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

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.

LOUIS SINISGALLI, INDIVIDUALLY AND D/B/A METRO WRECKING OF ROCHESTER, INC., LOUIS SINISGALLI WRECKING CORP., SINISGALLI WRECKING CORP., METRO DEMOLITION OF ROCHESTER, SONDAR ENTERPRISES, INC.,
Respondent.

OSHRC DOCKET
NO. 94-2981

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 23, 1996. The decision of the Judge will become a final order of the Commission on May 23, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before May 13, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

DOCKET NO. 94-2981

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: April 23, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-2981

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Terrence C. Brown-Steiner, Esquire
Shapiro, Rosenbaum & Liebschutz
Fourth Floor, Irving Place
30 West Broad Street
Rochester, NY 14614

Barbara Hassenfeld-Rutberg
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Office and
Courthouse, Room 420
Boston, MA 02109 4501

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501

PHONE:
COM (617) 223-9746
FTS ~~(617) 223-9746~~

FAX:
COM (617) 223-4004
FTS (617) 223-4004

SECRETARY OF LABOR,	:	
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Respondent.	:	

Appearances:

Barnett Silverstein, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Terence C. Brown-Steiner, Esq.
Shapiro, Rosenbaum & Liebschutz
Rochester, New York
For Respondent

Before: Administrative Law Judge Barbara L. Hassenfeld-Rutberg

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et. seq.*, ("the Act"), to review citations issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(c) of the Act.

On August 30, 1994, two citations were issued to Louis Sinisgalli ("Sinisgalli"), Metro Wrecking of Rochester, Incorporated, Louis Sinisgalli Wrecking Corporation, Sinisgalli Wrecking Corporation, Metro Demolition of Rochester, and Son-Dar Enterprises, Incorporated. The two citations - one serious and one willful - stem from the investigation of an accident that occurred on March 16, 1994, at the Mumford Trailer Park in Rochester, New York (Tr. 34, 238, 598-99). Two

men were working inside an excavation when a large piece of earth broke free from one of the walls, injuring one of the workers (Tr. 34, 43, 46, 108-09, 111-12, 238-39, 339-40; Exhibit C-1). The serious citation alleges six violations, three of which have been amended to be characterized as repeat, with a total proposed penalty of $10,500. At the hearing, the Secretary withdrew the sixth item of the serious citation, reducing the total proposed penalty to $8,750 (Tr. 752-53). The willful citation alleges one violation of the excavation standard and a penalty of $49,000 is proposed. A notice of contest was timely filed and a hearing was held in Rochester, New York on October 12-13 and 19-20, 1995.

Before proceeding to the merits of this case, it must first be determined which party, if any, of those cited by the Secretary may be properly held responsible for the violations at issue here. Under the Act, only an "employer" is liable for violations that affect the safety and health of its "employees", i.e., those individuals with whom the party has an employment relationship.[1] *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158, 1987-90 CCH OSHD ¶ 28,504 (No. 87-214, 1989) (consolidated). In order to determine whether an employment relationship exists, the Commission has stated that the key factor is whether the cited party had the ability to control the work involved. *Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 2126 (No. 91-2929, 1994); *Vergona Crane Co.*, 15 BNA OSHC 1782, 1784, 1991-93 CCH OSHD ¶ 29,775 (No. 88-1745, 1992). In other words, who had control over the work environment such that abatement of hazards can be obtained? *MLB Industries, Inc.*, 12 BNA OSHC 1525, 1527, 1985 CCH OSHD ¶ 27,408 (No. 83-231, 1985). Additional relevant factors the Commission has considered include: Who do the workers consider to be their employer? Who pays their wages? How are their wages established? *Van Buren-Madawaska*, 13 BNA at 2158 (quoting *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1703, 1978 CCH OSHD ¶ 22,829 (No. 14801, 1978)). *See also Vergona Crane Co.*, 15 BNA OSHC 1782, 1991-93 CCH OSHD ¶ 29,775 (No. 88-1745, 1992); *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637, 1991-93 CCH OSHD ¶ 29,689 (No. 88-2012, 1992), *aff'd*, 20 F.3d 938 (9th Cir. 1994). It has been held that even in criminal cases, the court can pierce the corporate

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[1] Section 3(5) of the Act, 29 U.S.C. § 652(5), defines "employer" as "a person engaged in a business affecting commerce who has employees." Section 3(6) of the Act, 29 U.S.C. § 652(6), defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce."

veil to find that an individual is responsible as an "employer" within the meaning of the Act. Where a defendant's business is incorporated but it is run as a sole proprietorship, he is held to be the "employer". *U.S. v. Cusack*, 806 F. Supp. 47, 49, 51 (D.N.J. 1992). The court in that case found that "an officer's or director's role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director is in fact the corporation and is therefore an employer". *Id.* The fact that *Cusack* was a criminal case does not change the culpability of an individual who hides behind a corporate veil in an attempt to escape liability, whether it be civil or criminal. Based on the numerous corporations Sinisgalli set up, which he ran exclusively or primarily but then they became defunct, I find that he in fact was the true employer in all these corporations. Since the present existence of most of them is questionable, I find that an employment relationship existed between Sinisgalli and the workers present at the Mumford Trailer Park on the days in question. I find him to be individually responsible as the employer for the violations affirmed herein. In addition to his own assets, any assets hidden in any of the corporations cited herein where he is an officer or director shall be considered his assets for the purpose of obtaining the fine.

Sinisgalli contends that the men at the site were not employed by him or any of his corporations, but were employed by Metro Wrecking of Rochester, Incorporated ("Metro"), one of the companies cited here (Tr. 368-69, 377). Aside from occasionally serving as an unpaid consultant to Metro for the past few years, Sinisgalli maintains that he has no corporate affiliation with the company which he claims is owned by Donna Caceci , a very close friend whom he has known since he was 5 years old (Tr. 366, 368-69, 383, 386-87, 394, 409, 413, 553).[2] Of the remaining companies cited here by the Secretary, Sinisgalli has admitted ownership of three: Louis Sinisgalli Wrecking Corporation, Sinisgalli Wrecking Corporation ("Sinisgalli Wrecking"), and Son-Dar Enterprises, Incorporated ("Son-Dar") (Tr. 365-66, 374-75, 410-11; Exhibit C-2).[3] According to Sinisgalli, the first of these corporations was never operated, and the latter two corporations have no employees,

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[2] Although the New York State Certificate of Incorporation for Metro does not indicate the owner's identity, the compliance officer testified that he was informed by the State Insurance Fund that Caceci was listed as Metro's owner (Tr. 853; Exhibit R-3).

[3] The state incorporation records associated with these corporations confirm only Sinisgalli's ownership of Sinisgalli Wrecking (Exhibits R-2, R-4, & R-5).

other than himself as president (Tr. 370-71, 395, 398, 425, 553).It is undisputed that the third corporation, Son-Dar, owns the Mumford Trailer Park and that he shares office space on Western Drive in Rochester, New York with Caceci for the corporations cited herein. (Tr. 34, 186, 368, 370-71, 380-81, 384, 665-66, 948-49).

As owner of the trailer park, Sinisgalli testified that he hired several subcontractors, including Metro, to perform the work associated with installing a new septic tank (Tr. 395, 410-12, 418-19, 435-38). To dig the excavation in which the septic tank would be placed, Sinisgalli alleges that he made a deal with Metro, bartering its excavation services for his prior consultation work for Metro for which he never received compensation (Tr. 369, 386-87, 394, 409). At Sinisgalli's request, the excavation was performed by a Metro machine operator at least one month prior to the March 16 accident (Tr. 397, 408-09, 496, 945-46; Exhibit C-1). About that time, Sinisgalli was informed that water was seeping into the excavation, and the subcontractor he had hired to build the septic tank indicated that water would keep the concrete poured to form the tank's walls from "curing" properly (Tr. 392-93, 438, 456). In order to keep the water level down, five electric submersible pumps were placed at the bottom of the excavation, and a gas pump and a diesel pump were placed outside the excavation (Tr. 51-52, 249, 392, 405-07, 447-48). Sinisgalli testified that he borrowed the latter two pumps from a friend, and the five electric pumps were rented in Metro's name by Peter Jannarone, who usually works as a bid estimator for Metro at the Western Drive office where Sinisgalli and Caceci are located (Tr. 391-92, 405, 407-08, 446-54, 545, 681, 787-88, 851, 872-73, 896).

Sinisgalli does not dispute that on March 14, 1995, he phoned Jannarone and instructed him to pick up Joseph Watts and Nicholas Harris the following day and take them to the trailer park to remove the five electric pumps at the bottom of the excavation (Tr. 377, 393, 434, 459-60, 463, 471-73, 566-67, 589, 594-95, 874-75, 896, 947, 953-54). Sinisgalli testified that he has known Watts for about twenty years and throughout this period, Watts has frequently worked for him as an employee for one of his many corporations (Tr. 26, 367-68, 381-83, 395-97, 486-91). Sinisgalli became acquainted with Harris through Watts and has also employed him on several occasions allegedly in the name of different corporations (Tr. 350, 367, 381, 395-97). Both employees were always paid

in cash by either Sinisgalli or Caceci (Tr. 26, 34, 165-66, 351, 367-68, 379, 381, 492).[4]

On March 15, after a brief stop at the Western Drive shop to pick up equipment,[5] Jannarone drove Watts and Harris to the trailer park as instructed by Sinisgalli and the men spent the first few hours at the site draining water from the excavation with the gas pump (Tr. 46-49, 53, 239, 241-43, 245, 252-54, 260, 384-85, 876-78, 881, 903, 938-41). At some point after that, Watts and Harris donned boots and entered the excavation with shovels to dig the electric pumps out of the "silt" that had accumulated at the bottom (Tr. 50-52, 103-05, 249-50, 255-56, 260, 355-56, 885, 941, 944-45). Because the water in the excavation sometimes was at their waist level, the workers experienced adversity in trying to remove the pumps. Due to the ice melting, there was a little slide on that day, which the men likened to a mini cave-in (Tr. 55, 59, 62-63). They related their fears to Jannorane and then decided to exit the trench because of the dangerous conditions (Tr. 66). Since the men were unable to remove all five pumps from the excavation that day, Jannarone, Watts, and Harris left the trailer park about 4:00 PM and reported back to Sinisgalli at the Western Drive shop (Tr. 52, 66-68, 72-73, 103, 260, 326-27, 883-94, 942-43). Watts and Harris wanted to be paid as they were afraid to return to the site again to retrieve the two of the pumps still in the excavation (Tr. 52, 103, 106, 260, 474-75, 895, 961). Since Sinisgalli would not pay the men until the project was done, he told them to return to the trailer park the next day to retrieve the remaining pumps (Tr. 68, 76, 79, 329, 475-77, 960-61). When they expressed concern for their safety, Sinisgalli assured them it would be okay as there would be a freeze that night (Tr. 68). On March 16, 1995, while Watts and Harris were inside the excavation digging out the last pump, a large chunk of the northeast wall fell into the hole, trapping Watts's leg (Tr. 34-35, 40, 106-09, 171-72, 196-98, 200-01, 206-07, 210, 217, 226-27, 238-39, 339-40, 901-02, 906-07; Exhibit C-1). Various rescue personnel were called to the scene and were able to free Watts, who was taken to a nearby hospital and diagnosed with a broken ankle (Tr. 110-12, 169-71, 192, 206-07, 209-10, 213-14, 217, 226-27, 346-49). Harris apparently suffered only minor injuries (Tr. 349).

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[4] It is not clear from the record the exact nature of the role Caceci plays in businesses owned and operated by Sinisgalli.

[5] It is not clear from the record which one of the three corporations located at the Western Drive office actually owned the equipment in question.

According to Sinisgalli, Watts and Harris were hired as Metro employees by either him or Jannarone (Tr. 368-69). But since Sinisgalli was the one who contacted Jannarone with instructions as to what had to be done with regard to the electric pumps and who specifically should do it, it would be inaccurate to characterize Jannarone as the hiring party. Indeed, having worked with him in the past, both Watts and Harris considered Jannarone to be their *supervisor*, not their *employer*, and they believed that, like them, Jannarone worked for Sinisgalli (Tr. 36-37, 126, 239, 241, 256, 351-53). This is consistent with Jannarone's own testimony about his participation in this project. He indicated that he followed Sinisgalli's instructions and transported the men to and from the work site on both days (Tr. 471-73, 589-90, 594-95, 875-76, 947, 953-54). He also acknowledged that while at the site, he instructed Watts and Harris as to how the pumps should be removed (Tr. 256, 471-73, 589, 883-84, 887, 902-03, 954). It is clear that Jannarone himself was hired by Sinisgalli acting as the true employer, to supervise the work at the trailer park, a role which the record reflects he has frequently assumed for Sinisgalli (Tr. 395, 458-60, 471-73, 488-89, 572-75, 579, 585, 947, 967). In fact, testimony from Sinisgalli indicates that Jannarone served in this capacity throughout most of the septic tank project, including the period of time during which Sinisgalli was in poor health (Tr. 392, 396, 436, 447-51, 456, 458-59, 464). When Jannarone is employed by Metro, it is as a bid estimator not as a foreman (Tr. 872-73).

Although Sinisgalli maintains that if he hired these men, he did so in his capacity as Metro's consultant, his testimony regarding his relationship with Metro (owned by his very close friend Caceci with whom he shares office space), on this project does not support such a conclusion (Tr. 561-62). First, it is contradictory to claim, as Sinisgalli does here, that for this project, he and Metro made an agreement to exchange services in order to "wipe the slate clean" between them for prior consulting, but at the same time, he appears to have accrued additional uncompensated time by serving as Metro's unpaid consultant on the very same project (Tr. 387, 393-94). It is also difficult to believe that Metro would have wanted Sinisgalli to represent its interests on a project in which he, as owner of the trailer park had a personal stake in how quickly and under what circumstances the project was completed. The judge finds it interesting that no explanation was ever made on October 20, 1995 as to why Caceci was unavailable to testify in court to substantiate Sinisgalli's allegations regarding the role Metro played at the site on the days in question, even though the matter

of her testifying had discussed at the hearing on October 19, 1995 (Tr. 764). The compliance officer testified he attempted to obtain Caceci's testimony by subpoena to appear (for a deposition), but she did not comply with that subpoena (Tr. 851).

In fact, Sinisgalli's testimony reveals that he never actually approached this project as a representative of Metro; to the contrary, he operated with his own interests as owner of the trailer park in mind. For instance, when Metro was digging the excavation, Sinisgalli testified that he visited the site as much as possible to make sure that the excavation was being done the way *he,* not Metro, wanted it (Tr. 387, 397-98, 409-10, 413-14). Even though his agreement with Metro allegedly involved an even exchange of services, he indicated that his concern was "...to get the thing done right the first time [in order] to keep costs down..." (Tr. 413-14). Similarly, Sinisgalli testified that even though he had "hired" Metro to do so, he participated in placing the electric pumps in the excavation because "...it [is] *my* property and *I* wanted to make sure [it] was done right" (Tr. 559) (emphasis added). Finally, when Sinisgalli phoned Jannarone on March 14 to give him instructions about removing the electric pumps from the excavation, he testified that his main concern was the fee associated with their rental, a cost that would presumably be borne by the lessee (allegedly Metro) of the equipment (Tr. 392-93). However, his true concern was *not* for Metro's alleged liability, but for his *own* liability in that this was a cost for which he claimed that he, as president of Son-Dar, was ultimately responsible (Tr. 392-93). Where neither his conduct nor his testimony is consistent with such a role, I am simply not convinced that Sinisgalli was acting as Metro's consultant when he hired Watts, Harris, and Jannarone to remove the pumps from the excavation.[6]

There is no question that ultimate control over the working conditions at the trailer park rested with Sinisgalli. While his hiring of various subcontractors to handle different aspects of the project, such as the design of the excavation, the pouring of the concrete for the septic tank, and even

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[6] There was some suggestion at the hearing that Sinisgalli's authority at Metro exceeds that of mere "consultant". Indeed, Jannarone believed that Sinisgalli was a principal of Metro (Tr. 681, 851, 952-53). There is no doubt that the record raises serious questions about the nature of the business relationship between Sinisgalli, Caceci, and their employees, particularly where three of their corporations share the same office space and each one apparently "works" for the other in some capacity. The record, however, fails to provide any definitive answers to these legitimate questions. Thus, it cannot be unequivocally determined whether Sinisgalli plays a more significant role in Metro's operations than he has indicated.

the digging of the excavation, meant that each subcontractor assumed a certain amount of responsibility for the conditions which it may have created or to which its own employees might be exposed, Sinisgalli, as owner of the trailer park, remained very much in charge of the project as a whole (Tr. 410-12, 418-19, 438-39, 461-62). Even when he was ill, Sinisgalli coordinated the efforts of the subcontractors, supervised the excavation work, approved the use of pumps to drain the water from the excavation, obtained the two fuel-powered pumps himself and directed Jannarone to rent "brand new" electric ones; he even decided the manner in which the pumps should be placed inside the excavation (Tr. 387, 397-98, 410, 413-14, 446-56, 465-70, 559). As the true employer or even assuming that he was acting as a general contractor, Sinisgalli was in required by law and was in the position of authority, through his supervisory role with respect to other contractors or through his own resources, to abate the hazardous conditions at the site prior to allowing employees to work. *See, e.g., Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶20,691 (No. 12775, 1976); *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976).

It could have been argued that the men working at the trailer park on March 15 and 16 were hired by Sinisgalli as employees of Son-Dar. However, given the circumstances under which the men were hired, method of cash payments, as well as the lack of employment records between Sinisgalli, Caceci, their various corporations and their employees, it is far more accurate to say that on March 15 and 16, Jannarone, Watts and Harris had an employment relationship with Sinisgalli, the individual. Indeed, it was Sinisgalli who decided that the pumps should be removed; it was Sinisgalli who contacted Jannarone on March 14 with instructions regarding the removal of the pumps; and it was Sinisgalli who designated who would perform the work and when to continue the work despite his being warned of hazardous conditions that could and indeed did cause a cave-in. In so instructing, Sinisgalli designated Jannarone to serve as his representative at the site, vesting him with supervisory authority over Watts and Harris. According to Watts and Harris, it was also Sinisgalli who, after being informed on the night of the 15th that at least two of the pumps remained in the excavation, "determined" that the men had to return to the site the next day to remove the remaining pumps despite his being warned of a possible cave-in, and he would not pay them for the work done on the 15th until the job was completed (Tr. 68, 72-73, 76-79, 88-89, 329, 336-37).

It is also evident that all three of these men focused on Sinisgalli as an individual, not one of his corporations, as their employer. Indeed, Watts and Harris never seemed to know exactly which company they allegedly were working for when Sinisgalli hired them for a project, but their testimony reflects that they understood it was Sinisgalli who had hired them and it was Sinisgalli who would pay them in cash (Tr. 25-28, 32-34, 69, 78-79, 128-32, 165-66, 204, 237, 243-44, 349-51 485-88, 491, 623).[7] Similarly, while Jannarone validly considers himself to be an employee of Metro, his belief that Sinisgalli was a principal of Metro strongly suggests that he considered Sinisgalli to be his real employer (Tr. 681, 952-53). These impressions are consistent with the long-term employment relationship that Sinisgalli, in the guise of several corporate entities, has admitted to having with all three men (Tr. 26, 131-32). The fact that Watts and Harris have always been paid in cash suggests that Sinisgalli is more than willing to circumvent the law to avoid liability.[8] He cannot, however, hide behind his multiple corporate identities in order to avoid liability here. Therefore, I find that Sinisgalli maintained control of the working conditions at the trailer park on the days in question and he should be held responsible, as the employer, for all of the violations proven herein.

Serious Citation 1, Items 1, 2, & 3

In these items, the Secretary alleges three repeat violations of 29 C.F.R. § 1926.59, the hazard communication standard. The first item sets forth a violation of § 1926.59(e) which requires employers to develop, implement, and maintain a written hazard communication program. The second item sets forth a violation of § 1926.59(g)(1) which requires an employer to maintain a material safety data sheet (MSDS) in the workplace for each hazardous chemical which they use. The third item sets forth a violation of § 1926.59(h) which requires employers to provide employees

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[7] Although the New York Workers Compensation Board was apparently informed at some point after the accident that Watts and Harris were employees of Metro, the record does not support such a conclusion, and according to their testimony, neither Watts nor Harris ever believed that they worked for Caceci (Tr. 128, 142-43, 350-51, 792).

[8] As a Metro employee, Jannarone testified that Caceci signs his paychecks (Tr. 985). There is nothing in the record, however, to indicate how, or by whom, Jannarone was paid for work he performed for Sinisgalli outside of his normal duties for Metro.

with information and training regarding the hazardous chemicals in their work area.

The Secretary contends that Jannarone, Watts, and Harris, were exposed to various hazardous substances, specifically gas, diesel fuel, starting fluid, oxygen, and acetylene, while working at the trailer park in March 1994. Since, as noted *supra*, two of the pumps regularly used to drain water from the excavation were powered by gas and diesel fuel, these substances had to be readily available at the worksite. Also, according to Jannarone, these pumps had to be refilled on the days he, Watts, and Harris, were working at the trailer park because they were used to drain large amounts of water from the excavation before the men could enter it (Tr. 984-85). Watts claims that on these days, he filled one of the fuel pumps every morning with fuel from a five-gallon metal container that was stored on the back of Jannarone's truck (Tr. 53-54, 100-01, 116-17, 121, 150-51, 715-16). Although Harris doesn't recall that he or Watts ever fueled the pumps and Jannarone was not entirely sure whether Watts performed any refueling, in light of the record as a whole, I find Watts's testimony to be credible enough to establish that he did, at some point, participate in refueling one of these pumps (Tr. 253-54, 984-85). According to Michael Willis, the compliance officer, the gas pump was also fueled on the evening of March 16 by an unidentified man who filled the pump with gas from two plastic containers; when questioned, the man stated that he worked for Sinisgalli (Tr. 615-17, 728-30, 833-34). Although Watts testified that he used a metal container to fuel the pumps, Jannarone indicated that these plastic containers may have been used by Watts or Harris as well (Tr 985).

Both Willis and Watts testified that a can of starting fluid placed near one of the fuel pumps was used to help start the pumps in cold weather (Tr. 122, 716, 830). In addition, the compliance officer testified that tanks containing oxygen and acetylene were located behind the on-site trailer used by Jannarone, Watts, and Harris on the days in question (Tr. 827-32). These substances were apparently used when the septic tank was installed (Tr. 716, 848).[9] All of these hazardous materials were located in plain view of anyone visiting the site and were materials that, at least with regard to the operation of the fuel pumps, were needed on an ongoing basis. As such, both Sinisgalli and

[9] That Jannarone or Watts may have used these materials at that time has no bearing upon the current citation which focuses specifically upon the work performed by the men on March 15 and 16, 1994 (Tr. 716, 848).

Jannarone were aware, as in the case of the gas and diesel, or should have been aware, as in the case of the starting fluid, oxygen, and acetylene, that these substances were present at the trailer park.

The record clearly establishes that Sinisgalli had no written hazard communication program in place to provide his employees with the necessary information and training regarding the potential hazards these substances pose (Tr. 701, 715-17, 809). The appearance of a "generic" hazard communication program in one of the OSHA Reference manuals stored in Sinisgalli's Western Drive office does not satisfy the specific requirements of § 1926.59(e)(1), particularly where the program was never developed or implemented (Tr. 546-50, 701, 717-18, 809-10, 848-49; Exhibits R-7 & R-8). Indeed, none of Sinisgalli's employees interviewed were aware of the existence of a written hazard communication program (Tr. 123-24, 362-63, 908).

Based on his discussions with Jannarone, Watts, and Harris, the compliance officer determined that there were also no MSDSs available for the substances present at the site (Tr. 723-24, 824-25, 849). Although Sinisgalli submitted into evidence numerous MSDSs which he claims were contained in a red manual at the Western Drive office and available to all employees, these sheets were never shown to the compliance officer and none of the employees were aware of their existence (Tr. 535-37, 541-45, 724, 824-25, 849; Exhibit R-6). Both Jannarone and Harris testified that they are completely unfamiliar with a MSDS, and Watts indicated that he was never provided with such information (Tr. 123, 164-65, 362-63, 381-82, 908).

Finally, Willis determined that no training was given by either Sinisgalli or Jannarone to the men regarding the potential hazards these substances pose (Tr. 726, 969). Sinisgalli concedes that he provided no training whatsoever to Harris (Tr. 351, 363, 381). Watts, on the other hand, received some training in diesel fuel in 1978 when he was employed at a truck stop owned by Sinisgalli; he also recently attended a local college course on asbestos removal at Sinisgalli's expense (Tr. 53, 115-17, 121-23, 533-35). But this minimal effort in the distant past does not satisfy the cited standard's requirement for regular training that is focused upon the hazardous materials to which the worker is exposed.

Since these hazardous substances could cause serious injury to Sinisgalli's employees if improperly used or handled, the violations have been properly characterized as serious (Tr. 719-20, 724-25, 727). On the basis of two citations issued in 1993 to Sinisgalli Wrecking, the Secretary has

also alleged that these three violations should be characterized as repeat (Secretary's Amended Complaint; Exhibit C-3). A violation is properly classified as repeated under § 17(a) of the Act, 29 U.S.C. § 666(a), if at the time of the alleged repeat violation, there was a Commission final order against the same employer for a substantially similar violation. *Edward Joy Co.*, 15 BNA OSHC 2091, 2092, 1991-93 CCH OSHD ¶ 29,938 (No. 91-1710, 1993); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979). According to the compliance officer's undisputed testimony, the 1993 citations are final orders of the Commission (Tr. 705, 710-12). It is also undisputed that these citations contain two serious violations of § 1926.59(e)(1) and § 1926.59(h), and an other-than-serious violation of § 1926.59(g)(1), the same three standards cited in the current case (Exhibit C-3).

The question which remains is whether Sinisgalli Wrecking can be considered the "same employer" as the one cited here by the Secretary and found to be responsible for the violations alleged, i.e., Sinisgalli. Since Sinisgalli has admitted he is the president and sole stockholder of Sinisgalli Wrecking, I find that he is the true employer (Tr. 365-66, 866-68). Behind all three of the corporations of which Sinisgalli has admitted ownership is Sinisgalli alone. According to his own testimony, he serves these companies as owner, president, and vice-president; in fact, he maintains that he is their sole employee (Tr. 365-66, 370-71, 395, 398, 425). Accordingly, the violation is affirmed as repeat.

The compliance officer testified that he calculated a gravity-based penalty of $2,000 for each violation of the hazard communication standard (Tr. 720-22, 725, 727). This amount was then reduced by 20% for size and 10% for history, for a total proposed penalty of $1,400 for each violation (Tr. 702-04, 723, 725, 727-28). The reduction given for size was based on the assumption that Sinisgalli Wrecking was the cited employer and had, according to Jannarone, thirty employees (Tr. 702).[10] Without reliable information to indicate the actual number of workers employed by Sinisgalli or any of his corporations, this reduction stands. The reduction given for history, however, was given in error since the compliance officer was apparently unaware at the time the penalty was

[10] Originally, the reduction to be given was 40%, but the OSHA Area Director, in his discretion, decided to halve the size reduction because of what he considered to be Sinisgalli's total disregard for the Act (Tr. 702). Because I agree with his assessment, see *supra* p. 17, the reduction will remain 20%.

calculated that previous citations issued to Sinisgalli Wrecking had been placed into penalty collection (Tr. 703-04; Exhibit C-3). Since these citations properly constitute prior history that is attributable to Sinisgalli, the reduction will be eliminated. Therefore, based upon the compliance officer's testimony, as well as an independent review of the penalty criteria set forth at § 17(j) of the Act, 29 U.S.C. § 666(j), a penalty of $1,600 is assessed for each of these violations.

Serious Citation 1, Item 4

Under this item, the Secretary alleges violation of § 1926.152(a)(1) which requires that only approved metal safety cans be used for the handling and use of flammable liquids in quantities greater than one gallon. As noted *supra*, on March 16, the compliance officer observed a man, who indicated that he was working for Sinisgalli, use two plastic containers of gas – each containing at least five gallons – to fuel the gas pump at the trailer park (Tr. 615-17, 728, 833-34). According to Willis, these containers were not approved safety cans since they were made of plastic and did not have spring-closing lids or fire-arrestor screens (Tr. 617, 728-30). Jannarone confirmed that these containers were made of plastic and indicated that they may also have been used by Watts or Harris to fuel the pumps on the days in question (Tr. 985). Where Sinisgalli has offered nothing to dispute these facts, the violation must be affirmed.

Because an employee may suffer serious burn injuries as a result of failing to use an approved safety can when handling a flammable liquid, the violation is properly characterized as serious (Tr. 730). In terms of penalty, the compliance officer testified that he calculated a gravity-based penalty of $1,500, which was reduced by a total of 30% for size and history for a proposed penalty of $1,050 (Tr. 731-33). However, as discussed *supra* with regard to the hazard communication violations, the 10% reduction for history was given in error. Therefore, based upon the compliance officer's testimony, as well as an independent review of the penalty criteria set forth at § 17(j) of the Act, 29 U.S.C. § 666(j), a penalty of $1,200 is assessed.

Serious Citation 1, Item 5

Under this item, the Secretary alleges violation of § 1926.651(k)(1) which requires that daily inspections of excavations, the adjacent areas, and protective systems, be made by a competent

person. Specifically, the competent person is required to inspect for "evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres or other hazardous conditions." Section 1926.650(b) defines a "competent person" as:

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

Based on his discussions with Jannarone, Watts, and Harris, the compliance officer testified that none of the workers at the trailer park on the days in question were "competent" persons for the purposes of the cited standard (Tr. 735-36). Specifically, he noted that of the three, only Jannarone had the authority to correct a hazardous situation or remove one of the men from the excavation, and Jannarone did not know, for instance, how to classify the soil in which the excavation was dug (Tr. 735-36). Even Jannarone does not consider himself to be a "competent" person for these purposes, and he admitted that he did not conduct daily inspections of the excavation on the days in question (Tr. 737-39, 987). Having hired Jannarone to supervise this project, Sinisgalli should have been aware of his qualifications with regard to excavation work so that the working conditions at the trailer park could be properly evaluated pursuant to the cited standard (Tr. 586, 588, 739-40). The violation, therefore, must be affirmed.

Because failing to have a competent person inspect an excavation work area can result in serious injury or even death should a cave-in occur, the violation is properly characterized as serious (Tr. 739). In terms of penalty, the compliance officer testified that he calculated a gravity-based penalty of $5,000, which was reduced by a total of 30% for size and history for a proposed penalty of $3,500 (Tr. 750-51). However, as discussed *supra*, the 10% reduction for history was given in error. Therefore, based upon the compliance officer's testimony, as well as an independent review of the penalty criteria set forth at § 17(j) of the Act, 29 U.S.C. § 666(j), a penalty of $4,000 is assessed.

Serious Citation 1, Item 6

This item was withdrawn by the Secretary at the hearing (Tr. 752-53).

Willful Citation 2, Item 1

Under this item, the Secretary alleges violation of § 1926.652(a)(1) which requires each employee in an excavation to be protected from cave-ins by an adequate protective system. It is undisputed that on March 15 and 16, the excavation at the trailer was not protected by any type of shoring or sheeting system and at least two men were working inside it (Tr. 43, 46, 50-52, 59, 101, 176, 225, 238, 255-56, 263-64, 311, 437, 456-57, 667-68, 673, 884-85, 955-56; Exhibit C-1). According to the compliance officer, the excavation was approximately 54 feet long, 30 to 33 feet wide, and ranged in depth from 14 to 20 feet; the area in which the men were working was 20 feet deep (Tr. 601-06; Exhibit C-5). The compliance officer also indicated that the excavation was dug in a sandy soil that contained gravel, which is classified under the cited standard as Type B soil, but must be downgraded to Type C soil due to the presence of water in the excavation (Tr. 608, 668-71, 738). *See* Appendix A to Subpart P (29 C.F.R. §§ 1926.650 - 652).

As a whole, the record supports the compliance officer's assessment of the excavation's dimensions and soil type. Watts, Harris, and several rescue personnel who observed the area immediately following the accident, all concurred that the excavation was dug in a sandy type of soil which contained gravel, and that even with the use of pumps, a significant amount of water was present in the excavation (Tr. 40-43, 51-53, 98-100, 153, 171, 218, 227, 229, 231, 235-36, 250-51, 260, 267, 512, 515, 608, 680, 737-38, 770-71, 776, 879, 888-89). The photographs of the excavation taken by a member of the police department on the day of the accident also indicate that the excavation was dug in soil, not solid rock as alleged by Sinisgalli, and that water was, in fact, present at the bottom of the excavation (Tr. 201, 414-16, 497-99; Exhibit C-1). In terms of the excavation's size, Sinisgalli confirmed that the excavation measured approximately 54 feet by 33 feet, but opined that the depth of the excavation was less than 20 feet (Tr. 387-88, 496-99). The record, however, clearly establishes that the excavation measured at least 15 feet in depth (Tr. 40, 97, 248, 512, 679, 988-89).

Although both Sinisgalli and Jannarone contend that the walls of the excavation were adequately sloped, the evidence indicates otherwise (Tr. 497-500, 890-91, 905, 955). According to Watts, Harris, several rescue personnel, and the compliance officer, all of the walls of the excavation were virtually vertical except for the north wall where the large chunk of earth had

detached. After the accident, this wall was apparently sloped at an angle of somewhere between 45 and 70 degrees (Tr. 98, 102, 112, 171-72, 175, 198, 202-03, 212, 220-23, 229, 260, 314, 523-25, 599, 603, 609, 680, 841, 845-46). These observations are confirmed by the photographs of the excavation (Exhibit C-1). Therefore, I find that the excavation walls were not sloped at the 34 degree angle required for Type C soil (Tr. 672-73). *See* Appendix B to Subpart P, Table B-1.

Moreover, there is no question that both Jannarone and Sinisgalli were aware of the conditions at the worksite. Having supervised the work at the trailer park on both days, Jannarone was not only aware that the excavation was unprotected, but he observed conditions at the site visibly deteriorate. Jannarone acknowledged that there was a "tremendous amount" of water running into the excavation, that as the excavation walls began to thaw on the morning of March 16, water, dirt, and gravel began to run down the sides of the excavation, and that he was "concerned" that this condition might become more serious (Tr. 904, 943-45, 967-68, 971-73). Having been designated by Sinisgalli to supervise the men at the trailer park, Jannarone's knowledge of these hazardous conditions is clearly attributable to Sinisgalli, his employer. *A.P. O'Horo Co.*, 14 BNA 2004, 2007, 1991 CCH OSHD ¶ 29,223 (No. 85-369, 1991) (employee who has been delegated authority over other employees is considered a supervisor whose actual or constructive knowledge of violative conditions can be imputed to employer). In addition to his own observations, Watts and Harris testified that they repeatedly complained to Jannarone that dirt from the excavation walls was crumbling down around them. They indicated that Jannarone responded by assuring them that he would watch the walls from outside of the excavation, and he insisted that they remain in the hole until all of the pumps were removed (Tr. 55-56, 58-63, 65-66, 70-72, 106-07, 112, 261-62, 308-11, 322, 687-88). Although Jannarone denies that Watts and Harris complained to him about anything other than the fact that they were cold and wet, I find the two workers' testimony credible given the conditions under which they were working (Tr. 893-95, 898-900, 904).

Although Jannarone's knowledge can be imputed to Sinisgalli, the record strongly suggests that Sinisgalli was also aware of the hazardous conditions at the trailer park. Sinisgalli claims that prior to the accident, he had no knowledge whatsoever that the men were going to work *inside* the excavation. He contends that he instructed Jannarone to have the men remove the electric pumps from the top of the excavation by pulling them up from *outside* of the hole by their cords, drainage

hoses, and ropes which were tied to handles (Tr. 465-68, 471-73, 578, 580-81, 583). Because the pumps were trapped underneath the water and the silt, which had accumulated at the bottom of the excavation, Jannarone indicated that Watts and Harris were unable to remove the pumps in this manner; therefore, he ordered them to enter the excavation to dig out the pumps (Tr. 51, 103-05, 249, 256, 884, 909-10, 942-45, 955-59). Both Jannarone and Sinisgalli maintain that they never discussed Jannarone's decision to send the men into the excavation at any time before the accident occurred (Tr. 473-77, 909-10, 959-61). This allegation is contradicted by the credible testimony of Watts who stated that on March 15, after he and Harris had worked in the excavation that day, he expressed his fear to Sinisgalli about the danger of a cave-in, and Sinisgalli told them not to worry, there would be a freeze overnight (Tr. 68). Sinisgalli refused to pay them until the job was completed.

I am convinced that when all four men were gathered at the Western Drive shop on the afternoon of March 15, Sinisgalli was told why the men were unable to remove all five pumps from the excavation that day. By his own admission, Sinisgalli's primary concern was removing the pumps so as to avoid incurring additional rental fees; he also expected this work to take no more than one day to complete (Tr. 471-72). Facing another day of pump rental expenses and wages for the men, it is logical that Sinisgalli would want an explanation for the delay. Furthermore, Watts and Harris testified they specifically told Sinisgalli the reasons for the delay were that the pumps were buried at the bottom of the excavation, that they had to enter the excavation to dig them out, and that they were concerned about the fact that the walls of the excavation were collapsing (Tr. 68, 72-75, 88, 327-29, 336, 686-87). Thus, I find that by the evening of March 15, Sinisgalli was aware that the men were working inside the excavation and that conditions at the site were hazardous. Where the Secretary has established that § 1926.6529(a)(1) applied to the conditions at the trailer park, that its terms were not met, that two employees were exposed to these conditions, and that the employer had knowledge of these conditions, the violation must be affirmed. *See Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1386 (No. 92-262, 1995).

The Secretary has characterized this violation as willful. Under Commission precedent, a violation is willful if it is committed with intentional, knowing, or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Valdak Corp.*, 17 BNA

OSHC 1135, 1136, 1995 CCH OSHD ¶ 30,759 (No. 93-239, 1995), *aff'd*, No. 95-2194, 1996 WL 19008 (8th Cir. January 22, 1996). A willful violation is differentiated from other types of violations by a "heightened awareness - of the illegality of the conduct or conditions - and by a state of mind - conscious disregard or plain indifference." *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893 (No. 85-355, 1987).

Sinisgalli and Jannarone clearly understood the protection requirements under the excavation standard, yet they allowed Watts and Harris to work inside the excavation at the trailer park under extremely adverse conditions of which they were both aware (Tr. 441-44, 499, 582, 588, 682-83, 685, 687-88, 954-55). As discussed *supra*, on the first day that the men were working inside the excavation, the walls began to crumble, and despite the use of pumps to drain the excavation, Jannarone testified that an "incredible" amount of water was continuously running into the excavation (Tr. 943-45). Despite repeated complaints by Watts and Harris on March 15 to Jannarone, who observed these conditions and was admittedly concerned about the situation growing more serious, Watts and Harris at their own insistence, had to exit the excavation prior to completion of the job. Still, there was no attempt to provide some type of cave-in protection (Tr. 967-68). When conditions deteriorated once again on the second day, Jannarone still did not remove the men; his sole concern appeared to be removing the pumps from the excavation. Even though Sinisgalli had been informed on March 15 about the hazardous conditions in the excavation, he made no attempt to provide the workers with the protection required by law; he simply ordered the men to return the next day with the weak assurance that the walls would freeze. He apparently was not going to pay them until the work was complete (Tr. 77-96, 88-89). Yet Sinisgalli admitted at the hearing that he felt the excavation was dangerous, and he would not have entered it himself (Tr. 583-84). Where Sinisgalli and Jannarone had knowledge of the protection requirements of the cited standard and were aware of the hazardous conditions at the trailer park for two full days, their complete failure to protect Watts and Harris from a cave-in, the ultimate result of their failure to remove them from the excavation and address these hazards in the manner required by the cited standard clearly constitutes both a conscious disregard for the Act and an obvious indifference towards the safety of these men. Accordingly, the violation is affirmed as willful.

In terms of penalty, the compliance officer testified that he calculated a gravity-based

penalty of $70,000, the maximum penalty allowed for a willful violation under § 17(a) of the Act, 29 U.S.C. § 666(a) (Tr. 689-71, 697-99). Given Sinisgalli's blatant disregard for the requirements of the Act and the safety of his employees, I find that $70,000 is a reasonable and appropriate penalty. This amount was then reduced by a total of 30% for size and history for a total proposed penalty of $49,000 (Tr. 699-704). However, as discussed *supra*, the 10% reduction for history was given in error. Therefore, based upon the compliance officer's testimony, as well as an independent review of the penalty criteria set forth at § 17(j) of the Act, 29 U.S.C. § 666(j), a penalty of $56,000 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

ORDER

Serious citation 1, item 1, alleging violation of 29 C.F.R. § 1926.59(e)(1) is AFFIRMED and a penalty of $1600 is assessed.

Serious citation 1, item 2, alleging violation of 29 C.F.R. § 1926.59(g)(1) is AFFIRMED and a penalty of $1,600 is assessed.

Serious citation 1, item 3, alleging violation of 29 C.F.R. § 1926.59(h) is AFFIRMED and a penalty of $1,600 is assessed.

Serious citation 1, item 4, alleging violation of 29 C.F.R. § 1926.152(a)(1) is AFFIRMED and a penalty of $1,200 is assessed.

Serious citation 1, item 5, alleging violation of 29 C.F.R. § 1926.651(k)(1) is AFFIRMED and a penalty of $4,000 is assessed.

Serious citation 1, item 6, alleging violation of 29 C.F.R. § 1926.651(l)(2) is WITHDRAWN.

Willful citation 2, item 1, alleging violation of 29 C.F.R. § 1926.652(a)(1) is AFFIRMED and a penalty of $56,000 is assessed.

BARBARA L. HASSENFELD-RUTBERG
Judge, OSHRC

Date: _____
Boston, Massachusetts