 (7th Cir. 2016) (Stevens's brief, p. 2; Stip. 6-9).

DISCUSSION

To establish a violation of any OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The Secretary has the burden of proving each of these elements by a preponderance of the evidence. *Id.*

According to the Secretary on April 28, 2016, an employee was working in a trench without cave-in protection in violation of 29 C.F.R. § 1926.652. This standard provides:

- (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 (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

29 C.F.R. § 1926.652(a)(1). “[T]he provision applies to any excavation, unless the employer shows that the excavation meets one of two exceptions—it was ‘made entirely in stable rock;’ or it was ‘less than 5 feet . . . in depth and examination of the ground by a competent person provides no indication of a potential cave-in.’ ” *Bardav, Inc.*, 24 BNA OSHC 2105, 2107 (No. 10-1055, 2014) (quoting 29 C.F.R. § 1926.652(a)(1)). The standard applies regardless of whether the excavation was actually hazardous. *Id.*

For the reasons set forth below, the standard applies and Stevens failed to show the trench qualified for either of the permissible exceptions to the requirement for cave-in protection. *See Ford Dev. Corp.*, 15 BNA OSHC 2003, 2010 (No. 90-1505, 1992) (“[T]he party claiming the benefit of an exception bears the burden of proving that its case falls within that exception”), *aff’d*, 16 F.3d 1219 (6th Cir. 1994) (unpublished).

Applicability

Stevens concedes the trench at its worksite constitutes an excavation within the meaning of the cited standard and therefore the standard applies (Stevens’s brief, p. 3). It also appears to agree with the Secretary’s view that the excavation was not in stable rock and exceeded five feet in depth (Stip. 6-7; Stevens’s brief, p.11). The Court agrees these exceptions do not apply.

Trench Not in Stable Rock

The cited standard includes an exception for excavations made entirely in stable rock, which is defined as “natural solid mineral matter that can be excavated with vertical sides and remain intact while exposed.” 29 C.F.R. § 1926.652(a)(1)(i); App. A to Sub. P of Pt. 1926.652—Soil Classification, para. (b), *Stable rock*. As noted above, testing of the soil sample taken at the worksite confirmed the trench was dug in Type B soil and the parties stipulated the testing results were “accurate, authentic, and admissible” (Stip. 6-7; Tr. 127-29).

In addition to the testing, by definition, once the soil has been disturbed it can no longer be classified as Stable Rock or Type A soil—it is either Type B or Type C (Tr. 170-71, 178). App. A to Sub. P of Pt. 1926—Soil Classification, para. (b), *Type B*, (iii); *Stark Excavating*, 24 BNA OSHC at 2218 (evidence of past utility work in the area showed soil was previously disturbed). To create the trench at Stevens’s worksite, Atlas blasted the surface with explosives and then employees used an excavator to finish the work (Tr. 185, 212-13). Thus, even if the testing had not been completed, the Secretary still would have shown the trench was not in stable rock and therefore the trench did not qualify for the exception to the cave-in protection

requirements set forth in 29 C.F.R. § 1926.652(a)(1)(i) (Tr. 170-71, 178-79, 185; Secretary's brief, p. 5). *See KS Energy Servs. LLC v. Solis*, 703 F.3d 367, 369-70 (7th Cir. 2012) (discussing factors which preclude classifying soil as Type A). So, the exception for trenches dug entirely in stable rock does not apply.

Trench Deeper than 5 Feet

When the AAD and CSHO drove by the site, they could only see the top of two workers heads in a trench (Tr. 23, 119; Exh. C-4 at 7). This led them to believe the trench was deeper than six feet. *Id.* They confirmed this belief during the investigation by using an engineering rod to measure the trench's depth and finding it to be seven feet and four inches (Tr. 26-27). Photographs of the engineering rod taken while it was in the trench corroborate the witnesses' testimony (Exhs. C-1, e-h).

Stevens suggests this measurement could have been incorrect if the AAD held the rod at an angle when he measured the depth (Stevens's brief, pp. 6-14). However, no one disputed the AAD's testimony about holding the rod as straight as possible (Tr. 141). The photographs are consistent with this testimony (Exhs. C-1, e-h). Further, one of the employees seen in the trench, Tony Pierce, said he was approximately five feet and nine inches tall, which would be consistent with the testimony indicating only the top of his head could be seen in the trench from a distance³ (Tr. 23, 222; Exhs. C-1b, C-4). Stevens's employees witnessed the AAD and CSHO measure the trench and discussed the findings during the inspection (Tr. 127). No one questioned or challenged the findings during the inspection. *Id.* Finally, Stevens did not introduce evidence of any other measurements taken before, during, or after the inspection (Tr. 238-39). *See Capeway Roofing Sys. Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1986, 2003) (party would have provided the evidence had it been helpful). Therefore, because there is no evidence the trench was less than five feet deep, the exception set out in 29 C.F.R. § 1926.652(a)(1)(ii) does not apply.⁴

³ Pierce was employed by Stevens at the time of the inspection but was no longer an employee when he testified at the hearing (Tr. 220-21, 238). He indicated he thought the trench was probably "five and half" feet deep (Tr. 228, 239). He acknowledged this was not based on any actual measurements (Tr. 238-39). While the measurements given by the CSHO and seen in the photographs are credited over Pierce's recollection, the Court notes Pierce did not indicate the trench was less than five feet deep as is necessary to qualify for the exception to the requirement for cave-in protection (Tr. 228). 29 C.F.R. § 1926.652(a)(1)(ii) (limiting the exception to trenches *less than* five-feet deep).

⁴ Even if the trench is less than five feet deep, a competent person must still examine the trench and determine there is no indication of a possible cave-in. 29 C.F.R. § 1926.652(a)(1)(ii). Mr. Pierce did not address whether he determined there was any indication of a possible a cave-in. He explained he "eyeballed" the trench and concluded

Violation

Having found the standard applies and Stevens did not qualify for either of the exceptions to the requirement to have cave-in protection, the Court turns to whether the slope of the trench was sufficient to protect against cave-ins. When a trench dug in Type B soil is deeper than five feet, its slope cannot exceed 45-degrees⁵ (Stip. 8-9; Stevens's brief, p. 2). *Stark Excavating*, 24 BNA OSHC at 2216, 2218. 29 C.F.R. § 1926.652(a)(1).

To calculate the slope, or angle, of the sides of the trench, the Secretary's expert, Michael Shea, used the measurements obtained by the AAD and CSHO during their investigation (seven feet, four inches deep and fourteen feet wide) (Exh. C-9 at 4). He also considered the estimated measurement of the trench floor in the Expert Report of Jack Cochran, who testified on Stevens's behalf.⁶ *Id.* Using these measurements, Shea determined the trench's slope was 64.5 degrees, which is considerably above the 45-degree maximum the standard permits (Tr. 169; Exh. C-9). Table B-1 n.2.

Stevens does not dispute Shea's calculations. Instead, it attacks the Secretary's evidence alleging: (1) the CSHO and the AAD were inexperienced, (2) the measurement of the trench depth could be wrong; (3) the measurement of the trench width at the top could be wrong; (4) the CSHO and AAD did not measure the bottom width of the trench; and (5) the trench did not constitute a hazard (Stevens's brief, pp. 3-5, 9-16). For the reasons discussed below, the Court finds the challenge to capabilities of the CSHO and AAD to be without merit and the challenges to the measurements of the trench to be unsubstantiated.

1. Capabilities of the CSHO and AAD

Stevens challenges the experience and training of the two OSHA employees who conducted the inspection (Stevens's brief, p. 5). The CSHO has a college engineering degree, over twenty years of work experience, including seven years working in the health group with the Mine Safety and Health Administration (Tr. 14). He had been working for OSHA for over a year at the time of the inspection and completed extensive training with the agency. *Id.* Further, he was accompanied by the AAD who had considerable experience in workplace investigations

⁵ As noted above, Stevens does not argue it provided cave-in protection in a manner compliant with § 1926.652(c). (Stevens's brief, p. 3; Stip. 7). Even if it had made such an argument, the CSHO and the AAD both explained there were no protective supports or shields in the trench (Tr. 32, 119-20). Their testimony is consistent with the photographic evidence and is credited (Exh. C-1).

⁶ Knowing this measurement was not critical to determining the trench's slope (Tr. 175, 182).

(Tr. 15). Although Stevens relies on the AAD having been in his position for less than two years, like the CSHO, the AAD also had considerable other relevant experience, including working for OSHA for over six years before being promoted to AAD as well as fifteen years of experience as a safety consultant (Tr. 117). Contrary to Stevens's assertion, the Court finds both the CSHO and AAD have considerable experience in workplace health and safety. Their testimony was corroborated and Stevens fails to establish their level of experience adversely impacted their credibility.

2. Trench Depth Was 7 feet and 4 inches

Stevens takes issue with how the trench was measured (Stevens's brief, p. 10). First, it suggests the depth measurement could have been inaccurate if the AAD held the measuring rod at an angle rather than vertically when he measured the trench depth. *Id.* There is no evidence the AAD did this (Tr. 125-26, 141). Further, as Shea explained, even if the AAD had held the rod flush with the sides of the trench rather than vertically as he said he did, the measurements would still indicate a slope in excess of 45-degrees (Tr. 174).

Stevens repeatedly mischaracterizes Shea's testimony saying he found the trench to be six feet, four inches deep (Stevens's brief, pp. 9, 11). To the contrary, Shea explained the trench was essentially a triangle. So, one could calculate the depth even if only the width across the top and length of one angled side was known (Tr. 175, 182). For example, if the angled side of the trench was seven feet and four inches long (as opposed to the vertical depth being seven feet and four inches as the Secretary alleges), with a fourteen-foot width the trench's slope still would not have complied with the cited standard (Tr. 174-76). Thus, even if the Court fully credited Stevens's unsubstantiated theory that seven feet and four inches was the angled length of the side, the trench was still not sloped appropriately. *See Ford*, 15 BNA OSHC at 2010 (affirming a violation of 29 C.F.R. § 1926.25(a) even though the trench's exact depth was not established).

3. Trench was 14 feet wide at the top

Stevens also disputes the Secretary's proof of the trench's width (Stevens's brief, pp. 6-7). The CSHO and AAD both testified they measured the top of the trench and determined it was fourteen feet wide in the area where they observed the workers (Tr. 27-28, 123-26). However, the Sampling Worksheet, which was prepared a few days after the inspection and attached to the soil sample, lists the trench as 21 feet across at its widest point (Exh. C-5). While the Sampling Worksheet refers to the trench's widest point, the CSHO and AAD explained the

area where they saw the employees was not the widest point of the trench (Tr. 31-32). This is consistent with the testimony of Pierce, one of the employees observed in the trench, who acknowledged he had not been exclusively in the widest part of the trench (Tr. 241; Exh. C-1a-b). Two other documents, the Safety Narrative and the Violation Worksheet, corroborate the AAD and CSHO's testimony by also specifying the trench was fourteen feet wide (Tr. 111; Exhs. C-3, C-4). Further, as noted above, according to the AAD, the fourteen-foot width was discussed during the inspection and was not challenged then⁷ (Tr. 127).

The photographic evidence further bolsters the evidence of the trench being fourteen feet wide (Exh. C-4). The parties agree the drain pipe had a five-foot diameter (Tr. 166, 286). While knowing the size of the drain pipe cannot yield the exact dimensions of the trench, the photographs showing the pipe in the trench support the witnesses' testimony regarding the width and shape of the trench (Exh. C-4). One photograph shows the CSHO's engineering rod resting on top of the five-foot drain pipe and extending beyond it before reaching the sides of the trench. *Id.* Although the photograph's resolution is not sufficient to see the measurement markings on the rod, in light of the known width of the drain pipe, the photograph is consistent with the witnesses' recollection and supports the measurements in the Safety Narrative and Violation Worksheet (Exhs. C-3, C-4, C-5). In addition, the site supervisor acknowledged the trench appeared to be narrower near the drain pipe and wider at the back (Tr. 242; Exh. C-1c). Accordingly, the use of the fourteen-foot width to calculate the trench's slope was appropriate.

4. Width of the Trench at Bottom

The Secretary's response to a discovery request provided the bottom width of the trench was fourteen feet (Exh. R-1). However, at the hearing, the Secretary did not establish the exact width of the trench floor. The CSHO and AAD acknowledged they did not enter the trench to measure the floor because they were concerned about the safety of the excavation (Tr. 148). And, the AAD cast doubt on a fourteen-foot width at the bottom when he acknowledged the sides of the trench were not completely vertical, as they would need to be if the trench was the same width at the top and bottom (Tr. 132).

⁷ Stevens's also provided the fourteen-foot width dimension to its own expert so he could prepare his report (Tr. 296-99; Exhs. C-9, C-11). Stanley Hallmark, of Atlas, testified they needed to blast the trench at least three feet wide for the portion of the trench where the pipe will be laid (Tr. 210). However, he noted they could not control whether the blasting would result in a wider trench and he did not discuss any measurements of the trench. *Id.* He also acknowledged Stevens's employees worked on the trench after he completed the blasting work and he did not know the actual dimensions of the trench at the time of the inspection (Tr. 212-13).

The Secretary did not need to establish the width of the trench floor, however, because he provided evidence about the depth and width of the trench. Only these two measurements are needed to calculate the slope and establish a violation (Tr. 175, 182). Further, the slope calculated with these two established measurements is consistent with the estimated seven-foot width of the trench floor Stevens's expert provided in his report (Exh. C-9 at exh. E; Tr. 165, 286, 298). The storm drain in the trench had an approximate five-foot diameter and there was about a foot on each side of the drain, which is consistent with the trench being seven feet wide at the bottom (Tr. 36, 166-67, 286; Exh. C-1d).

5. Standard does not require proof of a hazard

Finally, Stevens argues the trench did not constitute a hazard (Stevens's brief, pp. 4-5). Stevens's expert, Jack Cochran, testified, based on the photographs he saw, the excavation looked like "relatively stable rock" and he did not believe there was a substantial probability of serious harm (Tr. 289). However, the standard applies to any excavation unless one of the two exceptions applies, i.e., the excavation is dug entirely in a material which meets the standard's definition for stable rock or the depth is less than five feet. *Bardav*, 24 BNA OSHC at 2107-8; *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1110 (No. 11-2559, 2016) (belief there was no hazard did not preclude affirming a violation of 29 C.F.R. § 1926.652(a)(1)). Cochran acknowledged blasted excavations have irregular sides and it is difficult to predict how material is going to break up when being blasted (Tr. 291). He explained the "natural instinct" is for the soil to want to close once it has been cut (Tr. 292). He had no firsthand knowledge of the type of soil in the trench at issue here. *Id.* Further, he specifically acknowledged the measurements and calculations presented during the hearing were correct, including Shea's determination that the slope of the trench exceeded the maximum angle the standard permits and he admitted the calculations in his own expert report were in error⁸ (Tr. 293, 295-96; Exh. C-9 at exh. E).

Thus, Cochran's testimony does not undermine finding the excavation violated the cited standard. The Secretary's evidence of the trench being seven feet, four inches deep and fourteen feet wide is credited over Stevens's speculation that these measurements could be erroneous.

⁸ At one point in his testimony, Cochran said he was "not willing to concede" the trench was fourteen feet wide (Tr. 294). This appears to conflict with an earlier statement acknowledging Shea's measurements and calculations were correct (Tr. 293). In addition, other than noting the measurement of the trench's width could be disputed, he provided no other measurements or rational as to why the evidence of the fourteen-foot width should be rejected (Tr. 294). In contrast, the Secretary provided additional support such as photographs and information about the drain pipe's dimension in support of his view of the trench's dimensions.

With these dimensions, both the Secretary's expert and Stevens agree the trench was not adequately sloped.

Accordingly, because the trench was not made entirely in stable rock and was more than five feet deep, Stevens needed to provide sufficient cave-in protection. Stevens failed to provide such protection and so the Secretary established a violation of 29 C.F.R. § 1926.652(a)(1).

Employee Exposure to the Violation

The CSHO and AAD saw and photographed two workers in the trench (Tr. 23; Exhs. C-1a, C-1b). During their investigation, the CSHO and AAD learned one of the workers was Pierce, Stevens's site supervisor (Tr. 23-24). According to the CSHO, he was told the other employee working in the trench was Cody Pierce, another Stevens' employee.⁹ *Id.* At the hearing, Pierce acknowledged he was in the trench but indicated Austin Payne, rather than Cody Pierce, was in the trench with him (Tr. 221-22). Since Payne was also a Stevens' employee, this factual dispute is not outcome determinative. *Id.* The Secretary established a supervisor and an employee both were in the trench at the time alleged in the Citation. This is sufficient to show employee exposure.¹⁰ See *Bardav*, 24 BNA OSHC at 2108 (evidence that employees were in unprotected excavation established exposure).

Employer Knowledge of the Violation

To establish knowledge, the Secretary must show the Stevens knew, or with the exercise of reasonable diligence, could have known of the violative condition. See e.g., *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001) (employer had actual and constructive knowledge of a violation of 29 C.F.R. § 1926.652(a)); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986) (finding knowledge when supervisor was nearby and should have known that work would place employee close to the hazard). The site supervisor acknowledged he had been working in the unprotected trench with another employee¹¹ (Tr. 236,

⁹ Cody Pierce did not testify.

¹⁰ In addition to actual exposure, the record also shows employee access to the violative condition was reasonably predictable. See *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), aff'd without published opinion, 79 F.3d 1146 (5th Cir. 1996). There is no evidence employees were precluded from entering the trench. Nor is there a claim the work did not require anyone to be in the trench.

¹¹ In its brief, Stevens did not allege there was any employee misconduct. Nor does the record reflect sufficient evidence to establish this defense. See *Daniel Int'l v. OSHA*, 683 F.2d 361, 364 (11th Cir. 1982) (employer bears the burden of showing employee misconduct caused the violation); *Schuler-Haas Elec. Corp.*, 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006) (discussing the four-part test for unpreventable employee misconduct). Thus, the Secretary may establish employer knowledge by showing two employees knew of the violative condition. See *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2156 (No. 08-1656, 2016).

239). When the exposed employees include not only the supervisor but also a subordinate employee, the supervisor's knowledge is imputable to the employer. *Empire Roofing Co. SE, LLC*, No. 16-17309, 2017 WL 4708162, at *3 (11th Cir. Oct. 19, 2017) (imputing knowledge when neither foreman nor subordinates used fall protection); *Quinlan v. Sec'y of Labor*, 813 F.3d 832 (11th Cir. 2016) (imputing supervisor's knowledge of subordinate employee's violative conduct).

In addition to the site supervisor's actual knowledge, the Secretary also showed constructive knowledge. The trench was in plain view and could have been seen by another supervisor, Reed Cole (Tr. 129, 139, 238). Cole had been at the worksite earlier in the day, before the CSHO and AAD arrived, and he was capable of viewing the trench and its slope then (Tr. 129, 238). See *Bardav*, 24 BNA OSHC at 2108 (supervisor's presence near the trench showed employer knowledge); *Fla. Lemark Corp. v. Sec'y of Labor*, 634 F. App'x. 681, 684-85, 688, 25 BNA OSHC 1825, 1827-28 (11th Cir. 2015) (unpublished) (finding knowledge prong met when the supervisor could have discovered the hazardous condition through reasonable diligence).

Stevens does not deny knowledge of the trench but argues the site supervisor believed the trench complied the excavation standard (Stevens's brief, p. 4.) However, belief in the presence of a hazard is not the appropriate test—the Secretary does not have to prove the employer knew the condition constituted a violation. See *Revoli*, 19 BNA OSHC at 1684; *Jim Boyd*, 26 BNA OSHC at 1111 (believing the trench did not pose a hazard did not preclude finding a violation); *Kokosing Constr. Co.*, 21 BNA OSHC 1629, 1632 (No. 04-1665, 2006) (finding reasonable diligence required further action on the part of the employer), *aff'd*, 232 F. App'x 510 (6th Cir. 2007) (unpublished). It is enough to show the employer failed to engage in reasonable diligence to identify the violative condition. *Id.* The site supervisor did not measure the trench (Tr. 239). He knew the soil had been blasted and was capable of realizing its depth relative to his own height. *Id.* Further, the slope of the trench was nearly twenty degrees more than the maximum allowed for Type B soil (Tr. 48, 89, 169). It even exceeded the maximum slope for excavations in more stable Type A soil (Tr. 172). Thus, whatever the site supervisor's personal belief about the trench's compliance, it was not the product of reasonable diligence to determine the trench's compliance with the cited standard.

Affirmative Defenses

The Secretary met his *prima facie* burden of showing applicability, violation of the standard, employee exposure to the violative condition and employer knowledge. Although Stevens raised certain affirmative defenses in its Answer, it neither pursued them in its brief nor offered sufficient proof to establish any of them at the hearing. Accordingly, the violation is affirmed.

Characterization

The Secretary characterizes this Citation item as serious (Stip. 5). A violation is “serious” if there was a substantial probability death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k).

The trench at issue here was considerably steeper than the maximum allowable slope. (Tr. 169; Exh. C-9). Employees working in trenches without appropriate protection face cave-in hazards (Tr. 17, 118, 179; Exh. C-7). A cave-in can result in broken bones, crush injuries and death. *Id.* The AAD explained OSHA has a national emphasis program on trenching and excavations because of the number of fatalities and accidents associated with this type of hazard (Tr. 118-19; Exh. C-7). OSHA considers the risk serious enough to require inspectors to stop and investigate any time they see a trench or excavation (Tr. 15-17). Likewise, the Commission has previously characterized violations of the trenching standard as serious. *See e.g., Stark Excavating*, 24 BNA OSHC at 2224, 2228 (finding one violation of 29 C.F.R. § 1926.652(a) serious and another one willful); *Mosser Constr. Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (rejecting claim that the violation of 29 C.F.R. § 1926.652(a) was other-than-serious); *Calang Corp.*, 14 BNA OSHC 1789, 1794 (No. 85-0319, 1990) (noting trench cave-ins have been “one of the most severe problems in occupational safety”).

Neither Pierce nor Cochran provided adequate support for their opinion the trench could not result in a serious injury. *See Stark Excavating*, 24 BNA OSHC at 2222 (mistakenly believing trench was dug in Type A soil did not preclude serious characterization for a violation of § 1926.652(a)(1)); *Jim Boyd*, 26 BNA OSHC at 1113 (actions taken to comply with excavation standard did not preclude finding the violation willful). Both seemed to improperly focus on the probability of an accident, rather than on whether death or serious harm would be the probable result if an accident occurred. *See Mosser*, 23 BNA OSHC at 1046 (characterizing a violation of 29 C.F.R. § 1926.652(a) serious despite expert’s claim that cave-in hazard was not

present with the Type B soil at the worksite). When the focus is directed at what injuries are probable in the event of an accident, the violation is appropriately characterized as serious. *See John Carlo, Inc.*, No. 04-1405, 2006 WL 2037376, at *4 (O.S.H.R.C.A.L.J., May 22, 2006) (affirming a violation of 29 C.F.R. § 1926.652(a) as serious due to the cave-in hazard), *aff'd*, 234 Fed. Appx. 902 (11th Cir. 2007) (unpublished).

Penalty Amount

The Act requires consideration of four factors to determine the penalty: (1) the gravity of the violation; (2) the employer's size; (3) the employer's history; and (4) its good faith. *Orion Constr., Inc.*, 18 BNA OSHC 1867, 1868-69 (No. 98-2014, 1999). Of these, gravity is generally the most important factor. *Id.* at 1868.

The Secretary proposes a penalty of \$5,390.00 because, despite the violation's high gravity, Stevens is a small employer and a prior inspection within the last five years did not result in a violation (Secretary's brief, pp. 15-16). The Court agrees the gravity of the violation is high—broken bones or death would be the likely resulting injuries in the event of a cave-in and two employees were observed in the unprotected trench. The CSHO indicated the company had 47 employees, however, Stevens's President, Tom Stevens, testified the company had more than 85 employees (Tr. 22, 199). Stevens history reveals it was previously investigated, but not cited within the last five years (Tr. 47). The company had a health and safety policy and the Secretary does not allege a failure to promptly abate.¹² After weighing this evidence, with a particular emphasis on the gravity, the Court finds \$5,390.00 to be an appropriate penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

¹² In its brief, Stevens appears to deny the hazard was abated during the inspection (Stevens's brief, p. 16). However, the site supervisor said workers moved dirt around (including with a backhoe), and put gravel along with dirt in the trench (Tr. 233, 244-45). Stevens's expert also referred to employees taking abatement measures in his report (Exh. C-9 at exh. E at 2).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Item 2 of Citation No. 1, alleging a violation of § 1926.652(a)(1), is **AFFIRMED** as serious and a penalty of \$5,390.00 is assessed.

SO ORDERED.

/s/

Date: **November 13, 2017**

SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia