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

SECRETARY OF LABOR, Complainant, v. STARK EXCAVATING, INC., Respondent.	OSHRC Docket Nos. 09-0004, 09-0005

ON BRIEFS:

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For the Complainant

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For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration inspected two worksites of Stark Excavating, Inc., an excavation and paving company. The inspections took place on June 5 and July 22, 2008, in Peoria and Champaign, Illinois, respectively. As a result of these inspections, OSHA issued several citations to Stark under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. At issue on review are three citation items related to the Peoria worksite (Docket No. 09-0004): a serious eyewear violation alleged under 29 C.F.R. § 1926.102(a)(2), a willful excavation cave-in protection violation alleged under 29 C.F.R. § 1926.652(a)(1), and a repeat excavation spoil piles violation alleged under 29 C.F.R. § 1926.651(j)(2). Also at issue is

one citation item related to the Champaign worksite (Docket No. 09-0005): a willful excavation cave-in protection violation alleged under § 1926.652(a)(1). The Secretary proposed penalties of $2,000 for the eyewear violation, $35,000 for the spoil piles violation, and $70,000 each for the two cave-in protection violations.

Administrative Law Judge Patrick B. Augustine affirmed all of these citation items but he recharacterized the two cave-in protection violations as serious. He assessed a total penalty of $36,000 for these four violations—$2,000 for the eyewear violation, $7,000 for each of the cave-in protection violations, and $20,000 for the spoil piles violation. For the reasons that follow, we affirm the judge except with regard to the eyewear violation, which we vacate, and the characterization of the Peoria cave-in protection violation, which we affirm as willful. We assess a total penalty of $87,000.

DISCUSSION

I. Willful Citation 2, Item 1 (*cave-in protection*), Champaign Worksite

Under this item, the Secretary alleges a willful violation of § 1926.652(a)(1), claiming that Stark failed to provide cave-in protection for each employee working inside an excavation at the Champaign worksite. The cited provision states that "[e]ach 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." 29 C.F.R. § 1926.652(a)(1). The applicable paragraph here is (b)(2), which provides as follows: "*Option (2) – Determination of slopes and configurations using Appendices A and B*. Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart." 29 C.F.R. § 1926.652(b)(2). Under these appendices, soil in an excavation is classified as Type A, B, or C depending on the soil's characteristics, and the soil classification determines the maximum allowable slope for the excavation walls. 29 C.F.R. pt. 1926, sub-pt. P, apps. A(b) & B, tbl. B-1.

The judge affirmed the violation, but he recharacterized it as serious. On review, Stark disputes the judge's conclusion that the excavation did not comply with the requirements of the cited standard and his rejection of Stark's unpreventable employee misconduct ("UEM") defense. The Secretary disputes the judge's rejection of the violation's willful characterization, arguing that Stark's worksite superintendent "deliberately disregarded" the standard's requirements. Based on our review of the record, we conclude that the Secretary has established

the violation, but we conclude that it is not willful.

Background

At the Champaign worksite, Stark was installing sewer pipe in an excavation. The portion of the excavation relevant to this citation item ran in a straight line from the manhole Stark installed at the northern end to a preexisting concrete "frost wall" at the south end. On the morning of the OSHA inspection, Stark excavated around and to the south of the manhole, using a trench box for cave-in protection. Stark's superintendent, who was also the designated competent person on the worksite, classified the soil located 10 to 15 feet south of the manhole as Type B based on a reading he took using a penetrometer, an instrument that tests the compressive strength of soil. The penetrometer reading indicated that the soil had a compressive strength of 1.49 tons per square foot ("tsf"), just below the minimum compressive strength required for Type A soil.[1]

Stark's superintendent left the worksite for approximately one hour while the crew was installing the pipe to the south of the manhole. Before leaving, he instructed the crew to continue excavating and installing pipe from the manhole up to the southern "frost wall foundation," the preexisting concrete wall that started just below ground level and extended underground 5 to 6 feet. Following his departure, the crew uncovered two utility lines crossing the excavation,[2] and then continued excavating toward the frost wall. When the superintendent returned to the worksite, he saw that his crew was working in the area of the excavation between the southernmost utility line and the frost wall, but was no longer using the trench box because, a crew member claimed, it would not fit into the area between the southernmost utility line and the frost wall. The superintendent picked up some soil from that location and used his hand to assess the soil's characteristics. He concluded that it was "short-term Type A" based on the "much harder" soil there, and after "eyeballing" the excavation walls, he also concluded that they were adequately sloped.[3] Based on this assessment, the superintendent allowed the crew to continue working without using the trench box.

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[1] Type A soil has a compressive strength of 1.5 tsf or greater, but such soil is classified as Type B or C if it is fissured or has been previously disturbed. 29 C.F.R. pt. 1926, sub-pt. P, app. A(b).

[2] The excavator operator removed dirt from beneath the utility lines and laid the new pipe using the excavator's arm. It is undisputed that no Stark employee worked in the area of the excavation between the two utility lines.

[3] Where only sloping is used for protection, the maximum allowable slopes for excavations 20

Shortly thereafter, an OSHA compliance officer arrived at the worksite, noticed an employee leaving the unprotected area of the excavation, and began an inspection. That part of the excavation—between the southern-most utility line and the frost wall—was approximately 7 to 9.5 feet long, 7 feet deep, 5 feet wide across the bottom, and 13 feet wide across the top. The CO classified the soil in that area of the excavation as Type B based, in part, on the existence of the two utility lines indicating the presence of "previously disturbed soil" and on a thumb-penetration test that he believed showed a level of resistance indicative of Type B soil. Using a trenching rod, the CO measured the slope of the east wall at 75 degrees, the west wall at 65 degrees, and the south wall at 85 degrees. The top portions of both the east and west walls were "cut back" in certain places and were less sloped than the bottom portions of the walls, the latter being the only areas the CO measured.[4]

Compliance

In affirming the violation, the judge found that the excavation walls did not comply with the sloping requirements for Type B soil, which requires a slope of no more than 45 degrees. 29 C.F.R. pt. 1926, sub-pt. P, app. B, tbl. B-1. The judge concluded that the soil was Type B based on his findings that the soil in the excavation was both previously disturbed and fissured. 29 C.F.R. pt. 1926, sub-pt. P, app. A(b) (Type B soil includes "[p]reviously disturbed soils except those which would otherwise be classed as Type C soil," and "[s]oil that meets the unconfined compressive strength or cementation requirements for Type A, but is fissured or subject to vibration"). On review, Stark does not dispute that the excavation walls were too steep for Type B soil, but maintains that the soil was short-term Type A and that the excavation walls were

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feet or less in depth that contain Type A, B, or C soil are 53, 45, or 34 degrees, respectively. 29 C.F.R. pt. 1926, sub-pt. P, app. B, tbl. B-1. As to Type A soil, "[a] short-term maximum allowable slope" of 63 degrees is permitted if the excavation is "12 feet or less in depth." 29 C.F.R. pt. 1926, sub-pt. P, app. B, tbl. B-1 n.2. "Short term exposure" is defined as "a period of time less than or equal to 24 hours that an excavation is open." 29 C.F.R. pt. 1926, sub-pt. P, app. B(b).

[4] Discussing a photograph of the excavation, the CO testified that one part of the east wall was "somewhat linear" for the bottom "four-and-a-half, five, five-and-a-half feet," but then "you can see" where the excavator pulled off a little more soil at the top of the wall. He testified, however, that looking further along the east wall, "you can see that [the] angle in this area pretty much stays steady all the way from the bottom of the trench to the top of the trench." The CO observed, based on the photograph, that "you kind of see the same thing on the [west wall]."

sloped in compliance with the standard's requirements for this type of soil. We conclude that the soil was Type B.

1. Whether Soil was Previously Disturbed

In the area where employees worked without a trench box, the record establishes that preexisting utility lines cut through the northern area of the excavation, and the frost wall—which according to Stark extended beyond the east and west walls—was located behind the south wall of the excavation. Both of these conditions constitute evidence that the soil in these areas was previously disturbed and, thus, Type B. 29 C.F.R. pt. 1926, sub-pt. P, app. A(d)(1)(iv) (conduct "[v]isual analysis" of soil type by "[o]bserv[ing] the area adjacent to the excavation and the excavation itself for evidence of existing utility and other underground structures, and to identify previously disturbed soil"). Given the dimensions of the excavation—only about 7 to 9.5 feet separated the southernmost utility line and the frost wall—and the extent of previously disturbed soil, we find that employees working in any location south of the preexisting utility lines would have been exposed to such soil. *Manganas Painting Co.*, 21 BNA OSHC 1964, 1981, 2004-09 CCH OSHD ¶ 32,908, p. 53,397 (No. 94-0588, 2007) (noting that " 'reasonable inferences can be drawn from circumstantial evidence' " (citation omitted)). *See also Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976) (rejecting actual exposure test in favor of test based on "reasonable predictability" that "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger"); *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶ 30,754, p. 42,729 (No. 91-2107, 1995) (employer must protect employees in the "zone of danger," which is normally the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent).

2. Whether Soil Was Fissured

Additionally, Chairman Rogers and Commissioner Attwood conclude that soil in this area was fissured. "Fissured," as the term is used in the excavation standard, is defined as "a soil material that has a tendency to break along definite planes of fracture with little resistance, or a material that exhibits open cracks, such as tension cracks, in an exposed surface." 29 C.F.R. pt. 1926, sub-pt. P, app. A(b). An analyst from OSHA's Salt Lake Technical Center, the Secretary's expert witness on soil typing, testified that he measured the compressive strength of soil taken

from the excavation at greater than 4.0 tsf, a measurement indicative of Type A soil.[5] Nonetheless, he classified the soil as "sandy clay cohesive Type B," primarily because he observed tension cracks and "small size particles," that had broken off the samples, characteristics that he concluded indicated fissuring in the soil.

Stark claims that the analyst's testimony deserves no weight because he relied on a definition of fissured soil that is "markedly different" from the standard's definition. Stark focuses on the analyst's reference to "small size particles," claiming that he unreasonably interpreted the standard to include this characteristic. However, in addition to the OSHA analyst's reference to "small size particles," a thorough examination of his testimony shows that he also noted that the samples he examined had "tension cracks," which is one of the characteristics explicitly mentioned in the standard's definition of "fissured soil." *Id.* This description of fissured soil also appears in a section of the appendix that discusses how to conduct a "visual analysis" of soil in and around an excavation.[6] As the analyst further explained:

> [A] soil that is fissured would be a soil that has a tendency to break along certain definite planes of fracture with little resistance, and it's exhibited by the small particle sizes. . . . These definite planes of fracture where they break, that's evidenced by the small particles sizes that are seen in the soil. So this is a direct reflection of what's written in the regulations. It's a direct way of actually looking at the soil and determining if the soil does meet this criterion.

His testimony regarding "definite planes of fracture" is consistent with the standard's definition, and his reliance on "small particle sizes" was, in his *expert* opinion, how he determines that characteristic.[7] *Id.*; *see Indus. Glass*, 15 BNA OSHC 1594, 1601, 1991-93 CCH OSHD

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[5] *See supra* note 1.

[6] The relevant part of this section reads as follows:

> Observe the side of the opened excavation and the surface area adjacent to the excavation. Crack-like openings such as *tension cracks* could indicate fissured material. If chunks of soil spall off a vertical side, the soil could be fissured. Small spalls are evidence of moving ground and are indications of potentially hazardous situations.

29 C.F.R. pt. 1926, sub-pt. P, app. A(d)(1)(iii) (emphasis added).

[7] To the extent Stark is claiming that it lacked notice of what constitutes "fissured" soil, the provisions in the appendix, including those that allow the use of laboratory tests to determine soil characteristics, are incorporated by reference in the cited standard. 29 C.F.R. § 1926.652(b)(2). Thus, the standard itself gave Stark notice that soil typing could be performed in a laboratory

¶ 29,655, p. 40,174 (No. 88-348, 1992) (finding for party based in part on eminence of its experts); *All Purpose Crane, Inc.*, 13 BNA OSHC 1236, 1239, 1986-87 CCH OSHD ¶ 27,877, p. 36,549 (No. 82-284, 1987) (finding expert's testimony "persuasive in light of his extensive expertise"). Accordingly, the Secretary has established that the soil was fissured.

For the reasons stated above, we find that the soil in the Champaign excavation was Type B. Moreover, because Stark concedes the excavation walls were not properly sloped for such soil,[8] we conclude that the Secretary has established a violation of § 1926.652(a)(1).[9]

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using any of the tests within the appendix about which OSHA's laboratory analyst testified. *Lombard Bros., Inc.*, 5 BNA OSHC 1716, 1718, 1977-78 CCH OSHD ¶ 22,051, p. 26,562 (No. 13164, 1977) (finding that given facts of case, "the text of the standard was sufficiently specific to give notice to respondent of its regulatory duty"). Moreover, Stark's safety manual explicitly incorporated by reference Appendix A to subpart P of 29 C.F.R. part 1926.

[8] Even if the soil had been short-term Type A, the slopes of the east and west walls—measured at 75 degrees and 65 degrees, respectively—exceeded 63 degrees, the maximum allowable slope for this type of soil. 29 C.F.R. pt. 1926, sub-pt. P, app. B, tbl. B-1 n.2. Stark claims that a ratio of horizontal distance to vertical rise, based on an excavation wall's *entire* distance and rise, must be used to determine the wall's slope, and such a calculation would have shown its walls were properly sloped. But it is clear under the standard that when sloping is the method of cave-in protection in use, "the steepest incline" of the "excavation face" is the portion of the wall that must comply with the maximum allowable slope. 29 C.F.R. pt. 1926, sub-pt. P, app. B(b) (defining "maximum allowable slope" as "the steepest incline of an excavation face that is acceptable for the most favorable site conditions as protection against cave-ins, and is expressed as the ratio of horizontal distance to vertical rise (H:V)"). Thus, where, as here, an excavation wall has areas with slopes of differing steepness, the standard requires that the slope be calculated based on the area with the steepest incline. The calculated slope can be expressed either as a degree or a ratio.

Stark also contends that the south wall of the excavation, sloped 85 degrees, was adequately protected from cave-in by the concrete frost wall. We disagree. In evidence is a photograph showing that the frost wall is located *behind* the excavation's south wall, and that the excavation's south wall is comprised of soil. Accordingly, the frost wall would not have provided required cave-in protection to employees working inside the excavation. Moreover, installation of the frost wall would have required digging up the surrounding soil, making the south-wall soil "previously disturbed" and therefore Type B, which is subject to a maximum allowable slope of 45 degrees.

[9] Commissioner MacDougall concludes that the Secretary's evidence regarding fissuring, even that presented through expert opinion, is insufficient to carry the Secretary's burden to prove that the soil was Type B fissured soil. Commissioner MacDougall notes that according to Stark's superintendent and safety director, the CO did not mention during the inspection that the soil was fissured. The CO himself, when asked whether he observed fissured soil, stated that if he had, he would have told Stark about it during the inspection as he believed it was an "important" factor. Further, Commissioner MacDougall concludes that OSHA's laboratory analyst takes an overly

Unpreventable Employee Misconduct

Stark argues that the cave-in protection violation was the result of UEM. To establish this affirmative defense, an employer must show that it "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *Manganas Painting Co.*, 21 BNA OSHC at 1997, 2004-09 CCH OSHD at p. 53,412. The employer's burden of proof, however, is "more rigorous" when the violation alleges, as it does here, "unpreventable *supervisory* misconduct" because, as the Commission has recognized, the supervisor's duties include "protect[ing] the safety of employees under his supervision" and the supervisor's misconduct is "strong evidence that the employer's safety program is lax." *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1603, 2001 CCH OSHD ¶ 32,473, pp. 50,234-35 (No. 95-0489, 2001), *aff'd per curiam*, 53 F. App'x 122 (D.C. Cir. 2002) (unpublished).

It is undisputed that Stark had written rules addressing the violative condition, and that it had adequately communicated those rules to its employees, including its supervisors. Additionally, the judge found that Stark monitored for compliance with those rules, at least through the actions of its safety director, "by reviewing daily foreman reports and conducting on-site safety audits." The judge rejected Stark's UEM defense, however, based on his finding that Stark's supervisors did not "effectively enforce [the company's] own rules and policies when violations were discovered" because they gave oral warnings instead of written safety tickets. He also found that at the two excavations at issue here, "similar excavation safety deficiencies were observed at two different jobsites, supervised by different individuals, involving different

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broad view of the standard's definition of "fissured" soil. The OSHA laboratory analyst initially testified that he based his finding of fissuring upon seeing "small portions of the soil" that did not stay in "huge globs," which is not a determination that comports with the standard's definition of "fissured" soil. In addition, the laboratory analyst testified that of the samples he analyzes that have an unconfined compressive strength of greater than four, he finds 99 percent of them to be fissured, and it is "very rare" for him to conclude that one is Type A soil. Thus, Commissioner MacDougall does not assign his testimony dispositive weight. In weighing all of the evidence, she finds that the Secretary has not proven that the soil was fissured. Consequently, Commissioner MacDougall does not join in the majority's analysis of fissured soil above. Commissioner MacDougall concludes that the soil in question was Type B based solely on the fact that it was previously disturbed.

employees, only a few weeks apart," circumstances that he stated "belie[] the notion that the violative conduct was isolated or unforeseeable."

We agree with the judge that Stark failed to effectively enforce its rules—including those concerning excavation cave-in protection—when violations were discovered. One month after a July 2006 OSHA inspection, Stark instituted a written disciplinary policy that required the issuance of a written safety ticket for any safety violation and progressive disciplinary consequences for subsequent violations.[10] At that time, Stark's safety director provided all supervisors—including the superintendent at the Champaign worksite and the foreman at the Peoria worksite—with booklets of safety tickets and explained that, pursuant to its disciplinary policy, if any employee did not follow Stark's safety rules, the supervisor was to issue that employee a written safety ticket. The tickets themselves explicitly stated that violators, even first-time ones, are to be issued written warnings, and no provision in Stark's safety program allowed for oral warnings. Both the superintendent at the Champaign worksite and the foreman at the Peoria worksite admitted to understanding what was required under Stark's disciplinary policy.

Between August 2006, when Stark first required the issuance of written safety tickets, and July 2008, when OSHA conducted its inspection of the Champaign worksite (the second inspection in this case), Stark's supervisors issued a total of thirty-three tickets. Of those thirty-three tickets, six were issued by Stark's area manager in Champaign—all in September 2006, the month after the policy went into effect—and the rest of the tickets were issued by Stark's safety director. No other supervisor issued a written ticket over the 22-month period between Stark's establishment of this policy and OSHA's Champaign inspection. Indeed, the Champaign superintendent and Peoria foreman both testified that they preferred to issue oral warnings instead of written safety tickets, and their testimony suggests that they never would have issued a written safety ticket upon discovering an employee's violation of Stark's safety program.

[10] According to Stark's safety tickets, fall protection violations were to result in a "[w]ritten warning & 24 hours off without pay" for a first offense, a "[w]ritten warning & 72 hours off without pay" for a second offense, and termination for a third offense. For any other safety violations, the first offense was to result in only a written warning, and the second through fourth offenses were to result in the same consequences stated above for an employee's fall protection violations.

As Stark points out, the Commission has recognized that oral warnings are adequate in certain cases. But "[o]nly in a rare case . . . where an employer has a long, near-unblemished safety and health history, despite frequent opportunities for violations, can that employer establish that its work rule was effectively enforced by only oral reprimands." *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1864, 1995-97 CCH OSHD ¶ 31,197, p. 43,689 (No. 93-1122, 1996), *aff'd per curiam*, 149 F.3d 1183 (6th Cir. 1998) (unpublished table decision). Here, Stark's policy expressly required written warnings with progressive disciplinary consequences, so giving only oral warnings undermined the policy's progressive nature. *Id.*, 1995-97 CCH OSHD at p. 43,689 (finding that employer's failure to issue "written reprimand, although it was [employee's] second violation of the work rule, demonstrates that [employer] did not follow its own safety program," and "[t]his fact undermines [employer's] claim that its oral reprimands provided adequate enforcement").[11] Even if oral reprimands would have been adequate under the circumstances of this case,[12] Stark provided no documentation indicating that any supervisor at any of its 200 to 250 worksites had issued an oral warning during the 22-month period in question. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081, 2002-04 CCH OSHD ¶ 32,657, p. 51,327 (No. 99-0018, 2003) (employer's UEM argument "fails without any specific evidence to corroborate

[11] Indeed, the foreman of the Peoria worksite failed to issue a written safety ticket for the eyewear violation discussed *infra* despite his realization at the time of OSHA's inspection that the laborer's eyewear did not comply with the company's safety policy. Moreover, there is no evidence that the foreman even issued the laborer an oral warning for the infraction. *Precast Servs., Inc.*, 17 BNA OSHC 1454, 1456, 1995-97 CCH OSHD ¶ 30,910, p. 43,036 (No. 93-2971,1995) (evaluating employer's disciplinary measures in context of UEM defense and noting that "Commission precedent does not rule out consideration of *post*-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline"), *aff'd*, 106 F.3d 401 (6th Cir. 1997) (unpublished table decision).

[12] Commissioner MacDougall notes that, unless otherwise required by a standard, an employer is not required to have written work rules and is not required to document the steps taken to communicate safety rules and to discover violations. Thus, Commissioner MacDougall is concerned about creating a disincentive to employers who develop a strong safety policy, such as the one Stark developed in 2006. However, the Commission may "count [ ] the absence of documentation against the proponent of [a UEM] defense." *P. Gioioso & Sons, Inc. v. OSHRC*, 675 F.3d 66, 73 (1st Cir. 2012) (citation omitted). *See also GEM Indus., Inc.*, 17 BNA OSHC at 1863, 1995-97 CCH OSHD at p. 43,689. Here, if there was documentation that verbal warnings were given, it might be said that Stark met its burden in showing that the violations were "isolated" and "unforeseeable." Further, if there was documentation regarding the verbal discussions, it is less likely that Stark's safety director could be said to have ignored the failure of its supervisors to follow the instituted disciplinary policy.

its assertion that employees were disciplined"); *Precast Servs., Inc.*, 17 BNA OSHC at 1455, 1995-97 CCH OSHD at p. 43,035 ("To prove that its disciplinary system is more than a 'paper program,' an employer must present evidence of having actually administered the discipline outlined in its policy and procedures.").

Stark essentially argues that it established that its disciplinary policy was effective because employee violations diminished after the policy was instituted. This assertion is contradicted, however, by admissions from Stark supervisors that they disregarded the policy—the record reflects that had they observed safety violations, they would not have issued written warnings (or even documented oral disciplinary action).[13] The policy's shortcomings are also demonstrated by the safety director's admitted failure to ask supervisors why they were not issuing written tickets even though he knew that no supervisors, except the Champaign area manager, had submitted required copies of any tickets. Additionally, we find that the existence of two non-compliant excavations within such a short period of time—both of which were overseen by supervisors who were also competent persons responsible for the non-compliant conditions—is "strong evidence" that Stark's enforcement was lax.[14] *CBI Servs., Inc.*, 19 BNA OSHC at 1603, 2001 CCH OSHD at pp. 50,234-35 (recognizing that misconduct by supervisor is "strong evidence that the employer's safety program is lax"). We therefore affirm the judge's rejection of Stark's UEM defense.

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[13] Commissioner MacDougall notes that the Secretary appears to fault Stark for lack of discipline since the implementation of its 2006 progressive disciplinary policy. There is a danger in such a position because it is likely that if the reverse were true, one might find fault with that, too. In other words, if the record showed a continuing stream of multiple violations continuing to the current contested citations, the Commission might conclude that Stark's disciplinary program was not effective and its employee misconduct defense would fail on that basis. The appropriate inquiry is simply whether the employer demonstrated that it had a work rule that effectively implemented the requirements of the cited standard and that the work rule was adequately communicated and effectively enforced. *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1055, 1991-93 CCH OSHD ¶ 29,344, p. 39,452 (No. 86-1087, 1991).

[14] The judge's finding that Stark's enforcement of its safety program was lax is further supported by the fact that its "supervisors gave each other advance warning" when Stark's safety director conducted safety audits of the company's various worksites, thereby undermining the " 'surprise' element" of these audits. To establish the employee misconduct defense, an employer must show that it has an effectively enforced disciplinary program for safety violations. *See Rawson Contractors, Inc.*, 20 BNA OSHC at 1081, 2002-04 CCH OSHD at p. 51,327. It follows that in instituting measures designed to discover safety program violations, supervisors lessen the effectiveness of random inspections by giving each other a head's up.

Characterization

The judge characterized the cave-in protection violation as serious rather than willful, finding the evidence did not demonstrate Stark's state of mind was such that, if informed of the duty to act, it would not have cared, and that although Stark's conclusions about the soil type being short-term Type A were incorrect, they were reasonable and appear to have been made in good faith. The Secretary argues, as he did to the judge, that through its superintendent at the Champaign worksite, Stark had a heightened awareness of OSHA's cave-in protection requirements and the violative condition. The Secretary also contends that despite this awareness, the superintendent "deliberately disregarded" these requirements and allowed a Stark employee to work in an unprotected trench, essentially substituting his own judgment for the requirements of the standard.

"The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.' " *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181, 2000 CCH OSHD ¶ 32,134, p. 48,406 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

> [I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference . . . .

Hern Iron Works, Inc., 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, pp. 41,256-57 (No. 89-433, 1993). This state of mind is evident where " 'the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.' " *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citation omitted).

We agree with the Secretary that Stark had a heightened awareness of the requirements of the cited provision, but we do not find that Stark had the requisite state of mind for a willful violation. Regarding Stark's heightened awareness, the parties stipulated at the hearing that all Stark employees, including the superintendent, received appropriate training concerning the work rules at issue. Specific to the excavation rules, the superintendent testified that he: (1) learned about sloping and trench box methods of cave-in protection through training from both Stark and his previous employer; (2) has "been through several OSHA training classes and

competent person classes"; and (3) has viewed demonstrations "put on by the trench box companies." The superintendent also testified that he had "[t]he OSHA standard guidelines . . . for years," and used them, along with penetrometers and protractors issued by Stark, "to help [him] with sloping."

As the designated competent person at the Champaign worksite, the superintendent was responsible for analyzing the soil type in the excavation and determining what protective measures were needed to comply with OSHA's cave-in protection requirements. The superintendent testified that he completed a "Competent Person Daily Report" before leaving the worksite on the day of the inspection. This report, a template of which is contained in the company's excavation manual, includes information that mirrors the requirements of § 1926.652(b)(1)-(2), (c), (g) & Apps. B-C. *See Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1126-27, 1993-95 CCH OSHD ¶ 30,048, p. 41,284 (No. 88-572, 1993) (concluding that employer's safety program establishes awareness of duties in cited standards). Although the Daily Report itself does not mention the applicable OSHA standard, the excavation manual includes a copy of Subpart P in its entirety and the standard is referenced in the company's safety manual. Given this evidence, we conclude that the superintendent, and thus Stark, had a heightened awareness of the cited provision's requirements. *See Caterpillar, Inc.*, 17 BNA OSHC 1731, 1732-33, 1995-97 CCH OSHD ¶ 31,134, pp. 43,482-83 (No. 93-373, 1996) (finding heightened awareness established by imputing knowledge of supervisory personnel to employer), *aff'd*, 122 F.3d 437 (7th Cir. 1997).

However, we do not find that Stark "deliberately disregarded" these requirements. Stark's superintendent conducted a soil analysis, prepared an excavation report and, prior to his departure from the worksite, required his crew to use a trench box. After he returned and found that the crew was no longer using the trench box, the superintendent evaluated the soil in the area where the crew was then working, but he erroneously concluded that it was short-term Type A. Specifically, the superintendent testified that when he returned to the worksite, he noticed in less than a minute that: (1) the trench box was no longer being used, which surprised him because "[w]e run with the trench box"; (2) the excavator operator was "digging" while the other crew member, who was standing in the excavation, provided direction; (3) the crew had almost finished excavating from the southernmost utility line to the south wall and had "dug out" underneath both of the utility lines; and (4) the operator required "more than one pass . . . to fill

the [excavator] bucket," indicating that "the ground was hard"—"considerably harder than it was when" work started that morning. One crew member explained to the superintendent that the trench box was not being used because it would not fit between the southernmost utility line and the frost wall.

Although the superintendent also admitted he took no penetrometer readings from the area of the excavation where he observed the crew working without a trench box, he did assess the soil in this area and found that it was too hard to put his thumb in. According to the superintendent, based on his observations and the fact that his penetrometer reading from that morning was just below the compressive strength requirement for Type A soil, he concluded at that point that the soil was in fact short-term Type A. He also concluded that his crew did not need to use the trench box to complete work on the excavation because, in his estimation, the slopes of its walls were "[i]n compliance," i.e., they were sloped no more than a one-half-to-one ratio (63 degrees) and, therefore, offered adequate protection. Based on our review of the record, we find the Secretary has not shown that the superintendent was, in fact, aware that the excavation was noncompliant. *See Gen. Motors Corp.*, 22 BNA OSHC 1019, 1043, 2004-09 CCH OSHD ¶ 32,928, p. 53,622 (No. 91-2834E, 2007) (consolidated) ("[T]he Commission and courts distinguish 'between mere negligence and willfulness, holding that the former is sufficient for affirming a non-willful violation, but that willfulness is characterized by an intentional, knowing failure to comply with a legal duty.' " (citation omitted)).

As to the superintendent's specific sloping estimates, the Secretary has failed to establish that the superintendent appreciated he was violating the requirements of the standard at the time of his assessment. The superintendent testified that he knew the excavation's depth was 7 feet based on "the plans," and he estimated that the tops of the east and west walls each protruded 3.5 feet from their bases. These estimates were relatively close to what the CO subsequently measured—except that the superintendent did not take into account the more severe cutbacks at the top of the east and west walls, which skewed his analysis of the slopes of those walls. Because his estimates of the walls' slopes were not so far from the actual slopes of the walls' steepest inclines, he reasonably could have believed the east and west walls were in compliance. *Compare Calang Corp.*, 14 BNA OSHC 1789, 1791-92, 1987-90 CCH OSHD ¶ 29,080, pp. 38,870-71 (No. 85-0319, 1990) (finding violation willful as employer, who was told excavation walls were "nominally vertical," "could not have believed in good faith that the slope of the

trench walls complied with OSHA requirements"). Moreover, the Secretary never asked the superintendent anything about his assessment of the 85-degree soil-covered south wall, leaving us nothing with which to evaluate whether he knew that the wall's slope was significantly out of compliance—even for short-term Type A soil.

As to his failure to correctly type the soil, we note that OSHA's subsequent testing of the soil confirmed the superintendent's assumptions concerning the soil's compressive strength. Additionally, the record does not indicate if the superintendent considered whether the excavation contained previously disturbed or fissured soil.[15] In fact, the Secretary never asked the superintendent any questions about previously disturbed soil, even though it was evident that the soil had been previously disturbed to install the utility lines at the north end and the frost wall at the south end.[16] With regard to fissuring, the superintendent admitted that he was aware of the term from his training, and testified that at the time, he believed "fissuring" would have included "cracks in the sides of the bank or anywhere in [the] sides of the excavation." However, the record contains no evidence as to whether he observed any such cracks when he assessed the soil, either before his departure from the worksite or after his return. And beyond examining the soil for cracks, the superintendent admitted he was not aware of any other circumstances that would be indicative of fissuring.

In sum, we find that the evidence does not show the superintendent was attempting to sidestep the requirements of the excavation standard or that his failure to comply with them was anything more than negligence. *Compare Rawson Contractors, Inc.*, 20 BNA OSHC at 1081-82, 2002-04 CCH OSHD at p. 51,327 (holding foreman "acted with conscious disregard of the

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[15] As previously stated, Commissioner MacDougall does not join in the majority's analysis or conclusion regarding fissured soil.

[16] Commissioner Attwood notes that, in her judgment, the Secretary's failure to elicit any testimony from the superintendent on this issue is of critical importance. The superintendent testified that he had filled out an "Excavation Competent Person Daily Report" on the day of the inspection. That form required him to check for previously disturbed soil, and stated: "Reminder—Soil previously disturbed is Type C Soil . . . ." As we have found, both ends of the 7 to 9.5-foot long excavation showed obvious signs that the soil was previously disturbed. If the superintendent had recognized that fact, he would have known that the soil was Type B and that the excavation walls should have been sloped accordingly. It is inexplicable that the superintendent overlooked this condition. However, the Secretary elicited no testimony from him that would shed any light on his failure to revise his appraisal in light of this important factor in soil typing.

requirements of [§ 1926.652(a)(1)]" as he was the competent person and admitted to knowing "condition was in violation of OSHA standards when he made the decision to remove the trench boxes and send employees into the trench"). We therefore conclude that the Secretary has failed to establish that the superintendent consciously disregarded the requirements of the cited standard. Accordingly, we affirm Willful Citation 2, Item 1 in Docket No. 09-0005 as serious.

II. Serious Citation 1, Item 1b (*eyewear*), Peoria Worksite

Under this item, the Secretary alleges a serious violation of § 1926.102(a)(2), which provides that eyewear protection must be compliant with American National Standards Institute ("ANSI") requirements.[17] It is undisputed that on the day of the inspection, a Stark laborer cutting an "8-inch pipe with a 16-inch cut-off saw" was wearing prescription eyeglasses that had dark lenses similar to those of the safety glasses issued by Stark, but lacked side shields as required by ANSI. For approximately ten minutes, the laborer, who was also wearing a fully brimmed hard hat, was in the excavation cutting the pipe. The foreman at the worksite, who was standing near the edge of the excavation, watched the laborer perform this task.

The only issue on review with respect to this item is whether Stark " 'knew or could have known with the exercise of reasonable diligence of the conditions constituting the violation.' " *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073, 2004-09 CCH OSHD ¶ 32,943, p. 53,787 (No. 06-0792, 2007) (citation omitted). In affirming the violation, the judge found that the foreman's "presence and direct observation of [the laborer] while he was cutting the pipe" established Stark's knowledge of the violative condition. Stark argues that the judge erred in finding that its foreman had knowledge of the violative condition, because: (1) the hard hat worn by the laborer while he was in the excavation blocked the foreman's view of the laborer's glasses "during the brief 10-minute period [the laborer] was cutting the pipe"; (2) the lack of side shields on the glasses would not be readily apparent to the foreman since they "are very small and are sometimes clear"; and (3) the foreman "was accustomed to seeing his crew wear safety glasses" and "had never worked with an employee who wore prescription glasses."

We agree with Stark that the record fails to support the judge's finding of knowledge. Photographs in evidence show that from the foreman's position at the edge of the excavation, his

[17] Section 1926.102(a)(2) states: "Eye and face protection equipment required by this part shall meet the requirements specified in American National Standards Institute, Z87.1-1968, Practice for Occupational and Educational Eye and Face Protection."

view of the laborer's face—including his eyewear—was blocked by the laborer's fully brimmed hard hat. *See Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2085-86, 2009-12 CCH OSHD ¶ 33,200, p. 55,767 (No. 06-1542, 2012) (rejecting argument that foreman's proximity to employee who failed to use lifeline established foreman's knowledge of fall protection violation, because although foreman worked near violative condition, his view of employee at relevant time was restricted and duration of violative conduct was unknown); *Manganas Painting Co.*, 21 BNA OSHC at 1989, 2004-09 CCH OSHD at p. 53,405 (finding that Secretary did not establish knowledge of respirator violation as evidence did not show whether supervisor could have seen, in dusty conditions, that employee was not wearing respirator inside his blasting hood). There is no evidence that the laborer ever looked up from his work during the brief amount of time he was in the excavation or that he was otherwise positioned relative to the foreman in a way that would have allowed the foreman to see the laborer's eyewear without the hard hat obstructing his view.

The record also fails to support the Secretary's claim that the lack of side shields was "obvious," as well as his implication that the foreman "must have seen" that the laborer was wearing improper eyewear while the crew worked together for an hour and a half before the laborer entered the excavation.[18] According to the foreman, while he "wasn't really paying attention" on the morning of the inspection, he did notice that the laborer was wearing glasses with dark lenses. Not until "OSHA was onsite and we had all been talking among ourselves" did the foreman notice that the glasses lacked side shields. Indeed, the record does not show that the foreman was ever in a position to observe that the glasses lacked side shields before then, and there is no dispute that the side shields on Stark's safety glasses were "very small" and "sometimes clear" in color. *See Shaw Areva Mox Servs., LLC*, 23 BNA OSHC 1821, 1825 n.8, 2009-12 CCH OSHD ¶ 33,178, pp. 55,613-14 n.8 (No. 09-1284, 2012) (rejecting knowledge argument in part because record did not establish "personnel were sufficiently close to the fuel tank to have necessarily observed such a *small and subtle* defect during the time the cited condition existed" (emphasis added)).

[18] We note that Stark's safety manual requires the use of ANSI-compliant eye protection at all times, while § 1926.102(a) requires ANSI-compliant eyewear only "when machines or operations present potential eye or face injury."

The Secretary claims that the foreman would have noticed the laborer was not wearing the required eye protection at the time of the violation had he "simply paid attention sooner." According to the Secretary, the foreman was not reasonably diligent because he did not "notice, or inquire about, [the laborer's] use of eye protection before [the laborer] began working in the trench." But in focusing on the foreman's testimony that he "wasn't really paying attention" before OSHA arrived on site, the Secretary ignores the context of this statement. The foreman testified that he noticed the laborer was wearing glasses that were "dark," which he concluded were Stark-issued safety glasses. In addition, his testimony suggests that he was unaware the laborer wore prescription glasses—even though he had previously worked with the laborer, he stated that "he did not have anyone on [his] crews that wore . . . prescription glasses." Thus, the record shows that the foreman took note of the laborer's eyewear and assessed it, making a reasonable judgment based on the dark lenses that the laborer was wearing the required safety glasses.

Despite this initial assessment, the Secretary maintains that the foreman should have further "inquire[d] about" the laborer's eyewear given Stark's safety rule requiring ANSI-compliant eyewear at all times. Yet the Secretary has not shown that the foreman had any reason to question the adequacy of the laborer's eyewear after making an initial assessment of it. *Cf. Thomas Indus. Coatings, Inc.*, 23 BNA OSHC at 2085, 2009-12 CCH OSHD at p. 55,767 (questioning, but not determining, existence of violative condition does not necessarily establish actual knowledge). Nor has the Secretary established that the foreman had any reason to believe the laborer would be likely to violate Stark's safety policy by not wearing the required eyewear.[19] Under these circumstances, we find the Secretary has not established that Stark, through its foreman, had knowledge of the violative condition.[20] Accordingly, we vacate Serious Citation 1, Item 1b in Docket No. 09-0004.

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[19] The Secretary claims that because "Stark's Safety Manual requires that employees must also wear goggles or a face shield when 'grinding, chipping, sawing or using power tools,' " the laborer's eyewear should have been on the foreman's mind "throughout the morning." But the safety manual does not state that all employees must wear goggles or a face shield; it simply states that "*eyeglasses must be supplemented* with goggles or a face shield when grinding, chipping, sawing, or using power tools." (Emphasis added.) The record does not establish that the foreman knew or could have known that the laborer was wearing prescription eyeglasses in the first place, which is what would have triggered the need for goggles or a face shield.

[20] The Secretary also argues, as he did before the judge, that knowledge of the violative condition

III. Willful Citation 2, Item 1 (*cave-in protection*), Peoria Worksite

Under this item, the Secretary alleges a willful violation of § 1926.652(a)(1), claiming that Stark failed to provide cave-in protection for each employee in the excavation at the Peoria worksite. The judge affirmed the violation but recharacterized it as serious. Stark has not challenged the violation's merits on review, arguing only that the violation was the result of UEM. As discussed with respect to the Champaign cave-in protection item, we find that Stark failed to show that it effectively enforced its rules when violations of its safety policy, including rules concerning excavation cave-in protection, were discovered. We therefore reject Stark's UEM defense as to this item as well.[21]

The Secretary argues that the judge erred in rejecting the violation's willful characterization because the record shows that Stark's foreman at the Peoria worksite "deliberately disregarded" the requirements of the excavation standard and, alternatively, exhibited plain indifference to employee safety. *See Hern Iron Works, Inc.*, 16 BNA OSHC at 1214, 1993-95 CCH OSHD at p. 41,257 ("A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference."). The judge determined that Stark lacked the state of mind necessary to establish a willful violation of § 1926.652(a)(1) because Stark (1) "had developed and implemented, as conceded by [the Secretary], a well-documented excavation safety program with adequate rules and employee training"; and (2) made "a reasonable effort . . . to slope the excavation as opposed to not taking any steps at all to slope the walls." As to this latter determination, the judge found that the foreman was in a hurry, neglected to measure the excavation walls, and "did not know whether . . . the sloping was in compliance with [OSHA's] requirements." But the judge concluded that the foreman's "actions are distinguishable from a

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can be imputed to Stark from its superintendent at the Peoria worksite. The judge did not address the superintendent's knowledge in his decision. Based on our review of the record, we find that the superintendent lacked not only the opportunity to observe the laborer's eyewear before he entered the excavation—the foreman testified that the CO "walked up right behind" the superintendent, who had just arrived at the worksite—but also the ability to view this eyewear from his position at the top of the excavation.

[21] Stark raises its UEM defense as to Repeat Citation 3, Item 1 (spoil piles) as well. We reject Stark's argument for the same reasons already discussed with respect to its cave-in protection rules—it failed to prove that its safety policy was effectively enforced following discovery of violations.

supervisor who measured the angle of the excavation walls, determined they were non-compliant, and then proceeded with no regard for employee safety."

We disagree. It is undisputed that the excavation was 8 feet deep and dug in Type B soil, and its walls exceeded the maximum allowable slope of 45 degrees for this type of soil. There is also no dispute that the foreman, who was the designated competent person at the Peoria worksite, was aware of the soil type before he observed a Stark laborer enter and work in the unprotected excavation. Indeed, as the competent person, he was responsible for analyzing the soil type in the excavation and determining what protective measures were needed to comply with OSHA's cave-in protection requirements. Like the competent person at the Champaign worksite, the foreman was required to perform this task each day by completing the Competent Person Daily Report included in Stark's excavation manual. The foreman acknowledged that the safety director had given him a copy of the excavation manual and explained to him how to use the Daily Report. The foreman also testified that he took a 10-hour OSHA class that, among other things, covered excavation work, and that the safety director discussed "OSHA excavation rules" at an annual safety training meeting.

According to the foreman, he used the Daily Report "every day" during the period before OSHA's inspection of the Peoria worksite; he would record the soil type in the Daily Report and then determine what type of cave-in protection to use—sloping, benching, or a trench box. As previously noted, the portion of the Daily Report pertaining to cave-in protection, as it relates to sloping and benching methods, mirrors the requirements of § 1926.652(b)(1)-(2), (c), (g) & Apps. B-C, and while the report itself does not mention the applicable OSHA standard, Stark's excavation manual includes a copy of Subpart P in its entirety and the standard is referenced in its safety manual. *See Morrison-Knudsen Co.*, 16 BNA OSHC at 1126-27, 1993-95 CCH OSHD at p. 41,284 (concluding that employer's safety program establishes awareness of duties in cited standards). Additionally, the foreman's testimony suggests that he had previously conducted soil testing and utilized various methods of cave-in protection to comply with "OSHA regulations." Given this evidence, we conclude that the foreman, and thus Stark, had a heightened awareness of the cited provision's requirements. *See Caterpillar, Inc.*, 17 BNA OSHC at 1732-33, 1995-97 CCH OSHD at pp. 43,482-83 (imputation of supervisory knowledge).

We also conclude that the record supports the Secretary's contention that the foreman "deliberately disregarded" these requirements. The evidence shows that the foreman knew the

excavation walls should have been sloped at a maximum of 45 degrees before the laborer entered the excavation to cut the pipe. The foreman testified that soon after work began that day, he determined that the excavation contained Type B soil based on a sample he analyzed with a penetrometer, and he recorded that information in his Daily Report. Printed on the report itself is the requirement that "[i]f sloping/benching methods of protection are used," the slope for an excavation with Type B soil is "1:1 or 45°." This establishes that the foreman, as Stark's competent person at the worksite, was aware that unless a trench box was used, the excavation walls could not be sloped more than 45 degrees without running afoul of his company's, as well as OSHA's, safety requirements.

Despite the foreman's testimony that he had no idea at the time whether the excavation walls were sloped in accordance with "the OSHA regulation" because he was "in a hurry" and not "paying attention," the evidence shows that he knew—or at least deliberately avoided knowing—that the slopes of the east and west walls exceeded 45 degrees by a wide margin. The CO measured the slopes of these walls at 60 to 80 degrees, depending on the precise locations along the walls. Yet, the foreman admitted that after he typed the soil, he did nothing that morning to determine whether the walls of the excavation met the 45-degree requirement.[22] As he recognized, he "was not really thinking at all," he "was in a hurry and . . . just wanted to get the job done," it was a "big oversight of [his]," and he "did not pay attention to really how the hole looked." Consistent with this admission, the foreman's Daily Report shows that he did not complete the portion of the report pertaining to cave-in protection. Having classified the soil type and recorded it on the Daily Report, we find it incredible that the foreman could have failed to observe the marked discrepancies between the slopes that actually existed—up to 80 degrees—and the 45-degree slopes that the foreman knew were required for this particular excavation.

[22] Without explanation and with no supporting references to the record, the judge found that "the record demonstrates a reasonable effort by [Stark] to slope the excavation." Stark relies on this finding on review, still providing no support for it other than to note that the foreman sampled the soil. There is nothing in the record to indicate that, after assessing the soil type and recording that information in the foreman's Daily Report, Stark made any effort to provide cave-in protection to its employees at the Peoria worksite. The foreman's action in taking a soil sample merely informed him that cave-in protection was required and that the slopes of the excavation walls should be no more than 45 degrees.

Under these circumstances, we find that the foreman either knew the slopes of the excavation walls exceeded 45 degrees, or deliberately avoided this knowledge in his admitted haste to complete the work.[23] *See E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1572, 2009-12 CCH OSHD ¶ 33,030, p. 54,363 (No. 94-1979, 2009) (relying on *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998), which notes that " 'actual knowledge and deliberate avoidance of knowledge are the same thing' " and "[b]ehaving like an ostrich supports an inference of actual knowledge" (citation omitted)); *see also Rawson Contractors, Inc.*, 20 BNA OSHC at 1081-82, 2002-04 CCH OSHD at p. 51,327 (conscious disregard established where foreman was competent person and knew "condition was in violation of OSHA standards when he made the decision to remove the trench boxes and send employees into the trench"). Contrary to Stark's contention on review, the foreman's failure to protect the laborer working in the excavation was not based on " 'a good faith, albeit mistaken, belief' " that the excavation was in compliance with OSHA's requirements. *Manganas Painting Co.*, 21 BNA OSHC at 1991, 2004-09 CCH OSHD at p. 53,406 (citation omitted). We affirm Willful Citation 2, Item 1 in Docket Number 09-0004 as willful.

IV. Penalties

In assessing a penalty, the Act requires the Commission to give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). It is undisputed that Stark is a relatively large employer with a history of prior excavation violations. On review, Stark argues that the penalty amount assessed for any affirmed violation should be reduced because the company "demonstrated substantial good faith with regard to the implementation of its safety program." Stark also claims that the violations at issue were low gravity.

As we previously stated regarding Stark's UEM defense, the evidence does not support the company's assertion of good faith. With respect to gravity, both of the excavations at issue

[23] According to the foreman, once he realized OSHA's compliance officer was on-site, it "kind of hit home" that he was sure the excavation was not properly sloped. *See Fiore Constr. Co.*, 19 BNA OSHC 1408, 1409, 2001 CCH OSHD ¶ 32,335, p. 49,575 (No. 99-1217, 2001) (finding experienced foreman with heightened awareness of requirements of § 1926.652(a)(1) "made a conscious decision not to use cave-in protection" where he had received OSHA excavation training and admitted to CO at time of inspection that trench "probably wasn't in compliance").

in this case were considerably out of compliance with the cited standard's cave-in protection requirements, posing significant risks to the employees exposed to the violative conditions. *See Calang Corp.*, 14 BNA OSHC at 1794, 1987-90 CCH OSHD at p. 38,873 (substantial penalties typically warranted for cave-in protection violations because "the incidence of cave-ins is high, and the likelihood of death or severe injury to employees in a collapsing trench is . . . high"). Exposure in the Peoria excavation involved a single employee for ten minutes. In addition, two spoil piles and a backhoe were located immediately next to that excavation, though the Secretary does not dispute Stark's assertion that the asphalt underneath the backhoe may have decreased the risk of it falling in. With respect to the Champaign excavation, the length of exposure was approximately one hour and involved one or two employees. *See Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201, 2004-09 CCH OSHD ¶ 32,880, p. 53,231 (No. 00-1052, 2005) (noting that principal factor in penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury"). Given these circumstances, we assess penalties of $60,000 for the willful cave-in protection violation and $20,000 for the repeat spoil piles violation in Docket No. 09-0004 (Champaign), and we assess a penalty of $7,000 for the serious cave-in protection violation in Docket No. 09-0005 (Peoria).

ORDER

We vacate Serious Citation 1, Item 1b in Docket No. 09-0004. We affirm Willful Citation 2, Item 1 in Docket No. 09-0004 as alleged and assess a penalty of $60,000; we affirm Repeat Citation 3, Item 1 in Docket No. 09-0004 as alleged and assess a penalty of $20,000; and we affirm Willful Citation 1, Item 2 in Docket No. 09-0005 as serious and assess a penalty of $7,000.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Heather L. MacDougall
Commissioner

Dated: November 3, 2014

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Stark Excavating, Inc., Respondent.	OSHRC DOCKETS NO. 09-0004 09-0005 (Consolidated)

Appearances:

Leonard A. Grossman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Julie O'Keefe, Esq., Armstrong Teasdale, LLP, St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Stark Excavating, Inc. ("Respondent") worksite in Peoria, Illinois on June 5, 2008, and a second inspection of a worksite in Champaign, Illinois on July 22, 2008. As a result of those inspections, OSHA issued *Citations and Notifications of Penalty* to Respondent charging violations of the Act at each location.[1] Respondent timely contested the citations in both cases, which were subsequently consolidated

1 OSHRC Docket No. 09-0004 (OSHA Inspection No. 310801246) consists of an alleged serious violation of 29 C.F.R. §1926.102(a)(2) with a proposed penalty of $2,000.00; an alleged willful violation of 29 C.F.R. §1926.652(a)(1) with a proposed penalty of $70,000.00; and an alleged repeat violation of 29 C.F.R. §1926.651(j)(2) with a proposed penalty of $35,000.00. Complainant withdrew an alleged violation of 29 C.F.R. §1926.21(b)(2) [Citation 1 Item 1(a)] before trial. OSHRC Docket No. 09-0005 (OSHA Inspection No. 310802095) consists of an alleged willful violation of 29 C.F.R. §1926.651(j)(2) with a proposed penalty of $70,000.00; and an alleged willful violation of 29 C.F.R. §1926.652(a)(1) with a proposed penalty of $70,000.00.

for hearing, and a trial was conducted between November 3 and November 6, 2009, in Peoria, Illinois.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. At all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Complaints* and *Answers; Slinghuff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a prima facie violation of the Act, the Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

A violation is "serious" if there is a substantial probability that death or serious physical harm could result from the violative condition. *29 U.S.C. 666(k)*. Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm would result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp.* v. OSHRC, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶29,942 (No. 88-0523, 1993).

When Complainant alleges a "repeat" violation, she has the burden of establishing that the present and past violations are substantially similar. *Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Complainant makes a prima facie showing of "substantial similarity" by establishing the past and present violations are for failure to comply with the same standard. The burden then shifts to Respondent to rebut that showing. *Monitor Construction Co*., 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

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.'" *Diamond Installations, Inc*., 21 BNA OSHC 1688, 2005 CCH OSHD ¶32,848 (No. 02-2080, 2006) (cited references omitted). This test describes misconduct that is more than negligent but less than malicious, or committed with specific intent to violate the Act or standard. *Georgia Electric Co.,* 595 F.2d 309, 318-19 (5th Cir. 1979*); Ensign-Bickford Co. v. OSHRC,* 717 F.2d 1419, 1422-23 (D.C.Cir. 1983). The employer's state of mind is the key issue. *Diamond Installations,* supra. Complainant must show that Respondent had a "heightened awareness" of the illegality of the conduct. *Id*. Heightened awareness is more than simple awareness of the conditions constituting the alleged violation; such evidence is already necessary to establish the violation. *Id.* Instead, Complainant must show that Respondent was actually aware of the unlawfulness of the action or that it "possessed a state of mind such that if it were informed of the standards, it would not care." *Id.*

Numerous cases "make clear that willfulness will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible." *Froedtert Lutheran Hosp., Inc.,* 20 BNA OSHC 1500, 1510 (No. 97-1839, 2004). Thus a company cannot be found to have willfully violated a standard if it exhibited a good faith, reasonable belief that its conduct conformed to law, or if it made a good faith effort to comply with a standard or eliminate a hazard. *American Wrecking Corporation v. Secretary of Labor,* 351 F.3d 1254, 1262-63 (D.C. Cir. 2003); *General Motors Corp. Electro-Motive Division*, 14 BNA OSHC 2064, 1991 CCH OSHD ¶29,240 (No. 82-630 *et al*., 1991). To negate willfulness, the employer's good faith efforts or belief must be objectively reasonable under the circumstances. *Caterpillar Inc.,* 17 BNA OSHC 1731, 1733 (No. 93-373, 1996), *aff'd* 122 F.3d 437 (7th Cir. 1997).

Respondent asserted "unpreventable employee misconduct" as an affirmative defense in each case. To establish this defense, Respondent must show that: (1) it had established work rules designed to prevent the violations, (2) it adequately communicated those rules to its employees, (3) it took steps to discover violations of its rules, and (4) it effectively enforced the rules when violations were discovered. *Diamond*

Installations supra. When the alleged misconduct is that of a supervisor, the required proof 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, 1991 CCH OSHD ¶29,317 (No. 87-1067, 1991). The actions and knowledge of supervisory personnel are generally imputed to their employers. *Revoli Const. Co.,* 19 BNA OSHC 1682 (No. 00-0315, 2001). It is well settled that an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Access Equipment Systems, Inc.,* 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). In such an instance, the Respondent must establish that it took all feasible steps to prevent the incident, including adequate instruction and supervision of its supervisory employee. *Archer-Western Contractors Ltd.,* supra.

Factual Stipulations

The following undisputed facts were identified in the parties' pre-trial submissions:

- Respondent has an office and place of business at 895 W. Washington St., Bloomington, Illinois.
- Respondent is engaged in the business of excavation and related activities as well as construction.
- On June 5, 2008, Respondent had a worksite located at 3708 N. Prospect Road, Peoria, Illinois (Starbucks Coffee) which was the site of Inspection 310801246 (Docket 09-0004).
- On July 22, 2008, Respondent had a worksite at Springfield and Third, Champaign, Illinois which was the site of Inspection 310802095 (Docket 09-0005).
- Stark Excavating was cited for a violation of Occupational Safety and Health Standard 29 C.F.R. §1926.652(a)(1) or its equivalent which was contained in OSHA inspection 308573252, Citation 1, Item 2b issued on August 30, 2006, with regard to a workplace located at Euclid Street, Bloomington, Illinois. Respondent did not contest this citation. An Informal Settlement Agreement re: Inspection 308573021, including this citation, was signed by Wayne E. Clayton on

behalf of Respondent, and was entered on September 21, 2006.

- Stark Excavating was cited for a violation of Occupational Safety and Health Standard 29 C.F.R. §1926.652(a)(1) or its equivalent which was contained in OSHA Inspection 308573021, Citation 1, Item 2, issued on August 30, 2006, with regard to a workplace located at the corner of North Orange Prairie Road and West Landens Way, Peoria, Illinois. Respondent did not contest this citation. An Informal Settlement Agreement re Inspection 308573021, including this citation, was signed by Wayne E. Clayton on behalf of Respondent, and was entered on September 21, 2006.

- Stark Excavating was cited for a violation of Occupational Safety and Health Standard 1926.651(j)(2) or its equivalent which was contained in OSHA Inspection 308573252, Citation 1, Item 1 issued on August 30, 2006, with regard to a workplace located at Euclid Street, Bloomington, Illinois. Respondent did not contest this citation. An Informal Settlement Agreement re Inspection 380573021, including this citation, was signed by Wayne E. Clayton on behalf of Respondent, and was entered on September 21, 2006. (See also Tr. 89-90, 92-94, 866; Ex. C- 40, C-41, C-42).

- (OSHRC Docket No. 09-0004/OSHA Inspection No. 310801246) Prior to Matt Bohm's entry into the excavation, Foreman Jason Schupp had classified the soil at the excavation as Type B and had recorded that on his daily report. Prior to Matt Bohm's entry into the excavation, Jason Schupp did not take measurements to determine the slope of the walls of the excavation. A measurement taken by CSHO Karl Armstrong at the site indicated the excavation had not been properly sloped. During the inspection, CSHO Armstrong did not determine the distance of the spoil pile from the excavation. During the time he was in the excavation, Matt Bohm wore (i) prescription glasses that did not have side shields; and (ii) a hard hat. CSHO Armstrong used a soil pocket penetrometer during his inspection, and obtained results of 1.8 tons per square foot and 2.1 tons per

square foot.

- (OSHRC Docket No. 09-0005/OSHA Inspection No. 310802095) The area of the excavation from where CSHO Strain took his measurements for the purpose of determining soil type and slope had been dug during the day of the OSHA inspection. During the inspection, CSHO Strain did not measure the distance of the spoil pile from the excavation.

Additional Findings of Fact and Discussion

OSHRC Docket No. 09-0004 (OSHA Inspection No. 310801246) (Starbucks site)

On June 5, 2008, OSHA Compliance Safety and Health Officer ("CSHO") Karl Armstrong, with the Peoria, Illinois Area OSHA Office, conducted an inspection of Respondent's jobsite at Prospect Road in Peoria, Illinois. (Tr. 25-26). Respondent is a large excavation and paving company that typically handles about 250 jobs per year throughout central and southern Illinois. (Tr. 937). At this location, Respondent's crew was replacing a leaking underground fire hydrant water-line in an excavation in front of a Starbucks coffee house. (Tr. 36, 550-551). The excavation was originally created two weeks earlier, but the crew had not been back to the site until the day of the OSHA inspection at issue here. (Tr. 551). Before entering the jobsite, CSHO Armstrong observed and photographed four of Respondent's employees working in and around the excavation from across the street: Foreman Jason Schupp, Backhoe operator Mark Schweigert, Superintendent Greg Gilmore, and Laborer Matthew Bohm. (Tr. 26-28; Ex. C-5).

Foreman Schupp was the crew supervisor and designated competent person. (Tr. 77-78, 127-128). Foreman Schupp and Superintendent Gilmore were standing at the edge of the excavation, watching Mr. Bohm working inside the excavation, when OSHA arrived at the jobsite. (Tr. 31, 89, 577-578). Mr. Bohm was cutting off a piece of pipe with a hand-held, 16-inch, cut-saw. (Tr. 70-71, 566). He worked in the bottom of the 8-foot deep excavation for approximately ten minutes. (Tr. 36, 574; Ex. C-17). Foreman Schupp admitted that, prior to OSHA arriving, he had not checked the angle of the excavation walls to determine whether they were compliant. However, he did analyze a soil sample and fill out his competent

person/excavation report. (Tr. 574, 590).

Significant evidence, including expert testimony, was introduced on soil samples and soil-typing at this excavation. (Tr. 211-249). That testimony ultimately became irrelevant as the parties eventually stipulated during trial that the soil in this excavation was "Type B" as defined in 29 C.F.R. §652. (Tr. 146, 228-230, 232).

Using an engineering rod and universal protractor, CSHO Armstrong determined that three of the walls in the excavation were angled vertically at 76 degrees, 80 degrees, and 75 degrees. (Tr. 50-52; Ex. C-9, C-10, C-11, C-18, C-20, C-22). Safety Director Clayton confirmed that he also observed excavation walls exceeding 63 degrees during OSHA's inspection. (Tr. 892). Ultimately, Respondent stipulated during trial that at least one side of this excavation was not in compliance with the excavation protection regulations. (Tr. 20, 59-60).

In addition, Foreman Schupp conceded that Mr. Bohm was not wearing approved safety glasses while cutting the pipe. (Tr. 583-585). Mr. Bohm was wearing only his personal prescription glasses. (Tr. 68, 584). Foreman Schupp testified that this was the first jobsite he supervised in which an employee wore prescription glasses so he did not recognize it as an issue. (Tr. 582-583). Although Mr. Bohm's eyeglasses did not qualify as OSHA or ANSI compliant safety glasses, CSHO Armstrong testified that they did offer some protection to the eye. (Tr. 175, 200). Therefore, he concluded that the condition presented a "lesser" probability of an actual injury in terms of calculating a proposed penalty. (Tr. 175).

With regard to the alleged spoils pile violation, CSHO Armstrong photographed the condition and location of the piles during his inspection but failed to physically measure their distance from the top edge of the excavation wall. (Tr. 44, 110; Ex. C-15). He did not recognize the location of the spoils piles to be an issue until later when he was reviewing investigative photographs. (Tr. 107-108). At least one of the spoils piles depicted in investigative photographs was clearly several feet high and located right at the edge of the excavation wall, immediately above the pipe that had been cut by Mr. Bohm. (Ex. C-12; C-15; C-

19; C-21). CSHO Armstrong described two hazards resulting from such a situation: (1) material from the spoils pile falling into the trench onto employees, and (2) the weight of the spoils pile at the edge contributing to the possibility of an excavation wall collapse. (Tr. 88). The court also notes that one of OSHA's investigative photographs clearly depicts the base of an outrigger on the backhoe resting right at the top edge of the excavation above the area in which Mr. Bohm was working. (Ex. C-19).

In addition to the stipulations concerning Respondent's history of violations in 2006, Respondent also received three other citations approximately twenty years earlier. However, Complainant failed to produce a copy of the twenty-year-old citations and conceded that they were not significant in determining the classification of the present violations. (Tr. 186, 194, 197-198).

Respondent's primary dispute with regard to the citation items alleged in this case concern: (i) employer knowledge; (ii) employee misconduct; (iii) the willful classification of Citation 2 Item 1; and (iv) the repeat classification of Citation 3 Item 1. (Tr. 74, 230).

Citation 1 Item 1(b)

Complainant alleges that Respondent violated the cited regulation as follows:

> *29 CFR 1926.102(a)(2): Eye and face protective equipment being worn by the employees did not meet the requirements specified in American National Standards Institute, Z 87.1-1968, Practice for Occupational and Educational Eye and Face Protection. An employee was exposed to eye injuries, while cutting 8-inch ductile pipe with a 16-inch cut-off saw and the employee was wearing prescription glasses which did not meet the requirements of ANSI Z 87.1-1968, and did not have side shields to protect the eyes from side exposure to flying debris.*

The cited regulation provides:

> *29 CFR 1926.102(a)(2): Eye and face protection equipment required by this Part shall meet the requirements specified in American National Standards Institute, Z87.1-1968, Practice for Occupational and Educational Eye and Face Protection.*

Respondent's employee, Matthew Bohm, was cutting a water main pipe with a portable hand-held

saw. The cited standard requires ANSI compliant eye protection "when machines or operations present potential eye or face injury from physical, chemical, or radiation agents." *29 C.F.R. §1926.102(a)(1)*. Particles entering the eye as a result of cutting pipe with a hand-held saw could have result in substantial and permanently debilitating injuries. The standard clearly applies to the cited condition. Foreman Schupp acknowledged that in this instance, Mr. Bohm was wearing his personal prescription glasses rather than qualifying safety glasses. The standard was violated. Obviously, Mr. Bohm was the employee exposed to the violative condition. *Fabricated Metal Prods*., 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997). Foreman Schupp was the crew supervisor and designated competent person. (Tr. 77-78, 127-128). Knowledge of Mr. Bohm's failure to wear qualifying eye protection is imputed to Respondent through Foreman Schupp's presence and direct observation of Mr. Bohm while he was cutting the pipe. *Globe Contractors, Inc. v. Herman*, 132 F.3d 367 (7th Cir. 1997). The citation was properly characterized as a serious violation. *Whiting-Turner Contracting Co.,* 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). Complainant established the prima facie elements necessary to affirm Citation 1 Item 1(b).

Citation 2 Item 1

Complainant alleges that Respondent willfully violated the cited regulation as follows:

> *29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) sloping and benching systems, or paragraph (c) support systems, shield systems, and other protective systems: Each employee in an excavation is not protected from cave-ins by an adequate protective system. The employer does not protect each employee in its trenches by properly sloping the trenches or using appropriate protective systems. This violation was observed at 3708 North Prospect Road, Peoria, Illinois. To abate this violation, the employer must ensure that its trenches are properly sloped or equipped with appropriate protective systems, and that no employees enter trenches until this protection is provided.*
>
> [with additional language regarding abatement verification requirements

and reference to previous citations alleging violations of the same standard in 2006 (two), 1989, and 1986]

The cited regulation provides:

> *29 CFR 1926.652(a)(1): 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 that ground by a competent person provides no indication of a potential cave-in.*

The citation alleges a failure to provide adequate excavation protection for Respondent's employees. The cited standard addresses various acceptable methods of excavation protection. The standard clearly applies. The parties agreed that the soil in this eight-foot-deep excavation was "Type B." Therefore, the slope of the excavation walls could not exceed 45 degrees (one horizontal to one vertical). *29 C.F.R. §1926.652, Appendix B, Table B-1.2*. The record establishes that three walls of the excavation exceeded the maximum allowable slope, with no other form of protection having been implemented. The terms of the cited standard were violated. Mr. Bohm's presence in the bottom of the excavation while it was in this condition establishes employee exposure to the violative condition. As with Citation 1 Item 1(b) above, Foreman Schupp's direct knowledge of Mr. Bohm working in this excavation, in this condition, is imputed to Respondent.

The court concludes that Complainant failed to establish the willfulness of this violation. Respondent had developed and implemented, as conceded by Complainant, a well-documented excavation safety program with adequate rules and employee training. (Tr. 520-521). The existence of this program, and the acknowledgement of OSHA as to its comprehensiveness, does not demonstrate the Respondent's state of mind was "such that, if informed of the duty to act, it would not have cared." *Diamond Installations*, supra. In addition, the record demonstrates a reasonable effort by the Respondent to slope

the excavation as opposed to not taking any steps at all to slope the walls. Foreman Schupp admitted that he was in a hurry and neglected to measure the angle of the excavation walls on the morning of the inspection. (Tr. 574, 594-595). He also testified that he did not know whether or not the sloping was in compliance with the requirements. (Tr. 675). His actions are distinguishable from a supervisor who measured the angle of the excavation walls, determined they were non-compliant, and then proceeded with no regard for employee safety. While there is no excusing Foreman Schupp's omission, or the exposure of Mr. Bohm to this unsafe condition, the court is not convinced that the evidence in this case rises to the level of "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." On the contrary, Foreman Schupp testified that he "*usually get[s] into trouble because [he] take[s] too much time making sure that ditches are correct* ." (Tr. 594). Inaction due to negligence is not generally equated to willfulness. See *McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133 (1988). Considering these facts, in combination with the finding (below) that Respondent established three of the four elements necessary to prove an employee misconduct defense, the court concludes that Complainant failed to establish willfulness. Since a wall collapse in this improperly sloped excavation could have resulted in serious injury or death, the court concludes that Complainant established the prima facie elements necessary to affirm Citation 2 Item 1 as a serious violation of the Act.[2]

Citation 3 Item 1

Complainant alleges that Respondent repeatedly violated the cited regulation as follows:

> *29 CFR 1926.651(j)(2): Employees were not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations: Each employee in an excavation is not protected from struck-by hazards and the spoil pile and materials are stored within two feet of the excavation. The employer does not protect each employee in its*

2 Complainant made a verbal motion at trial for her complaint to be amended to conform to the evidence presented pursuant to F.R.C.P. 15, in that the alleged willful violations could alternatively be deemed repeat violations. (Tr. 981). However, by written notice on November 20, 2009, Complainant withdrew that motion.

> *trenches by setting spoil piles and materials at least two feet from trenches. This violation was observed at 3708 North Prospect Road, Peoria, Illinois. To abate this violation, the employer must ensure that spoil and materials are set back from the edge of the excavation at least two feet and that no employees enter trenches until this protection is provided.*
>
> [with additional language regarding abatement verification requirements and reference to a previous citation alleging a violation of the same standard in 2006]

The cited regulation provides:

> *29 CFR 1926.651(j)(2): Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.*

The citation is for improper placement of spoils extracted from an excavation. The cited standard establishes the minimum distance for proximity of spoils piles to an excavation. The standard clearly applies to the cited condition. The standard prohibits placement or storage of "excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations" within two feet of the excavation edge. CSHO Armstrong testified that the spoil pile at the south end of the excavation came down to the edge of the excavation. (Tr. 53). Investigative photographs also establish that the spoils pile nearest to the backhoe bucket, as well as one of the backhoe outrigger bases were within two feet of the excavation edge. (Ex. C-12, C-15, C-19, C-21). The terms of the standard were violated. Mr. Bohm was exposed to this violative condition while he was working inside the excavation. If dirt from the spoils pile collapsed back into the excavation, or the backhoe's outrigger base slipped off the edge, Mr. Bohm could have been seriously injured or killed. Therefore, employee exposure was established. As with the first two alleged violations, Foreman Schupp was present and his knowledge of these jobsite conditions is imputed to Respondent.

It was undisputed that Respondent received a *Citation and Notification of Penalty* in 2006 which included a violation of 29 C.F.R. §1926.651(j)(2). (Ex. C-41, C-42). By presenting evidence of a previous violation of the same cited standard, Complainant has met its burden of establishing the substantial similarity of the hazards. Respondent failed to present evidence to rebut that prima facie showing. Accordingly, Complainant established the prima facie elements necessary to affirm Citation 3 Item 1 as a repeat violation of the Act.

Affirmative Defense

Respondent asserted the defense of unpreventable employee misconduct to these violations. The record establishes that Respondent had written rules concerning excavation protection requirements, spoils pile placement during the excavation process, and effective eye protection. (Ex. R-7). Respondent also established that those rules were adequately communicated to employees and supervisors through training and distribution of written materials. In fact, Complainant stipulated to these elements of the defense. (Tr. 520-521). Respondent also established that it monitored for compliance with these rules, at least through the actions of its Safety Director, Wayne Clayton, by reviewing daily foreman reports and conducting on-site safety audits. (Tr. 799-805). However, the court is not persuaded that Respondent effectively enforced its own rules and policies when violations were discovered.

Foreman Schupp acknowledged that Respondent's policy for safety violations mandates the issuance of "safety tickets" with progressive disciplinary consequences. (Tr. 542-543). According to company policy, the first violation should result in the issuance of a ticket accompanied by a written warning.[3] (Ex. R-2). A second violation should result in a ticket accompanied by a one-day suspension without pay. A third violation should result in a ticket accompanied by a three-day suspension without pay. Respondent's policy mandated that a fourth violation resulted in termination. (Tr. 543; Ex. R-2). The court notes that the Respondent's policy does not allow "verbal" warnings to be issued in lieu of the

written safety tickets. Safety Director Clayton testified that in 2006, after the safety violation policy was implemented, he provided training on the policy to all area managers, superintendents and foremen (collectively referred to as "supervisors"), and provided copies of the policy to each of those individuals along with a "safety ticket" book. (Tr. 798-799, 852-853). Despite this policy, training and Foreman Schupp's observation of safety violations by various employees, he testified that he has never issued any tickets to anyone. (Tr. 543). Foreman Schupp testified that he has verbally corrected employees in the past for improper placement of spoils piles and failure to wear proper safety glasses. (Tr. 523-525). In fact, the only method of correction he has ever used for employee safety violations were both verbal and undocumented. (Tr. 602-603). The deficiency in the practice of verbal warnings lies in the fact that this practice undermines Respondent's safety rule enforcement scheme in that there was no method to determine how many times a particular employee had received verbal corrections for safety violations, especially when working for different foremen.[4]

Foreman Schupp was not the only supervisor who had observed safety violations on Respondent's jobsites yet failed to follow its discipline program. Rod Martin, one of Respondent's Superintendents, testified that he verbally corrects employees for safety deficiencies but has never issued any "safety tickets." (Tr. 633-634). In fact, none of Respondent's supervisors, with the exception of Safety Director Clayton, have issued any "safety tickets" to any employee since August of 2006 - the same year the program was implemented. (Tr. 947-948). For the safety program to truly be effective and properly implemented, supervisors need to follow Respondent's own policy and issue safety citations. In conclusion, the court rejects Safety Director Clayton's theory that supervisors did not issue "safety tickets" to employees in 2007 and 2008 because the company established a better track record of complying with safety regulations. (Tr. 883-887). Superintendent Martin and Foreman Schupp contradicted his theory

3 Respondent had a different disciplinary policy for fall protection deficiencies, none of which are applicable to this case.
4 The record establishes that employees work on different crews under different supervisors. The exposed employee in this case, Mr. Bohm, typically works on paving crews rather than excavation crews. (Tr. 559).

through testimony that after 2006, they issued only verbal warnings for observed safety violations.

In addition to supervisors not following Respondent's program for enforcing its safety rules, the court is also troubled by Superintendent Martin's testimony that supervisors gave each other advance warning when Safety Director Clayton was in their area conducting safety audits. (Tr. 637). Superintendent Martin testified that supervisors on different projects communicated by radio to let each other know when Safety Director Clayton was patrolling the area. (Tr. 637). This apparent cooperation among Respondent's supervisors to undermine the "surprise" element of internal safety audits exposes a flaw in the effectiveness of Respondent's safety enforcement program.

Foreman Schupp's statement that he "gets into trouble" when he "takes too much time making sure that ditches are correct" is also troubling. (Tr. 594). This reveals an unsavory conundrum for Respondent's supervisors - risking trouble for taking the time to properly implement safety measures, or, risking trouble for *not* taking the time to properly implement safety measures. This is a dilemma that would not be present in a workplace in which safety was a priority and failure to follow safety rules was effectively enforced.

Finally, incorporating the findings below concerning OSHRC Docket No. 09-0005, the fact that similar excavation safety deficiencies were observed at two different jobsites, supervised by different individuals, involving different employees, only a few weeks apart, belies the notion that the violative conduct was isolated or unforeseeable. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1193 (Nos. 89-2883 & 3444, 1993); *Brennan v. Butler Lime and Cement Co*., 520 F.2d 1011 (7th Cir. 1975).

These facts convince the court that: (1) Respondent's safety program has deficiencies that need to be addressed, and (2) Respondent's rules were not effectively enforced when violations were discovered. *Rawson Contractors*, Inc., 20 BNA OSHC 1078, 2002 CCH OSHD ¶32,657 (No. 99-0018, 2003). Accordingly, Respondent failed to establish the affirmative defense of unpreventable employee misconduct with regard to the violations alleged in OSHRC Docket No. 09-0004.

OSHRC Docket No. 09-0005 (OSHA Inspection No. 310802095) (Champaign site)

On July 22, 2008, OSHA Compliance Safety and Health Officer ("CSHO") Jeff Strain, with the Peoria, Illinois Area OSHA Office, conducted an inspection of Respondent's jobsite at Springfield and Third, in Champaign, Illinois. (Tr. 261). A general contractor representative walked him over to an excavation CSHO Strain had observed when he entered the jobsite, and introduced him to Respondent's Superintendent, Rod Martin. (Tr. 263). Superintendent Martin was the designated competent person for the excavation. (Tr. 313-314). Respondent's crew, under the supervision of Martin, was installing underground sewer lines near a newly constructed store. (Tr. 642).

Superintendent Martin told CSHO Strain that he had tested the soil with a penetrometer that morning, as well as the day before, both of which indicated a compressive strength of 1.49 tons per square foot ("tsf"). (Tr. 663). A slightly higher result of 1.5 tsf would have been an indication of "Type A" soil.[5] (Tr. 663). Consequently, Superintendent Martin categorized the soil as "Type B." (Tr. 663). Based on CSHO Strain's observations of the soil, a thumb-penetration test, the existence of two previously installed utility lines, and observed fissures, he also concluded that the soil was "Type B." (Tr. 288). To be sure, CSHO Strain took two soil samples and mailed them to OSHA's Salt Lake City Laboratory for analysis. (Tr. 289; Ex. C-38). At trial, Complainant maintained its position that the soil in the excavation was "Type B", while Respondent argued that soil in the area in which employees were working was actually "short-term Type A" which would allow slopes as steep as 63 degrees (1/2 horizontal to 1 vertical). (Tr. 342-343).

5 The court references unconfined compressive strength as *an* indicator of soil type, rather than *the* indicator, because the

On the morning of the OSHA inspection, but before CSHO Strain's arrival, Superintendent Martin's crew had been using a trench-box for excavation protection. (Tr. 658). However, Superintendent Martin left the site for a one-hour meeting, and when he returned, his crew was no longer using the trench box because it would not fit into the area between the water main and the frost wall (a type of foundational wall). (Tr. 665-666, 739-740; Ex. C-35, C-36). The protection method at that point was simple sloping - no benching, shielding, or other type of excavation protection was being attempted. (Tr. 389-391). No additional soil testing had been conducted when the crew decided to change from trench-box protection to sloping protection. (Tr. 702). Based only on his previous penetrometer test and what Superintendent Martin described as "much harder" soil, he changed his previous conclusion and determined that the soil in the new working area must have changed to "Type A." (Tr. 667, 674). On that basis, he allowed his crew to continue working without using the trench box.[6] (Tr. 667).

When CSHO Strain arrived "a few minutes later", Superintendent Martin was observed and photographed working with his crew at the excavation. (Tr. 659, 669; Ex. C-36). Superintendent Martin conceded that one of Respondent's employees, A.J. Kerber, had been working in the excavation for about an hour when CSHO Strain arrived at the jobsite. (Tr. 276, 666, 735).

During the OSHA inspection, Superintendent Martin and Safety Director Clayton conducted two additional penetrometer tests which resulted in compressive strength readings of 3.5 tsf and over 4.0 tsf. (Tr. 672, 736, 912). Clint Merrell, a Laboratory Analyst in OSHA's Salt Lake City Technical Laboratory, who has performed more than 2,600 soil analyses during his thirty year tenure with OSHA, testified as an expert witness on soil-typing. (Tr. 217; Ex. C-25). He described in detail how he applied OSHA's method of analyzing the two soil samples he received from CSHO Strain. (Tr. 213, 440-471, 480; Ex. C-27, C-38).

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regulations establish multiple factors which must be considered. See *Appendix A to Subpart P of 29 C.F.R. §1926.*

6 Notably, during Superintendent Martin's pre-trial deposition, he described a very different approach to soil-typing in the area at issue: "I took no sample where A.J. Kerber was working. If you didn't take any samples in the area of the employee's exposure, you should have - - you should treat it as Type C." (Tr. 712).

His own compressive strength testing resulted in readings similar to those obtained by Superintendent Martin and Safety Director Clayton during the inspection: 4.0 tsf and 4.1 tsf. (Tr. 441-449). Despite Mr. Merrell's compressive strength test results, which he acknowledged were indicators of "Type A" soil, he ultimately concluded that the samples were "sandy clay cohesive Type B" soil, primarily based on small clumps that had broken off of the samples. (Tr. 444). He testified that this was an indication of fissuring in the soil. (Tr. 441-442, 448-453). Mr. Merrell explained that compressive strength tests were only one indicator of soil-type. "Type B" soil can also have a high compressive strength. (Tr. 454). Respondent did not call an expert witness to address Mr. Merrell's contentions. CSHO Strain's testimony and investigative photographs also revealed that the excavation contained previously disturbed soil, as two existing utility lines were uncovered and continued to cross through the middle of Respondent's excavation. (Tr. 265, 668; Ex. C-32). The soil would have also been previously disturbed during the construction of the frost wall on the south end of the excavation. (Tr. 691-700; Ex. C-33, C-34, C-35).

The excavation was more than six feet deep and the angles of three of the trench walls measured (vertically) 85 degrees , 75 degrees, and 65 degrees. (Tr. 280, 286-287, 384, 958; Ex. C-32, C-35, C-36). Safety Director Clayton confirmed that he also observed walls in the excavation which were greater than 45 degrees, which he agreed would not be compliant for "Type B" soil. (Tr. 909, 954). CSHO Strain testified that none of the three excavation wall angles he measured would be compliant in either "Type B" or "Type A" soil. (Tr. 434).

With regard to the alleged spoils pile violation, CSHO Strain did not actually measure the distance of the spoils pile to the edge of the excavation wall. (Tr. 349). He assumed that any loose material on the top edge of the excavation wall consisted of spoils material. (Tr. 350). However, the white rock gravel prevalent in the photographs and near the edge of the excavation did not come out of the excavation. (Ex. C-33, C-34). A layer of white gravel had been intentionally placed on the surface edge to serve as a buffer between work materials and mud (Tr. 679, 681, 683, 686, 723) and to build a ramp (Tr. 679-680). Thus,

the white gravel is not part of the spoil pile. An examination of the photograph taken by CSHO Strain clearly shows the placement of the white gravel. (Ex. C-36). With the exception of a few clumps of soil, the white gravel is readily visible until the area north of the preexisting utility line. (Ex. C-33). Superintendent Martin testified that he specifically checked the spoils pile above the area where Mr. Kerber had been working and no part of that spoils pile, except for a few small clumps of dirt, were within two feet of the excavation edge. (Tr. 687). Superintendent Martin explained that the only spoils pile material within two feet of the edge was in the portion of the excavation being backfilled - behind the pre-existing water pipe (running perpendicularly through the excavation about halfway up). (Ex. C-30, C-31, C-33 and C-36). He also testified that employees were not working in that area. (Tr. 724, 731-732). Since CSHO Strain did not personally observe employees working in the excavation where the spoil piles actually were within two feet of the excavation wall (i.e., north of the preexisting water pipe), or measure any distances from the spoils pile to the excavation edge, the court accepts Superintendent Martin's description of the employee's location in relation to the spoils piles. The court also gives weight to the photographic evidence which shows the white gravel laid down as a buffer from the mud at grade level. (Ex. C-33 through C-36).

Citation 1 Item 1

Complainant alleges that Respondent willfully violated the cited regulation as follows:

> *29 CFR 1926.651(j)(2): Employees were not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations: Each employee in an excavation is not protected from struck-by hazards and the spoil pile is stored within two feet of the excavation. The employer does not protect each employee in its trenches by setting spoil piles at least two feet from trenches. This violation was observed at Springfield and Third, Champaign, Illinois. To abate this violation, the employer must ensure that spoil piles are set back from the edge of the excavation at least two feet and that no employees enter trenches until this protection is provided.*
>
> [with additional language regarding abatement verification requirements

and reference to a previous citation alleging a violation of the same standard in 2006]

The cited regulation provides:

> *29 CFR 1926.651(j)(2): Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.*

Complainant carries the burden of proof on all elements necessary for a prima facie violation of the Act. In this instance, Complainant failed to establish by a preponderance of the evidence that the spoils pile was placed within two feet of the excavation edge above the area in which Mr. Kerber was working. Therefore, there is insufficient evidence to conclude that the cited standard was violated or that Mr. Kerber was exposed to any violative condition. Since violating the terms of the standard and employee exposure are essential elements of a prima facie violation, Citation 1 Item 1 is VACATED.

Citation 1 Item 2

Complainant alleges that Respondent willfully violated the cited regulation as follows:

> *29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) sloping and benching systems, or paragraph (c) support systems, shield systems, and other protective systems: Each employee in an excavation is not protected from cave-ins by an adequate protective system. The employer does not protect each employee in its trenches by properly sloping the trenches or using appropriate protective systems. This violation was observed at Springfield and Third, Champaign, Illinois. To abate this violation, the employer must ensure that its trenches are properly sloped or equipped with appropriate protective systems, and that no employees enter trenches until this protection is provided.*
>
> [with additional language regarding abatement verification requirements and reference to previous citations alleging violations of the same standard in 2006 (two), 1989, and 1986]

The cited regulation provides:

> *29 CFR 1926.652(a)(1): 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 that ground by a competent person provides no indication of a potential cave-in.*

The citation alleges a failure to properly protect employees working in an excavation. The cited standard addresses various acceptable methods of excavation protection. The standard clearly applies. The court agrees with the results of the soil analysis conducted by Mr. Merrell, CSHO Strain, and Superintendent Martin (his first analysis, prior to the OSHA inspection), that the soil in this excavation where Mr. Kerber was working was "Type B" soil. CSHO Strain and Mr. Merrell both testified that they observed indications of fissuring in the soil. But even if their testimony about fissuring (which Respondent strongly disputed) is ignored, the excavation contained two previously installed utility lines and a foundational wall that was installed on the south end of the excavation, clearly indicating that the soil in the area had been previously disturbed. The applicable regulations state unequivocally that: "...no soil is Type A if: (i) [t]he soil is fissured; or...(iii) the soil has been previously disturbed..." *Appendix A to Subpart P of Part 1926 - Soil Classification*. The record establishes that three walls of the excavation exceeded the maximum allowable slope of 45 degrees for "Type B" soil, with no other form of protection having been implemented. Therefore, the terms of the cited standard were violated. Mr. Kerber's presence in the bottom of the excavation establishes employee exposure to the violative condition. Finally, Superintendent Martin's direct knowledge of Mr. Kerber working in this excavation, in this condition, is imputed to Respondent.

The court does not agree, however, that Complainant established the willfulness of this violation. As discussed above in the context of OSHRC Docket No. 09-0004, Respondent had developed and

implemented, as conceded by Complainant, a well-documented excavation safety program with adequate rules and employee training. (Tr. 520-521). The existence of this program, the acknowledgement of OSHA as to its comprehensiveness, and facts relating to alleged employee misconduct described below do not demonstrate the Respondent's state of mind was "such that, if informed of the duty to act, it would not have cared." *Diamond Installations,* supra.

Superintendent Martin conducted a soil analysis, prepared an excavation report, and required employees to use a trench box for protection prior to OSHA's arrival. Even after Superintendent Martin returned from a short meeting and discovered the change in excavation protection methods, he re-evaluated the soil and erroneously concluded that it had changed to Type A in the new working area. While there is no excusing Superintendent Martin's failure to ensure the appropriate slope angles of the excavation walls at that point, or the exposure of Mr. Kerber to this unsafe condition, the court is not convinced that the evidence in this case rises to the level of "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." On the contrary, Respondent maintained from the date of the inspection through trial, based on reasonable albeit incorrect evidentiary support, that this was a short-term excavation containing "Type A" soil. Therefore, Respondent argues, pursuant to CSHO Strain's own demonstrative diagram of the excavation, the walls were compliant. (Tr. 408; Ex. C-37). The court finds that although Superintendent Martin's and Safety Director Clayton's conclusions about the soil type were incorrect because of fissuring and previous disturbances to the soil, they were reasonable and appear to have been made in good faith. The Commission has held that willful violations are not appropriate if the employer acted reasonably and in good faith. *General Motors Corp. Electro-Motive Division,* supra.

In analyzing the alleged willfulness of this violation, the court provides no weight to the OSHA investigation which occurred approximately seven weeks prior to this one (OSHA Inspection No. 310801246) because citations resulting from that inspection had not even been issued by the time of the

present inspection. The court also notes that after the 2006 excavation citations, Respondent implemented significant and substantial changes to its excavation safety program, including additional training, excavation manuals for supervisors, daily excavation reports, and a discipline program which included the issuance of safety tickets to employees. (Tr. 793-801).

Considering these facts, in combination with the finding (below) that Respondent established three of the four elements necessary to prove an employee misconduct defense at this location, the court concludes that Complainant failed to establish the willfulness of Citation 1 Item 2. Since a wall collapse in this improperly sloped excavation could have resulted in very serious injuries or death, the court concludes that Complainant established the prima facie elements necessary to affirm Citation 1 Item 2 as a serious violation of the Act.

Affirmative Defense

Respondent also asserted the defense of unpreventable employee misconduct to these violations. (Tr. 6, 23). The same rationale discussed above in the Affirmative Defense section of OSHRC Docket No. 09-0004 applies here. Respondent's safety program is deficient in that supervisors issue only undocumented and untracked verbal warnings, have not followed Respondent's written requirements to issue progressive "safety tickets" since 2006, and have created a system which undermines the "surprise" aspect of internal safety audits by providing each other with advanced warnings when Safety Director Clayton is in their area. Additionally, the occurrence of virtually identical excavation violations on two different jobsites within a seven week period contradicts the notion that the behavior was isolated or unforeseeable. *Falcon Steel Co*., supra. Respondent failed to establish that its excavation rules were effectively enforced and deficiencies in the implementation of their safety program were exposed. Accordingly, Respondent failed to establish the affirmative defense of unpreventable employee misconduct with regard to the violations alleged in OSHRC Docket No. 09-0005.

Penalties

In calculating the appropriate penalty for violations, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. *29 U.S.C. §666(j)*. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). Neither of the OSHA investigators credited Respondent for size, history, or good faith in formulating proposed penalties in these two cases. (Tr. 206-207, 311-312).

In OSHRC Docket No. 09-0004 (OSHA Inspection No. 310801246), the court considers the totality of the circumstances, including the fact that one employee was exposed to all three violative conditions for approximately ten minutes, that all three violative conditions were open and obvious, and that Respondent was cited for similar excavation safety violations approximately two years earlier.

In OSHRC Docket No. 09-0005 (OSHA Inspection No. 310802095), the court also considers the totality of the circumstances, including the fact that one employee was exposed to the unprotected excavation for approximately one hour, that there were some indications (although ultimately incorrect) of "short-term Type A" soil, and that Respondent was cited for the same violation at two different locations two years earlier. Based on these factors, the court assesses penalties for the affirmed violations as set out below.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law:

OSHRC Docket No. 09-0004 (OSHA Inspection No. 310801246)

1. Citation 1 Item 1(b) is hereby AFFIRMED and a penalty of $2,000.00 is ASSESSED;

2. Citation 2 Item 1 is hereby modified to a serious violation, AFFIRMED as modified, and a penalty of $7,000.00 is ASSESSED;

3. Citation 3 Item 1 is hereby AFFIRMED as a repeat violation and a penalty of $20,000.00 is ASSESSED.

OSHRC Docket No. 09-0005 (OSHA Inspection No. 310802095)

1. Citation 1 Item 1 is hereby VACATED;

2. Citation 1 Item 2 is hereby modified to a serious violation, AFFIRMED as modified, and a penalty of $7,000.00 is ASSESSED.

/s/_____
PATRICK B. AUGUSTINE
Judge, OSHRC

Date: May 18, 2010
Denver, Colorado