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

SECRETARY OF LABOR, Complainant, v. DAISY CONSTRUCTION COMPANY, Respondent.	OSHRC Docket No. 10-2248

APPEARANCES:

John A. Nocito, Esquire, U.S. Department of Labor, Philadelphia, Pennsylvania
For the Complainant.

Edward Stepp, Director of Risk Management Services, Daisy Construction Company
Wilmington, Delaware
For the Respondent.

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under 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") inspected a work site of Daisy Construction Company ("Daisy" or "Respondent") on April 29, 2010. The site was located in Dover, Delaware, where Respondent was engaged in trenching work. The inspection resulted in Respondent being issued one serious citation and one willful citation. Respondent contested the

citations and the proposed penalties. The hearing in this matter took place in Wilmington, Delaware, on August 23, 2011. Both parties have filed post-hearing briefs. (Tr. 15-21; JX-1, ¶¶ 13-14).

The OSHA Inspection

Respondent has been in business for about 39 years. It is a Delaware corporation, and its corporate office is in Newport, Delaware. Its work involves highway and road construction. Daisy owns more than 200 pieces of heavy construction equipment. The project at issue, called the South Governors Avenue project ("the project"), involved a 2.25-mile-long area. Part of the project required installing PVC plastic conduit pipe underground so that overhead cables could be replaced with underground cables. (Tr. 31-32, 68, 106, 124, 178; CX-3, CX-4, p. 7, CX-6, p. 3, CX-8, p. 3).

On April 29, 2010, OSHA's Area Director ("AD") for the Wilmington office, Domenick N. Salvatore, received a complaint about employees being in an unprotected trench at the work site.[1] The trench was located at South Governors Avenue and Dover Street, Dover, Delaware ("work site" or "project site"). OSHA Compliance Officer ("CO") Lester Paul Kessler arrived at the project site at about 1:15 p.m. on April 29. He saw an employee in the trench, which had no protection in it, and he photographed what he saw.[2] He observed another individual standing next to the edge of the trench. He learned that person was Randy Drake, Daisy's foreman and competent person at the site.[3] The CO presented his credentials and asked Mr. Drake to have the employee exit the trench. Mr. Drake did so, and the CO began his inspection. He measured the trench and

[1] All dates in this decision will refer to the year 2010, unless otherwise indicated.
[2] The CO's photographs are CX-4, pp. 1-29.
[3] A competent person is "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. § 1926.650(b).

found it to be about 23 feet long and 6.5 feet wide. Its walls were vertical. Its depth was 7 feet 3 inches at one end, 7 feet 4 inches at the other end, and 8 feet 1 inch in the middle.[4] The CO considered the soil in the trench to be Class C, the least stable soil, as it was previously disturbed soil.[5] Daisy had previously excavated the soil to install water and sewer lines. The trench was also located at a busy intersection, which could affect the soil's stability. There was a trench box a few feet away from the trench. Daisy had not put the box in the trench that day. (Tr. 50-51, 68, 96-111, 145-49; JX-1, ¶ ¶ 3-6, CX-2, CX-3, p. 1, CX-4, p. 18).

On April 29, CO Kessler interviewed Michael Moore, the Daisy employee who had been in the trench, and Bill King, Daisy's excavator operator. Mr. Moore said that he had not attended any trenching training classes conducted by Daisy. Mr. Moore also said that he had begun working in the trench that day at about 9:00 a.m.[6] He told CO Kessler that the trench was approximately 7 to 7 ½ feet deep. Mr. King said that he did not get any training or classes, on trenching or other subjects, from Daisy. Mr. King stated that the trench box had not been used due to a concern that it could have broken the sewer main in the trench. The CO also interviewed Silvano DelSignore, Daisy's general superintendent at the site.[7] Mr. DelSignore told him he had arrived at the site around 10:00 a.m., he was aware there was an employee in the trench, and he did not think the trench was that deep. He said he had not used the trench box as he had feared it would break the utility lines in the trench. Finally, the CO interviewed Mr. Drake, who stated

[4] Respondent admits Messrs. DelSignore and Maruca knew that the trench was in excess of 5 feet in depth and not in stable rock. (CX-10, p. 3; JX-1, ¶¶ 4, 10).
[5] CO Kessler stated that Class C soil is a sandy type of granulated soil that does not hold together because it lacks clay composites. (Tr. 100, 103; CX-4, p. 3).
[6] According to Mr. Moore, the trench box was not used as it was "a pain in the butt." (Tr. 113-14; CX-11).
[7] Mr. DelSignore was evidently not present when the CO first arrived at the site. (Tr. 134-35, 194-97).

that Mr. DelSignore had been at the site and knew the employee was in the trench.[8] Mr. Drake also stated that Mr. DelSignore had been at the trench site on and off throughout the day.[9] (Tr. 41, 111-18, 136; CX-3, CX-11, CX-12).

As a result of the inspection, Daisy was cited for a serious violation of 29 C.F.R. § 1926.21(b)(2), for failing to instruct employees in the recognition and avoidance of unsafe conditions relating to trenching and excavation work. It was cited for a willful violation of 29 C.F.R. § 1926.652(a)(1), for allowing an employee to work in an unprotected trench. It was also cited for a willful violation of 29 C.F.R. § 1926.651(k)(2), as the competent person had permitted employees to work in an unprotected trench.

Jurisdiction

The parties have stipulated that Respondent is an employer with employees that is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). The parties have also stipulated that the Commission has jurisdiction of this proceeding under section 10(c) of the Act, 29 U.S.C. § 651, *et seq*. (Tr. 15-16, 20; JX-I, ¶¶ 1-2, 24-25). The Court finds, therefore, that the Commission has jurisdiction of the parties and the subject matter of this proceeding.

[8] At the hearing, Mr. Drake testified that the excavation for the conduit had to be backhoed before the night of April 29. He also testified that the project manager, Sam [Maruca], visited the work site in the morning and told him to get the work done before he came back or the state inspector saw them there. (Tr. 77-78; CX-3, p. 9, CX-8, p. 3).

[9] Later, CO Kessler also interviewed Messrs. Cannon and David Brian Detterbeck, as well as Mr. Drake for a second time. Mr. Detterbeck was a cable splicer with Cable Construction Group that had a contract with Comcast to perform the same type of inspection that Mr. Cannon performed for Verizon. He testified at the hearing that while at the work site at about 12:30 p.m., April 29, he saw Mr. Moore in the trench where there was no protection. He also said that he had seen Daisy employees working in other unshored trenches that were deeper than 5 feet. (Tr. 123, 141-43). Mr. Cannon told the CO that Mr. Moore was responsible for measuring each vault at the work site to determine how deep to dig the trench. (CX-3, p. 6).

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must demonstrate that: (1) the standard applies, (2) its terms were not met, (3) employees were exposed to the violative condition, and (4) the employer either knew of the condition or could have known of it with the exercise of reasonable diligence. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Willful Citation 2, Items 1a and 1b

Willful Item 1a alleges a violation of 29 C.F.R. § 1926.652(a)(1). That standard states as follows:

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

The parties have stipulated that the cited standard applies and that its terms were not met. The parties have further stipulated that the exceptions to the cited standard do not apply in this case. That is, exceptions (i) and (ii) above do not apply here because the excavation was not made entirely in stable rock and it was greater than 5 feet in depth. Finally, the parties have stipulated that Respondent is not contending that a protective system in compliance with 29 C.F.R. §§ 1926.652(b) or (c) was being used at the site on the day of the OSHA inspection. (Tr. 19; JX-I, ¶¶ 16-20, 26).

Willful Item 1b alleges a violation of 29 C.F.R. § 1926.651(k)(2). That standard provides, in relevant part, that:

> Where the competent person finds evidence of a situation that could result in a possible cave-in … exposed employees shall be removed from the

> hazardous area until the necessary precautions have been taken to ensure their safety.

The parties have stipulated that the cited standard applies and that its terms were not met. (Tr. 19-20; JX-I, ¶¶ 21-22, 26).

The parties' stipulations further establish the third and fourth elements of the Secretary's burden of proof as to Items 1a and 1b, *i.e.*, employee exposure to the cited condition and employer knowledge of the condition. In those stipulations, Daisy has admitted that two supervisors knew that employees were working in the trench without any cave-in protection in place.[10] (Tr. 16-17; JX-I, ¶¶ 5-10). Daisy asserts, however, that Mr. Drake was the person responsible for the violations, noting the testimony of Mr. DelSignore. (R. Brief, pp. 8-9). Mr. DelSignore testified he went to the site between 9 a.m. and 10 a.m. on April 29, saw employees in the trench without a trench box, and got a ladder and had the employees exit the trench.[11] Mr. Drake had gone to get a ladder himself, and when he returned, Mr. DelSignore allegedly told Mr. Drake to put the trench box in the trench before letting any employees go back in. Mr. DelSignore also testified he left before ensuring the box was put in, as he had to check on other areas of the project as well as another project. He did not return to the trench site until that afternoon, after he got a call about OSHA being there. (Tr. 210-17, 222-23, 226).

It is clear from the above that Mr. DelSignore's testimony was not consistent with the statements he made to the CO at the time of the inspection. It was also not consistent with Mr. Drake's testimony. The Court observed the demeanor of these three witnesses

[10] The CO's testimony and photographs also demonstrate employee exposure and supervisory knowledge of the condition. When the CO arrived at the site, Mr. Drake was standing near the edge of the trench and was watching as Mr. Moore worked in the unprotected trench. (Tr. 97-98, 101-05; CX-4, pp. 2-4, 6-7).
[11] Mr. DelSignore stated he went to the trench site because he got a call from a "Sam Laroughe" telling him there were employees in a trench without a trench box. (Tr. 210).

as they testified, including their facial expressions and body language, and found the CO to be a credible and convincing witness. Mr. Drake was also a credible witness, for the most part, and his testimony was largely consistent with what he told the CO during the inspection. Mr. DelSignore, on the other hand, was not a reliable witness in significant respects. Besides the foregoing, he testified that he did not tell the CO he had gotten the employees out of the trench that morning because he "didn't know [he] needed to." (Tr. 212). He further testified that he had signed the CO's "form" as the CO said he would have him "arrested" if he did not. (Tr. 213). He agreed that instead of staying to ensure the trench box was installed, he "walked away" from the situation. (Tr. 216). He also agreed that it "look[ed] like" Mr. Drake did not follow his instructions, even though Mr. Drake knew he could have been fired for insubordination. (Tr. 223, 226). Based on the Court's credibility determinations and the noted testimony, the Court will credit the testimony of the CO and Mr. Drake over that of Mr. DelSignore.[12]

According to Mr. Drake, Daisy began digging the trench at about 8:00 a.m. on April 29. Mr. DelSignore was there for at least part of the digging work. Around 9:00 a.m., Mr. DelSignore told Mr. Drake to get a trench box, and Mr. Drake did so. Mr.

[12] Another reason for crediting Mr. Drake's testimony is that it was corroborated in significant part by another witness, Michael Cannon. Mr. Cannon, the general foreman for Danella Line Service, was at the trench site that day to inspect the conduit placement for Verizon. He saw Respondent's employees, including laborer Mr. Moore, digging in the trench without any cave-in protection with Messrs. DelSignore and Drake standing nearby about 9:30 a.m. for 15 to 20 minutes. Mr. Cannon testified that he observed some rock and dirt flowing into the excavation. He stated that Respondent should have used a trench box sitting about 5 feet away because of the excavation's depth and the unstable situation. He was concerned that a telephone pole with overhead power lines being held up by a Dover Electric utility truck adjacent to the excavation might slide into the hole. He was also concerned that the vibration from the traffic and heavy machinery on the adjacent roadway could affect the excavation. Mr. Cannon also testified that his supervisor, Chris Strobel, visited the work site on April 29 and the two of them discussed their observations of Respondent's employees working in an unprotected trench. After departing the work site, Mr. Strobel called Mr. Cannon and told him to expect a "visitor" at the work site. Mr. Cannon stated that CO Kessler showed up at the work site between 1:00 p.m. and 2:00 p.m. and that Respondent's employees worked in the unprotected trench throughout the morning beforehand. He also stated that he later learned that Mr. Strobel had called OSHA. (Tr. 29-63, 101, 105; JX-1, ¶ 9, CX-4. pp. 1, 6-8).

Drake then went to get a ladder. When he returned, employees were in the trench, Mr. DelSignore was standing nearby, and the trench box was not being used.[13] Mr. Drake said that Mr. DelSignore did not order the employees out or tell him to do so, and he did not tell him to use the trench box. He also said that if Mr. DelSignore had told him to use the box, he would have, as Mr. DelSignore was his supervisor that day and the "big boss."[14] He stated that employees were in the trench for about three hours total; Mr. DelSignore was there "off and on" during that time. He further stated that there should have been protection in the trench but that the trench box could not be used.[15] Mr. Drake testified that Respondent did not use any protection in the trench because he and "Everybody wanted to get it [the job] done."[16] (Tr. 68-79, 82; CX-3).

Another aspect of Mr. DelSignore's testimony must be examined. Mr. DelSignore has been with Daisy for 30 years. He has been the operations manager for four to five years and before then was a superintendent. He testified that on April 29 he was replacing Dathan Booth, the project superintendent assigned to the subject project.[17] He further testified that on April 29, he had to check on that project and another project. He also had to attend to his operations manager duties. Mr. DelSignore stated that as the general superintendent that day, he was responsible for checking on projects that had either a superintendent or a foreman. A project superintendent is responsible only for the specific project to which he is assigned. Mr. DelSignore said that many projects have only a

[13] Mr. Drake said that the employees had gotten a ladder to use before he got back. (Tr. 71-74).
[14] Mr. Drake testified that he thought Mr. DelSignore was the general superintendent, but others referred to him as project manager. He stated that Mr. DelSignore reported to the company's owner and President, Leonard Iacono. (Tr. 69, 197-98; CX-8, p. 3).
[15] Mr. Drake testified the box was too wide and the trench could not be widened to accommodate it; there were also utilities in the way. (Tr. 74-75, 78). Despite this testimony, the box was put in the trench while the CO was there. (Tr. 109-11, 214-15). Photographs also show the box in the trench. (CX-4, pp. 27-29).
[16] When interviewed, Mr. Drake told the CO that he wanted to get the job done so that he could let Dover Electric Company release the telephone pole that it was holding. (CX-3, p. 8).
[17] Mr. Booth was absent on April 29 due to a family emergency. (Tr. 191-92).

foreman and do not have a superintendent. He also said he was not that familiar with the subject project and did not know how deep the cited trench was. He noted that the foreman at a job site is in "direct charge of the day-to-day operations," including safety. He agreed, however, that a superintendent has overall, day-to-day responsibility for safety. If a superintendent sees an unsafe condition or practice, he has a duty to correct it. According to Mr. DelSignore, he was a competent person in trench safety, he had OSHA training, and he was familiar with Daisy's safety manual, which covers trenching and references the OSHA standard. (Tr. 79-80, 116, 176-77, 191-200, 206-08, 216-26).

Daisy notes that Mr. Drake, as the foreman, was directly responsible for safety at the work site. It suggests Mr. DelSignore did not have the same level of responsibility, due to the brief period he was at the trench site, his other duties on April 29, and the fact he was part of Daisy's administrative staff. (R. Brief, pp. 8-9). The Court disagrees. Mr. DelSignore testified that a superintendent, upon seeing an unsafe condition or practice, has a duty to correct it.[18] (Tr. 199-200). And Mr. Drake testified that Mr. DelSignore was his supervisor that day and the "big boss" and that if he had told him to use the trench box he would have done so.[19] (Tr. 68-69, 76). Further, Mr. Booth testified that when he was out of town, Mr. DelSignore replaced him. Mr. Booth agreed that Mr. DelSignore

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[18] Respondent's manual outlining staff responsibilities states as follows:

> The superintendents have overall day-to-day responsibility for safe, efficient operations on all projects. Their safety responsibilities include, but not limited to:
>
> · Analyze job specifications and the project site for possible safety hazards, and with the assistance of the safety director, they will pre-plan each job to eliminate recognized safety hazards.…
>
> · Inspect each job for unsafe practices and conditions. Correct any unsafe practices or conditions and explain the reason for the correction.
> (Tr. 183-86, 190, 199-200; CX-8, pp. 8, 12, RX-B).

[19] Mr. Cannon also testified Mr. DelSignore was Mr. Drake's supervisor at the work site on April 29. (Tr. 41).

was the project superintendent on April 29 and thus would have had overall responsibility for safety on the project.[20] (Tr. 181-88). Based on the record, the Court finds that Messrs. DelSignore and Drake were both responsible for safety at the site, that both were aware by direct observation that employees were working in the unprotected trench, and that neither took the necessary safety measures to protect the employees from a cave-in.[21]

Whether the Violations were due to Unpreventable Employee Misconduct

Daisy contends that all of the violations in this case were due to the unpreventable employee misconduct of Mr. Drake, the foreman at the site. (R. Brief, pp. 3-6). The Third Circuit, where this case arose, has noted with approval the Commission's test for proving unpreventable employee misconduct, *i.e.*:

> (1) the employer had established rules designed to prevent the violation;
> (2) it adequately communicated the rules;
> (3) it took steps to discover violations of the rules; and
> (4) it enforced the rules when violations were discovered.

Pa. Power & Light Co. v. OSHRC, 737 F.2d 350, 358 (3d Cir. 1984)("PP&L"). In *PP&L*, the Third Circuit held that the Secretary may not shift to the employer ultimate risks of nonpersuasion where the inference of an employer's knowledge of conduct violating the Act is raised only by supervisory misconduct.[22] In so holding, the Third Circuit stated:

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[20] Whether Mr. DelSignore on April 29 was a general superintendent, as he stated, or the project superintendent, as Mr. Booth stated, he was responsible for employee safety at the trench site. Mr. DelSignore admitted superintendents have overall and day-to-day responsibility for safety. (Tr. 198-99).

[21] In light of Mr. Drake's testimony, the Court specifically finds that Mr. DelSignore had the employees enter the trench while Mr. Drake was looking for a ladder. (Tr. 71-74).

[22] The parties have stipulated that Daisy has the burden of proving unpreventable employee misconduct on the part of Mr. Drake. (Tr. 20; JX-I, ¶ 23). Generally, courts are not bound by stipulations pertaining to questions of law. *See Mintze v. Am. Gen. Fin. Serv., Inc.*, 434 F.3d 222, 228 (3d Cir. 2006) ("[Court] not bound by the parties' stipulations concerning questions of law"). This stipulation of law by the parties is inconsequential since the Court finds that there is insufficient evidence to support any unpreventable employee misconduct defense. The Secretary prevails in this matter regardless of which party has the burden of proof concerning unpreventable employee misconduct. The Court finds that the evidence shows that Daisy failed to exercise reasonable care to prevent the violations at issue because of inadequacies in its safety precautions, training of employees, and supervision. *See PP&L*, 737 F.2d. at 358. The Court also

> In cases where the Secretary proves that a company supervisor had knowledge of, or participated in, conduct violating the Act, we do not quarrel with the logic of requiring the company to come forward with some evidence that it has undertaken reasonable safety precautions….We do hold, however, that the Secretary may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge is raised only by proof of a supervisor's misconduct. The participation of the company's own supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not, standing along, end the inquiry into foreseeability.

737 F.2d at 357-58.

In this case, the Secretary has clearly shown that two Daisy supervisors knew of the trenching violation and did nothing to correct it.[23] In fact, it was Mr. DelSignore, Mr. Drake's superior, who had the employees enter the unprotected trench to begin working while Mr. Drake was searching for a ladder. In light of this evidence, and consistent with the Third Circuit's holding above, the Court will examine the evidence to see whether it shows that Daisy had undertaken reasonable safety precautions.

The record shows that Mr. Drake has worked in construction for 30 years. He had been with Daisy about a year and a half at the time of the inspection. Mr. Drake received Daisy's safety manual when he began working for the company, but no one asked him if he had read it or understood it. Daisy sent Mr. Drake to a safety course that addressed excavation, trenching and soil mechanics on February 25, 2010. It also sent him to a 10-hour OSHA course in construction safety and health on March 25, 2010. Mr. Drake went to a Daisy supervisors' meeting held on April 3, 2010. The supervisors' meetings usually include discussions of safety and policy procedures. (Tr. 65-67, 82-84, 194; RX-F).

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notes that Daisy had the opportunity and motivation to present evidence in support of its unpreventable employee misconduct defense in light of its stipulation.

[23] Mr. DelSignore admitted he knew there was an unsafe condition at the work site. He also agreed a trench box should have been used in the trench. (Tr. 216, 221-22; CX-8, p. 4). Daisy also admitted that Mr. Drake knew that the trench's depth and condition required a protective system. (JX-1, ¶ ¶ 7-9, CX-10, p. 3).

The record also shows that on May 3, 2010, Daisy sent Mr. Drake a notice that advised him that he was suspended pending the company's internal investigation of the circumstances at the subject site. It also advised him that the failure to provide workers with adequate protection in the trench violated section H of Daisy's safety policy, which covers trenching and excavations. On May 10, 2010, Daisy sent Mr. Drake another notice informing him that it was terminating his employment. The notice stated that in spite of the training he had received, Mr. Drake had "blatantly disregarded" worker safety by not providing a protective shoring system in the trench.[24] Before he was fired by Daisy, Mr. Drake went back to work for his previous employer, where he had worked for 15 years. (Tr. 65, 80-81; RX-A).

Section H of Daisy's safety manual addresses trenching and excavations. The Secretary notes that Exhibit RX-C, p. H-2, includes a provision for protective systems in trenches that references OSHA's excavations standard and requires supervisors to refer to the OSHA standard "for guidance to comply with this plan." She thus concludes that Daisy's manual included work rules designed to prevent the trenching violation. (S. Brief, p. 20).

As to Daisy's communication of its rules, the foregoing describes the training Mr. Drake received and the fact that he was given a copy of Daisy's safety manual. Mr. Drake testified, however, that no one asked him if he had read or understood the manual. (Tr. 66). Mr. DelSignore had also received OSHA training, and he was familiar with the

[24] Daisy admits that Mr. Drake directed its employees to connect pipe in the trench without the protection of a shoring system. (CX-10, p. 17). Mr. Drake admitted that Respondent could have shored, laid the ditch back, or used a trench box to protect the employees in the trench. (Tr. 86-87; RX-C). Likewise, CO Kessler testified that employers could use hydraulic shoring or sloping to protect their employees where a trench box could not be used. (Tr. 111). The photographs at Exhibit CX-4, pp. 27-29, taken by CO Kessler at the end of his inspection, show Daisy using a trench box in the excavation when backfilling. CO Kessler stated that Daisy did not have to widen the trench before inserting the trench box into the excavation. (Tr. 109-11).

safety manual. (Tr. 206-08). Messrs. Drake and DelSignore were competent persons in trenching and excavations, and both had 30 years of experience in construction work. (Tr. 65-68, 82-84,191, 196-97, 206-08). Despite their training, experience and qualifications, they allowed employees to work in the cited trench without any cave-in protection.

Daisy presented Exhibit RX-D, which contains copies of tool box safety talks held at its job sites in April 2010. Mr. Drake testified that one-page topic sheets were included in his paycheck envelopes. He indicated he led weekly tool box safety talks for his crews at his work sites.[25] (Tr. 66-67). Of the many documents in Exhibit RX-D, only two represent that trenching safety was addressed. These two indicate that Mr. Stepp gave a trenching safety talk at two sites at the subject project on April 2, 2010. Daisy offered no evidence as to what specifically was covered in these talks. The CO testified that tool box talks usually last only five to ten minutes. He further testified that while he received copies of Daisy's tool box talks during the inspection, the copies of the trenching safety talks were not provided until later, during discovery.[26] (Tr. 122, 137-40; CX-3).

In addition to the above, the CO testified that when he interviewed them, Messrs. Moore and King both said they had received no training from Daisy. (Tr. 112-14, 136; GX-11-12). Mr. Moore, the employee in the trench when the CO arrived, clearly required

[25] The first page of Exhibit RX-D appears to be a list of Daisy supervisors showing each date in April 2010 on which the specified supervisors gave tool box talks at their job sites. Mr. Drake's name is on the list, but there are no dates to indicate he gave tool box talks that month. There are also no documents in Exhibit RX-D to show he gave any such talks that month.

[26] Mr. King's name does not appear on any Daisy training sign-in sheets and Mr. Stepp told the CO that Daisy had no training records for Mr. King. (CX-3, p. 2, RX-D). There is no record of Mr. King receiving any training at Daisy. (CX-7, p.8, CX-8, p. 6). In the absence of any such written record, the Court finds that Daisy did not adequately instruct Mr. King in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury as of the date of OSHA's inspection. *See U.S. ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 303 (6th Cir. 1998) (the absence of a record of an event is probative of the fact that the event did not occur); *Wiley v. U. S.*, 20 F.3d 222, 227 (6th Cir. 1994) (same).

training in trenching safety. Mr. King, the excavator operator, also required such training, in that his job at the site involved digging the trench. The Secretary points to all of the foregoing in support of her assertion that Daisy did not adequately communicate its work rules. She also points to the fact that Messrs. Drake and DelSignore, the competent persons at the site, permitted employees to work in the unprotected trench. The Secretary cites to circuit court precedent which has held that "negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision … raises an inference of lax enforcement and/or communication of the employer's safety policy." *Danis-Shook Joint Venture XXV*, 319 F.3d 805, 811 (6th Cir. 2003).[27] (S. Brief, pp. 20-25). The Court agrees and finds that Daisy did not adequately communicate its work rules in regard to trenching safety.[28] *See Complete Gen. Constr. Co.*, 20 BNA OSHC 1412, 1416 (No. 02-1896, 2003), *aff'd* No. 03-4456, 2005 WL 712491 (6th Cir. Mar. 29, 2005) (finding that employer was not entitled to employee misconduct defense because it did not adequately communicate its trench safety program to its employees where weekly tool box meetings did not sufficiently focus on trench safety rules and employer did not ensure that employees actually read and understood the contents of the safety manual); s*ee also Schuler-Haas Elec. Corp*., 21 BNA OSHC 1489 (No. 03-0322, 2006) (rejecting claim of employee misconduct due to inadequate communication of

[27] Where the supervisor commits the violation, "the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991) ("A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax"). Here, Daisy failed to take feasible precautions to prevent the violations, including adequate instruction and supervision of its supervisors. *See CBI Serv., Inc*., 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001) (finding inadequate proof of unpreventable supervisory misconduct where employer failed to establish it took feasible precautions, including adequate supervision of supervisor).

[28] *See Butch Thompson Enters., Inc*., 22 BNA OSHC 1985, 1991-93 (No. 08-1273, 2009) (rejecting employer's supervisory misconduct defense in part because supervisors' participation in violation was evidence of poor communication and implementation of a safety program).

work rule where employer did not establish it provided hazard recognition training). (S. Brief, p. 22).

As to whether Daisy took steps to discover violation of its rules, the Secretary notes that Exhibit RX-C (section H of Daisy's safety manual) includes a "Trenching Inspection Checklist." Exhibit RX-C requires the checklist to be completed at least daily. (*See* RX-C, p. H-3). The checklist requires the foreman to document the trench's dimensions and to evaluate the soil type and the best protective system to use in the trench. It also requires, *inter alia*, noting the presence of any hazardous conditions and keeping spoil piles and equipment at least 2 feet from the edge of the trench. The checklist must be signed by the competent person. A note at the bottom of the checklist states as follows:

> All unsafe conditions must be corrected prior to trench entry. If any hazardous conditions are observed, the trench must be immediately evacuated and no one allowed to re-enter until corrective action has been taken.

The Secretary points out that there is no evidence that a checklist was completed for the subject trench or, for that matter, that a checklist had ever been completed for any of Daisy's trench sites. Mr. DelSignore testified that he was not aware that the checklist was required for trenching jobs. Further, despite his 30 years with Daisy, he admitted that he had never even seen the checklist until it was shown to him at the hearing. (Tr. 208-09; RX-C; S. Brief, pp. 23-24).

The Secretary also notes that Exhibit RX-E, which Daisy submitted to demonstrate that it inspected its work sites for safety hazards, was insufficient. Exhibit RX-E contains four documents entitled "Safety Compliance Inspection Weekly Summary Report." The reports summarize the site inspections Mr. Stepp

performed during April 2010. Only two of the inspections relate to the subject project. Those inspections took place on April 12 and 13, 2010. (S. Brief, pp. 24-25). The Court agrees with the Secretary. The subject project was a three-year undertaking, and it involved an area about 2.25 miles long. (Tr. 32, 178). The offer of documents that show only two inspections of such an extensive project is simply inadequate to establish effective monitoring of the project for trenching safety hazards. Put another way, in this case, two site visits do not constitute a diligent effort to discover violations.[29]

In regard to whether Daisy enforced its safety rules when violations were detected, the Secretary contends that Daisy did not. She asserts that Daisy's failure to effectively enforce its trench safety rules is most readily apparent by the fact that two Daisy supervisors did not follow those rules at the subject work site. Again, the Court agrees. As set out previously, "negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision … raises an inference of lax enforcement and/or communication of the employer's safety policy." *Danis-Shook Joint Venture XXV*, 319 F.3d at 811. (S. Brief, pp. 25-27).

Finally, the Secretary points out that there is no evidence that Daisy had implemented a disciplinary program to deal with violations of its safety rules. She notes that an employer may show effective enforcement of its rules where it has a progressive disciplinary program and where it has actually administered and consistently enforced the discipline set out in its policy. *See, e.g., Pace Constr.*

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[29] *See Reynolds, Inc*., 19 BNA OSHC 1653, 1656-57 (No. 00-0982, 2001) (finding insufficient evidence to establish that employer attempted to discover violations at a year-long project involving 20 employees, even though there were three safety audits, because there was no other evidence of a more frequent effort to oversee the safe operations of the project).

Co., 14 BNA OSHC 2216, 2217-20 (No. 86-758, 1991). (S. Brief, p. 27). Exhibit RX-A, discussed above, shows Mr. Drake was suspended and then terminated for his failure to provide adequate protection for the employees working in the trench. But, as the Secretary notes, disciplinary action after an OSHA inspection or citation is only relevant when viewed in conjunction with pre-citation disciplinary action. *See, e.g., McGuire & Bennet, Inc.*, 15 BNA OSHC 1878, 1878-79 (No. 91-0312, 1992). (S. Brief, pp. 27-28). Here, there is no evidence that shows that Daisy even had a disciplinary policy or that it had ever before issued any disciplinary notices to employees or supervisors for violations of company safety rules. For this reason, and for all of the reasons discussed herein, the Court concludes that there is insufficient evidence to demonstrate that Daisy undertook reasonable precautions to prevent the trenching violation in this case. The evidence shows that Daisy failed to: 1) adequately communicate its work rule, 2) take sufficient steps to discover violations, and 3) effectively enforce its work rules. The Secretary has thus met her burden of proof in regard to showing the alleged violations of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(k)(1).

Whether the Violations were Willful

The above-noted violations have been characterized as willful.[30] (Tr. 150-51). As the Secretary notes, a violation is willful if committed "… with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No.

[30] AD Salvatore testified about the reasons the violations were classified as willful, including a citation issued on September 4, 2008 for not providing an adequate protective system in accordance with 29 C.F.R. § 1926.652(a)(1) for employees working in an excavation at the subject project site. (Tr. 150-54; JX-1, ¶¶ 11-12, CX-14 through CX-15).

93-239, 1995, *aff'd*, 73 F.3d 1466 (8th Cir. 1996); *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181 (Nos. 89-2883 & 89-3444, 1993). A willful violation is differentiated by heightened awareness of the illegality of the cited condition and by a state of mind of conscious disregard or plain indifference. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993) (citing *Williams Enters.*, 13 BNA OSHC 1249, 1256-57, (No. 85-355, 1987)).[31] (S. Brief, p. 10).

As the Secretary indicates, Daisy was well aware of OSHA's excavations standard. Daisy has been in business for 39 years. Its business involves road and highway construction and includes sewer and water line construction. (Tr. 124; GX-3, p. 9). Daisy's safety manual contains a section on trenching and excavation which references OSHA's excavations standard. *See* RX-C. Daisy has trench boxes of varying sizes and other equipment to protect employees who work in trenches. (Tr. 86-88). The company has used trench boxes on prior jobs, and it used trench boxes at times on the subject project. (Tr. 181; GX-8, p. 4; S. Brief, pp. 10-11).

As set out previously, Messrs. DelSignore and Drake were competent persons in trenching and excavation work. Both had 30 years of construction experience, and both had attended the OSHA 10-hour course in construction. That course included trenching and excavation. (Tr. 65-68, 82-84, 191, 206-08). Mr. DelSignore testified that he was familiar with Daisy's safety manual, which covers trenching and excavation. (Tr. 207-08). The Court agrees with the Secretary that, in view of the type of work the company performs and the training, experience and

[31] *See also V.I.P. Structures, Inc*., 16 BNA OSHC 1873, 1875 (No. 91–1167, 1994) ("Willful conduct by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against his or her employer unless the supervisory employee's misconduct was unpreventable").

knowledge of Messrs. DelSignore and Drake, Daisy had a heightened awareness of the OSHA standards cited in this case. *See Fiore Constr. Co., Inc.*, 19 BNA OSHC 1408, 1409 (No. 99-1217, 2001) (affirming willful violation where foreman had a heightened awareness of the requirements of § 1926.652(a)(1) based upon his 12 years of excavation work experience, completion of a 40-hour OSHA excavation course, and his testimony that he knew OSHA's standards required him to use a trench box). (S. Brief, p. 11).

Another basis for finding heightened awareness is the fact that Daisy was previously cited in 2008 for a violation of 29 C.F.R. § 1926.652(a)(1) at the same project at issue here.[32] That citation became a final order of the Commission on December 8, 2008. (GX-14, p.1, GX-15, JX-I, ¶¶ 11-12; S. Brief, p. 12).

The Court further agrees with the Secretary that the actions of Messrs. DelSignore and Drake on April 29, 2010, show Daisy's conscious disregard of the cited OSHA standards and its own safety manual, as well as plain indifference to employee safety.[33] (S. Brief, pp. 12-19). The cave-in hazard was in plain view and

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[32] *See Reynolds, Inc*., 21 BNA OSHC 1581, 1590 (No. 05-0023, 2006) (finding heightened awareness of the need for cave-in protection based on history of prior citations involving § 1926.652(a)(1) and knowledge that excavation was 5 feet deep, walls were vertical, and fact that a trench box was on site, but was not used). *See also Lanzo Constr. Co., Inc*., 20 BNA OSHC 1641, 1649 (No. 97-1821, 2004) (finding willful violation of § 1926.652(a)(1) where employer had a heightened awareness of the requirements of the standard in that its safety manual incorporated the excavation standard and its superintendent admitted that a trench box was used at another site because of a previous citation). S. Brief, p. 11; *Reynolds, Inc*., 19 BNA OSHC at 1657 (finding willful classification appropriate based in part upon fact that employer had been previously cited for violations of § 1926.652(a)(1)). A prior citation for the same standard is proof of the employer's intentional disregard of or plain indifference to its safety obligations under the Act. *Id.*

[33] *See Butch Thompson Enters., Inc*., 22 BNA OSHC at 1992-94 (violation of § 1926.652(a)(1) was willful where two of employer's competent persons knew trench was 13 feet deep, had vertical walls, and was dug in previously disturbed Type C soil next to a busy roadway, but yet allowed employees to enter the trench); *B.S. Carter Constr., Inc.*, 21 BNA OSHC 2073, 2077 (No. 06-0343, 2006) (finding plain indifference to support a willful trenching violation where employer knew the trench lacked cave-in protection, had been in the excavation business for 30 years, and was cited before for a violation of 29 C.F.R. § 1926.652(a)(1) under very similar circumstances). (S. Brief, p. 17).

was open and obvious.[34] The CO's testimony establishes the depth of the trench and its hazardous condition (*i.e.*, it was 7 to 8 feet deep, had vertical walls and previously-disturbed soil, and was located next to a busy intersection).[35] Mr. Drake's testimony establishes the essential facts of what occurred on the morning of April 29, 2010. In particular, the digging of the trench began around 8:00 a.m. Mr. Drake was present during that activity, and Mr. DelSignore was there for at least part of the digging work. At about 9:00 a.m., Mr. DelSignore told Mr. Drake to get a trench box, and Mr. Drake did so. Mr. Drake then went to get a ladder. When he got back, employees were already working in the trench, Mr. DelSignore was standing nearby, and the trench box was not being used. Messrs. DelSignore and Drake did not discuss the trench box. And, while Mr. DelSignore was at the trench site off and on during the three-hour period employees were in the trench, he never told Mr. Drake to use the trench box or to have the employees exit the trench. (Tr. 68-82). In fact, as specifically found previously, Mr. DelSignore had the employees enter the trench while Mr. Drake was off looking for a ladder. As also found previously, Messrs. DelSignore and Drake were aware by direct observation that employees were working in the unprotected trench, and neither took the necessary safety measures to protect the employees from a cave-in.[36]

The Secretary cites to a number of cases in support of her contention that the violations were willful. The Court finds two of these cases to be particularly

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[34] *See Boring & Tunneling Co. of Am., Inc.*, No. 80-2571, 19 WL 18996, at *7 (O.S.H.R.C.A.L.J. June 29, 1981) (finding that violation of 29 C.F.R. § 1926.652(b) for failure to protect trench that was 24 feet long, 9 feet 6 inches wide, and 20 feet deep, was an open and obvious hazard).

[35] Mr. Cannon described the soil as sandy. (Tr. 45).

[36] Mr. Drake testified that he had previously seen Daisy employees working in unprotected trenches before April 29. (Tr. 80-81).

significant.[37] In one, the Commission upheld the judge's willful classification; the foreman had been trained as a competent person to identify trenching hazards, and he knew the condition violated OSHA standards, but decided to remove the trench boxes and send employees into the unprotected trench. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081-82 (No. 99-0018, 2003). (S. Brief, p. 16). In the other, the Seventh Circuit upheld the Commission's final order that adopted the judge's finding of a willful violation; the competent person allowed employees to work in an unprotected trench that was 10 to 11 feet deep, had vertical walls, and was in Type B and Type C soil. *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 372-73 (7th Cir. 1997). (S. Brief, p. 18). On the basis of the evidence of record, the violations of the cited standards are affirmed as willful.

Penalty Determination

The Secretary has proposed a grouped penalty of $63,000.00 for Items 1a and 1b of Willful Citation 2. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* section 17(j) of the Act, 29 U.S.C. § 666(j). Gravity is generally the primary factor to consider. *Orion Constr., Inc.*, 18 BNA OSHC 1867 (No. 98-2014, 1999).

AD Salvatore issued the citations in this case. He testified that he reviewed the investigative file and followed the procedures in OSHA's Field Operations Manual to arrive at the proposed penalty of $63,000.00. He considered the

[37] *See also DeWitt Excavating, Inc*., No. 10-1515, 2011 WL 3394941, at *9-10 (O.S.H.R.C.A.L.J. June 1, 2011) (willful violation of § 1926.652(a)(1) was established where employer was in excavation business since 1954, its superintendent and foreman were competent persons who knew the trench needed cave-in protection (it had vertical walls and was over five feet deep, was located next to a busy roadway, and was dug in previously disturbed Type-C soil), and the company was cited before for a similar violation.

violations to have high severity. At least one employee was working in the trench for several hours. If a cave-in had occurred it would likely have resulted in long-term incapacitation or death. He considered the probability of harm to be greater. The trench was over 5 feet deep, and it was composed of previously disturbed, Type C soil. The AD noted that a willful violation with high severity and greater probability results in an unadjusted penalty of $70,000.00. (Tr. 127-29, 149-50, 154-61; CX-1 through CX-3, CX-16).

AD Salvatore also testified about the adjustments that were made. He determined that Daisy was entitled to a 10 percent reduction due to its size (about 150 employees).[38] Daisy was not entitled to reductions for history or good faith, however, because the violations were classified as willful. The resulting adjusted penalty was $63,000.00. The AD noted that the penalties for Items 1a and 1b were grouped, since the violations were related. (Tr. 161-65; JX-1, CX-3, CX-16).

The Court finds that the full 20 percent reduction normally applied for an employer of Daisy's size is appropriate. The Court notes that Mr. Booth testified that, despite this instance, Daisy always used a trench box where needed. He also testified that Daisy had not experienced a trench cave-in. He said that no Daisy worker had experienced a life threatening injury, or died on the job. (Tr. 181-82).

The Court concludes that a substantial penalty for the willful items is appropriate, especially in light of the hazardous condition of the trench and the likelihood of serious injury or death if a cave-in had occurred. The Court finds it appropriate to reduce the

[38] The AD said that the 20 percent reduction normally available for an employer of Daisy's size was reduced to 10 percent because of the gravity of the violation and its willful classification. (Tr. 162).

$63,000.00 penalty proposed by the Secretary to $56,000.00. A penalty of $56,000.00 is assessed by the Court for these willful items.[39]

Serious Citation 1, Item 1

This item alleges a violation of 29 C.F.R. § 1926.21(b)(2), for Daisy's failure to instruct employees in the recognition and avoidance of unsafe conditions relating to trenching and excavation work. The cited standard states as follows:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The parties have stipulated that the cited standard applies. (JX-I, ¶ 15). As to the second and third elements of the Secretary's burden of proof, the Court finds that the terms of the standard were not met and that employees were exposed to the cited hazard. CO Kessler testified that when he spoke to them, Messrs. Moore and King both told him that they had received no training from Daisy.[40] (Tr. 112-15, 136; CX-3, CX 11, CX-12). Mr. Moore plainly required training in the hazards of working in trenches, as he was the employee the CO saw in the trench. Mr. King also required training in trenching work, as he was the individual who had excavated the trench. The Court further finds that Daisy

[39] *Ho*, 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (consolidated), *overruled on other grounds by E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1581 (No. 94-1979, 2009) (Commission has discretion to assess the penalties it finds appropriate).

[40] Mr. Moore's signed statement is Exhibit GX-11. It states that he had worked for Daisy for two years and he had had no classes in trenching; his training was on-the-job experience. Mr. King's signed statement is GX-12. It states that he had worked for Daisy for five years and that he had had no training or classes from Daisy.

either knew or should have known that it had not trained Mr. King as required.[41] The Secretary has met her burden of proving a violation of the cited standard.[42]

As with the willful violations, Daisy contends this violation was due to the unpreventable employee misconduct of Mr. Drake, the foreman at the site. (R. Brief, pp. 3, 5-6, 9-10). The Court has already found that Daisy did not show that it had taken reasonable safety precautions to prevent the trenching violations in this case. *See PP&L*, 737 F.2d at 358. In view of this finding, the Court concludes that the record does not show that Daisy's failure to adequately train Messrs. Moore and King was caused by unpreventable employee misconduct.[43] The alleged violation is affirmed as serious, as it is clear that the failure to train employees in the hazards of working in and around trenches could cause serious injuries or death. (Tr. 129-30).

The Secretary has proposed a penalty of $4,000.00 for this item. AD Salvatore testified that he determined this item to have high severity and greater probability, resulting in a gravity-based penalty of $5,000.00. A 20 percent reduction was applied, based on the company's size, but no reductions were given for history or good faith. (Tr. 165-67; CX-3, CX-16). The Court finds it appropriate to reduce the proposed $4,000.00 penalty to $3,000.00. A penalty of $3,000.00 is assessed by the Court for this item.[44]

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[41] Daisy was cited in June 2007 for violating the same standard. (Tr. 126; CX-1, p.5)

[42] *See Revoli Constr. Co., Inc*., 23 BNA OSHC 1697 (No. 10-0699, 2011) (finding that violation of § 1926.21(b)(2) established where record failed to demonstrate specific employee training in the recognition and avoidance of unsafe conditions).

[43] This conclusion is supported by the fact that Daisy was previously cited for violating 29 C.F.R. § 1926.21(b)(2) in 2007, which was before Mr. Drake began working for Daisy. (Tr. 65, 126; GX-3, p. 1).

[44] *See Ho*, 20 BNA OSHC at 1379. The penalty reduction results from the Court being mindful that the record includes a sign-in sheet reflecting Mr. Moore's signature at a safety meeting on "Trenching Safety" conducted by Mr. Stepp on April 2, 2010. (RX-D, at p. 4). This sheet, by itself, is insufficient to show that Mr. Moore was adequately trained in the hazards of working in and around trenches; especially in light of his testimony to the contrary.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.21(b)(2), is AFFIRMED, and a penalty of $3,000.00 is assessed.

2. Items 1a and 1b of Willful Citation 2, alleging violations of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(k)(2), respectively, are AFFIRMED, and a penalty of $56,000.00 is assessed.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: January 13, 2012
Washington, D.C.