United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, NW, Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. J. MASTERSON CONSTRUCTION CORPORATION, Respondent.	:	OSHRC DOCKET NO. 00-2000

APPEARANCES:	David L. Baskin, Esquire U.S. Department of Labor Office of the Solicitor Boston, Massachusetts For the Complainant.	Richard D. Wayne, Esquire Hinckley, Allen & Snyder, LLP Boston, Massachusetts For the Respondent.
BEFORE:	G. MARVIN BOBER Administrative Law Judge	

DECISION AND ORDER

Background and Procedural History

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"), to review (1) a citation issued by the Secretary of Labor pursuant to section 9(a) of the Act, and (2) the proposed assessment of penalty pursuant to section 10(a) of the Act. On August 3, 2000, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of one of Respondent's work sites on Route 20 in Sturbridge, Massachusetts. As a result of the inspection, OSHA issued to Respondent a one-item willful citation. Respondent timely contested the citation, and, following the filing of a complaint and answer and pursuant to a notice of hearing, an administrative trial was held in Boston, Massachusetts on August 6, 2001. Both parties have filed post-trial briefs.

Jurisdiction

The parties agree that Respondent, J. Masterson Construction Corporation, is an employer engaged in interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that the Commission has jurisdiction over this case.

Relevant Testimony

Dale Varney, a compliance officer ("CO") for OSHA for 13 years, was traveling west on Route 20 on August 3, 2000, when he noticed the tops of two hard hats in a trench. The CO drove to a lot across the street from the site, and from there he observed two employees wearing hard hats inside the trench and another person, later identified as Jeffrey Masterson, one of Respondent's superintendents, standing over the trench looking down.[1] When the CO approached the work site, the superintendent told the employees to exit the trench. The CO testified that the walls of the trench were not shored and that no trench box was in use. He further testified that the wall closest to the highway was essentially vertical and not sloped at a two-to-one ratio. Using a steel measuring tape, the CO measured the trench to be approximately 10.5 feet long and 7 feet wide. He also measured the wall closest to the highway and found it to be 6 feet, 2 inches high. The CO observed that water had accumulated at the bottom of the trench, and, when he tested the soil, he found it to consist of Type B and Type C soil. Superintendent Masterson accompanied the CO to inspect a trench box that was on site about 200 yards away, and, minutes later, the superintendent had the trench box installed in the excavation. (Tr. 12-15, 18, 30-32, 39, 44-45, 49-50, 112-18.)

Jeffrey Masterson testified that he "swing[s] by" work sites to check on them, that he was present at the site when OSHA arrived, and that he observed the CO taking measurements of the trench. Superintendent Masterson stated that he himself measured the trench wall by angling the measuring tape because he could not put the tape straight down, and that, according to his measurement, the trench wall was around or less than 5 feet tall. He also stated that he took pictures of the excavation site. (Tr. 122-23, 126, 131, 134-36, 166-78, 184-85.)

John Masterson, Respondent's owner and president, testified that the company employs approximately 27 employees. He further testified that when employees are hired, they are given a copy of the company's written safety program and OSHA training through a consultant, and that, in

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[1]Jeffrey Masterson, the son of Respondent's owner, testified that he himself does not have any ownership interest in the company. (Tr. 122, 135-36.)

addition, the company's foremen conduct weekly toolbox meetings. At the trial, President Masterson verified that OSHA had inspected his company in 1994 and 1997, and he identified the two settlement agreements relating to those inspections. (Tr. 188-201; C-5-6.)

Willful Citation 1, Item 1

The Secretary alleges that Respondent violated 29 C.F.R. § 1926.652(a)(1) by failing to provide an adequate protective system designed to protect employees from possible cave-ins.[2] In order to establish a violation of a specific standard, the Secretary must show by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) there was a failure to meet the terms of the standard; (3) employees had access to the violative condition; and (4) the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 20-1747, 1994).

The Secretary has satisfied her burden of proving a violation of the standard for the following reasons. First, it is undisputed that the standard applies to the cited condition. Second, I find that Respondent failed to meet the terms of this standard. The excavation was not made entirely in stable rock, and, despite Respondent's claim, the trench wall closest to the highway was more than 5 feet deep.[3] (Tr. 30, 38, 44-46, 83-84, 93-94, 112-13, 118-20; C-1, R-5.) The CO's testimony, which I found credible and convincing, was that the near-vertical trench wall closest to the highway was 6 feet, 2 inches tall. (Tr. 30, 38, 46, 83, 113, 118.) Superintendent Masterson attempted to discredit the CO's measurement by testifying that it was not possible to drop the steel measuring tape straight down into the trench. (Tr. 134-35.) Rather, according to the superintendent, the only way to measure the wall was to drop the tape down at an angle, and, using this method, he measured it to be 64

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[2]Specifically, the standard provides that:

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

[3]The CO also testified that nearby traffic and water accumulation further undermined the stability of the trench wall. (Tr. 46; C-3, C-7.)

inches or 5 feet, 4 inches high.[4] (Tr. 134-35, 166.) Contrary to the superintendent's assertion that the tape could not be dropped straight down, photographs C-3 and C-7 clearly show that the subject wall was concave or undercut, which supports the CO's testimony that he was able to drop the tape straight down. Photograph C-1, which depicts two employees in the trench with the subject wall above their heads, also supports the finding that the trench was over 5 feet deep.[5] The superintendent's testimony is further undermined by the fact he did not inform the CO of his measurement during the inspection. (Tr. 185-86, 218-19.) If the superintendent had actually measured the wall to be 5 feet or less, it is reasonable to conclude he would have shared his measurement with the CO.[6] I also found credible the CO's testimony that Respondent did not provide an adequate protective system to protect its employees. (Tr. 18, 20, 37-38.) The CO's testimony, as well as photographs C-1, C-3, C-7 and R-5, clearly establish that Respondent did not slope nor shore the trench and that no trench box was in use. Accordingly, Respondent did not comply with the terms of the standard.

Third, I find that employees had access to the violative condition. The record shows that at least two employees were working inside the trench and exposed to the cited condition.[7] (Tr. 13-15,

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[4]Respondent implies that because the superintendent's measurement was taken at an angle, this would constitute the "hypotenuse" of a triangle such that the true height of the wall would be around 5 feet. (R. Brief, p.15; Tr. 134-35.) I cannot make this leap in logic without accurate measurements of either the angles of the triangle or the length of one of the sides of the triangle. Respondent provided neither, rendering its theory sheer speculation at best.

[5]Photograph R-5, while not as dispositive as C-1, also indicates that the trench wall was likely more than 5 feet deep.

[6]Respondent also attempts to discredit the CO's measurements by introducing into evidence photographs of the 6-foot by 8-foot trench box. (Tr. 100-02, 123-25, 142-59; R-4, R-8.) However, R-4, the photograph of the trench box inside the trench, provides insufficient evidence of the depth of the trench, particularly since it cannot be ascertained whether the box is sitting at the bottom of the trench. Moreover, if the box had in fact provided accurate evidence of the depth of the trench, it seems unlikely the superintendent would not have pointed this out to the CO.

[7]Respondent argues that even if the CO's measurements were accurate, employees were not exposed to a hazard because a high density fill protected the trench walls. (R. Brief, p. 18.) In support of its argument, the Respondent cites photographs C-4, R-5 and R-7. (R. Brief, p. 8-9, 18.) I, however, fail to see how these photographs support Respondent's argument. Rather, photograph C-7

21-24; C-1, R-5.) Finally, I find that Respondent had actual knowledge of the violative condition. Knowledge of the employer's foreman or supervisor is imputable to the employer for the purpose of establishing knowledge. *Halmar*, 18 BNA OSHC at 1016. Superintendent Masterson was not only present at the excavation site, but he was also standing at the edge of the trench looking down at the employees while they were exposed to the violative condition. (Tr. 13-15, 21-24; C-1, R-5.) Based on the foregoing evidence, the Secretary has satisfied her burden of proving the alleged violation.[8]

The Secretary has classified this violation as willful. The Commission has held that a willful violation is one committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). As the Commission in *Williams* further explained:

> A willful violation is differentiated by a heightened awareness–of the illegality of the conduct or conditions–and by a state of mind–conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a

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more accurately depicts the high density fill in only a small area of the trench wall, and not extending the full length of the wall.

[8]Respondent asserts the affirmative defense of unpreventable employee misconduct. (R. Brief, p. 20.) To prove this defense, Respondent must show that: (1) it had established work rules designed to prevent the violation, (2) it had adequately communicated the rules to its employees, (3) it had taken steps to discover violations, and (4) it had effectively enforced the rules when violations were detected. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979); *see also, General Dynamics Corp. v. OSHRC*, 599 F.2d 453 (1st Cir. 1979). The Commission has held that "[w]here a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). Here, Superintendent Masterson, the owner's son, was involved in the misconduct–he watched and allowed employees to be exposed to the hazardous condition. (Tr. 13-15, 21-24; C-1, R-5.) Further, Respondent presented no evidence to show it had taken steps to discover violations or that it had effectively enforced the rules when violations were detected. Respondent's defense is thus rejected.

> willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete....[T]he test of an employer's good faith for these purposes is an objective one–whether the employer's belief concerning a factual matter or concerning the interpretation of a standard was reasonable under the circumstances.

Id. at 1256-57, 1259 (citations omitted).

I conclude that Respondent had the requisite heightened awareness and state of mind to classify this violation as willful. Respondent clearly had knowledge of the requirements of the standard, as it had been cited for the same violation twice previously, once in 1994 and once in 1997. (C-5-6.) In addition, the company president confirmed that all the supervisors were "competent persons" with 10 hours of OSHA training, including training in trenching. (Tr. 208-11.) Finally, the superintendent admitted to the CO that, as a competent person, he was aware of OSHA's trenching requirements. (Tr. 19-20, 47, 96-98.) Yet, despite this knowledge, the superintendent stood by as employees were exposed to the cited condition. (Tr. 13-15, 21-24; C-1, R-5.) Moreover, any assertion that the superintendent did not believe the trench violated OSHA's trenching standards would be unreasonable in light of the photographs illustrating that the wall was higher than the employees' heads and thereby greater than 5 feet deep. It would appear that Respondent was motivated more by a desire to finish the job quickly than by a desire to comply with the standard, and the fact that a trench box was placed in the trench without much difficulty, and within minutes of the CO's request, is clear evidence of Respondent's state of mind. (Tr. 20, 49-50.) By allowing its employees to work in the trench without an adequate protective system, Respondent intentionally disregarded the requirements of the Act and demonstrated plain indifference to employee safety. Therefore, Respondent's violation of the cited standard was properly characterized as willful.

Penalty

Pursuant to section 17(j) of the Act, 29 U.S.C. § 666(j), the Commission must give due consideration to four factors in assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith, and (4) the employer's prior history of OSHA violations. Generally, "the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). "The gravity of a particular

violation depends on such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Id*. at 2214.

The Secretary has proposed a penalty of $33,000 for the violation but has failed to specify the basis for this penalty amount.[9] The Commission has held that "[i]t is the Secretary's burden to introduce into the record evidence bearing on these section 17(j) factors. [She] should also explain how [she] arrived at the penalty proposed." *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995). Despite the Secretary's failure to explain her rationale, the necessary information can be found in the record. I find the gravity of the violation to be moderate to high, considering the number of employees exposed, the duration of the exposure, the precautions taken against injury and the probability an accident would occur. (*See, e.g.*, Tr. 46, 57.) As to size, the Commission takes into consideration the total number of employees and the employer's financial condition. *See Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624-25 (No. 88-1962, 1994). There is no evidence in the record about the company's financial condition, but President Masterson testified that Respondent has approximately 27 employees. (Tr. 188). I find, therefore, that Respondent is entitled to an adjustment in penalty based on size. As to good faith, no adjustment is appropriate in light of Respondent's failure to take any measure to protect its employees. (Tr. 18, 20, 37-38; C-1, C-3, C-7, R-5.) Finally, as to prior history, no adjustment is appropriate, as Respondent was cited for violating the same standard in 1994 and 1997. (Tr. 190-93; C-5-6.) On the basis of the foregoing analysis, a penalty of $23,100.00 is appropriate and is accordingly assessed.

[9]While the Secretary attempts to explain the rationale for the proposed penalty in her brief, she offered no such explanation at the hearing.

ORDER

Based upon the foregoing decision, the disposition of the sole citation item, and the penalty assessed therefore, is as follows:

Citation 1	**Standard**	**Disposition**	**Classification**	**Civil Penalty**
Item 1	29 C.F.R. § 1926.652(a)(1)	Affirmed	Willful	$23,100.00
Total Penalty Assessed:				**$23,100.00**

/s/

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Dated: 29 OCT 2001
Washington, D.C.