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.

JIM BOYD CONSTRUCTION, INC.,

Respondent.

OSHRC Docket No. 11-2559

REMAND ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued a serious citation and a willful citation to Jim Boyd Construction, Inc. alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, with a total proposed penalty of $58,100. On June 13, 2013, Administrative Law Judge Ken S. Welsch issued a decision in which he affirmed two citation items and vacated two others; characterized the affirmed violations as serious; and assessed a total penalty of $7,500. The Secretary filed a petition with the Commission on July 3, 2013, only seeking review of the judge's decision to characterize one of the affirmed violations—Citation 2, Item 1—as serious rather than willful. Jim Boyd filed an opposition to the Secretary's petition several days later. The case, which arises in the Eleventh Circuit, was directed for review on July 11, 2013.

Almost two weeks later, the Eleventh Circuit issued a decision in *ComTran Group, Inc. v. DOL*, 722 F.3d 1304 (11th Cir. 2013), a case in which the court held that where "the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the misconduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct[,]" such as "evidence of lax safety standards." *Id.*

at 1316. Because it is unclear if the issue of knowledge as presented in the case before us is affected by the court's decision in *ComTran*, we remand this case in its entirety to the judge for him to consider the applicability of the Eleventh Circuit's decision. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) (stating that Commission generally applies precedent of circuit to which case will likely be appealed "even though it may differ from the Commission's precedent"). Depending on the judge's resolution of this issue, he may allow the parties to "further develop[]" the record. *ComTran*, 722 F.3d at 1318.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: September 26, 2013

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1924 Building-Room 2R90, 100 Alabama Street, SW

Atlanta, Georgia 30303-3104

SECRETARY OF LABOR, Complainant v. JIM BOYD CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 11-2559

APPEARANCES:

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Atlanta, Georgia

For Complainant

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For Respondent

BEFORE: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Jim Boyd Construction, Inc. (JBC) is engaged in trenching and excavation work in Albany, Georgia. On March 12, 2011, employees with Piedmont Mechanical Inc. (PMI) were laying pipe in an excavation dug by JBC for a natural gas project at the Marine Corps Logistics Base in Albany, Georgia. While laying the pipe, the boom on a crane lifting the pipe into the excavation contacted an overhead power line. An employee of PMI in the excavation was severely burned. After receiving a complaint on the accident, a compliance officer with the Occupational Safety and Health Administration (OSHA) initiated an inspection of the worksite on March 16, 2011. As a result of the OSHA inspection, serious, and willful citations were issued to JBC, as well as PMI, on September 6, 2011. JBC timely contested the citations.

Serious Citation No. 1 alleges that JBC violated 29 C.F.R. § 1926.652(c) (item 1) for failing to connect sections of the trench shields with spreader bars; 29 C.F.R. § 1926.652(d)(1) (item 2) for failing to replace a damaged section of the trench shield system; and 29 C.F.R. § 1926.652(g)(1)(ii) (item 3) for failing to keep sections of the trench shields flush against the side walls of the trench. The serious citation proposes total penalties of $9,100.00.

Willful Citation No. 2 alleges that JBC violated 29 C.F.R. § 1926.652(a)(1) (item 1) for allowing employees to work in trenches with no cave-in protection. The willful citation proposes a penalty of $49,000.00.

A consolidated hearing with the related citations issued to PMI (Docket No. 11-2562) was held in Atlanta, Georgia, on August 21-22, and September 25-27, 2012. Jurisdiction and coverage are admitted (JBC's Answer). The parties filed post-hearing briefs on March 4, 2013. The Court's Decision involving PMI is issued separately on this date.

JBC denies the alleged violations, the willful classification, and the reasonableness of the proposed penalties. JBC argues that "the citation items should be vacated because the Secretary cannot carry her burden of proof with respect to each required element of each alleged violation" (JBC's Brief, p. 6). No affirmative defenses are claimed.[1]

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1 Issues not briefed are deemed waived. See *Georgia-Pacific Corp*., 15 BNA OSHC 1127 (No. 89-2713, 1991).

For the reasons discussed, items 1 and 2 of serious Citation No. 1 are vacated. Item 3 of serious Citation No. 1 is affirmed and a penalty of $3,000.00 is assessed. Item 1 of willful Citation No. 2 is affirmed as serious and a penalty of $4,500.00 is assessed.

Background

JBC is engaged in underground utility and paving work from its office in Albany, Georgia. The company is owned by Jim Boyd and employs approximately 45 employees company-wide (Tr. 412).

In early 2011, JBC was contracted by SCS Energy, the general contractor, to perform the excavation work on a project to convert landfill gas to energy for the Marine Corps Logistics Base, in Albany, Georgia. Chevron, Inc. was the construction manager. In addition to other work, JBC's excavation work for the pipeline included digging the trench, supplying and installing the trench shields and boxes, and as needed, sloping and benching the trench walls. The actual installation and welding of the pipeline was contracted to PMI (Tr. 13-15, 17, 616-617).

JBC's superintendent/competent person oversaw the trench work and was authorized to correct any problems with the trench (Tr. 9, 15, 67). He was on the site every day. Mr. Boyd, the owner, was on site about twice a week (Tr. 18). JBC had five employees working on the project. Although it excavated the trench, there is no evidence that any JBC employees performed any work inside the trench (Tr. 406, 440). However, the employees of PMI worked in the trench to lay and weld the pipe (Tr. 420, 427, 431, 439).

The original plans for the project called for the trench to be protected with hydraulic shoring. However, once it was determined that the trench would have to be both deeper and wider than planned, United Rentals, the equipment rental company, informed JBC that hydraulic shoring should not be used. Instead, it recommended that the trench be protected by trench shields or boxes (Tr. 102). Trench boxes came in various sizes, ranging from 6 to 8 feet in height and 12 to 20 feet in length (Tr. 26). Some were double-walled and some were single-walled (Tr. 25, 89).

On Saturday, March 12, 2011, PMI was placing pipes with the crane into a trench dug by JBC. The crane's boom accidently hit an overhead power line running parallel to the trench resulting in severe burns to one of PMI's employees who was working in the trench (Tr. 175).

As a result of the accident, an inspection was conducted by Ronald Byrd, a safety and health compliance officer (CO) for OSHA (Tr. 388). Pursuant to the inspection, JBC was cited for four violations of OSHA's excavation standards.

Discussion

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (*i.e*. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The record demonstrates and there is no dispute that the cited standards applied to JBC's trench work. The definition section of the *Excavation* standards (Subpart P) provides that "[t]his subpart applies to all open excavations made in the earth's surface" and that "[e]xcavations are defined to include trenches." *See* 29 C.F.R. § 1926.650(a). JBC excavated the trench and was responsible for installing the protective systems.

Citation No. 1, item 1 – Alleged Violation of § 1926.652(c)

The citation alleges a serious violation of 29 C.F.R. § 1926.652(c) on the grounds "at the trenching area-on or about March 9, 2011, employees worked inside the 10-12 foot deep trench where several sections of the trench shields were not connected together with the spreader bars, exposing employees to cave-in hazards." A penalty of $3,500.00 is proposed.

Section 1926.652(c) provides:

> *Design of support systems, shield systems, and other protective systems.* Designs of support systems shield system, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (c)(1); or in the alternative, paragraph (c)(2); or in

the alternative, paragraph (c)(3); or, in the alternative, paragraph (c)(4) as follows:

. . .

(2) Option (2) – Designs Using Manufacturer's Tabulated Data.
(i) Design of support systems, shield systems, or other protective systems that are drawn from manufacturer's tabulated data shall be in accordance with all specifications, recommendations and limitations issued or made by the manufacturer.
(ii) Deviation from the specifications, recommendations, and limitations issued or made by the manufacturer shall only be allowed after the manufacturer issues specific written approval.
(iii) Manufacturer's specifications, recommendation, and limitations and manufacturer's approval to deviate from the specifications, recommendations, and limitations shall be in written form at the jobsite during construction of the protective system. After that time this data may be stored off the jobsite, but a copy shall be made available to the Secretary upon request.

The trench boxes used by JBC consisted of two metal plates, secured by four spreader bars that normally fit into slots on the plates (Tr. 27-28). The assembly instructions contained in the tabulated data JBC received from United Rentals indicated that spreader bars and pins are to be used to secure the boxes. The instructions state that "[a]ny modifications or alterations not allowed unless approved in writing…" (Exh. C-4, pp. 1, 5, 6, 7, 8, 11, 12, 14, 15, and 17, para. 6 under *Limitations*). The instructions also state that "[a]ny use of a trench shield without efficiency spreaders and pins *or equal* will void the tabulated data and warranty (Ex. C-4, at pp. 13 and 16, para. 12) (*emphasis added*).

On two trench boxes, JBC could not place all four spreader bars into the precut slots because of the configuration of the pipes in the trench (Tr. 408). Instead, JBC welded two of the four spreader bars into place where they could not be fitted into the slots. The pipes were laid above the spreader bars (Exhs. C-8, C-11; Tr. 53-55, 62, 71, 77, 80, 98).

The CO admitted that during the inspection he did not notice that the spreader bars were welded to the panels (Tr. 406, 516, 526, 605). Nonetheless, he testified that the citation was justified because by welding the spreader bar, rather than using the pins, JBC deviated from the manufacturer's instructions without written permission as required by the assembly instructions. The CO also concluded by looking at the photographs of the trench, that the trench box was not adequately designed (Tr. 524).

The Secretary questions whether the spreader bars were actually welded to the plates and contends that the superintendent's assertion that he welded the spreader bars under the installed pipe is not credible. The JBC's superintendent testified that the welding was performed by a PMI welder, but did not identify the welder. A welder of PMI testified that he did not weld any boxes (Secretary's Brief, pp. 13-14; Tr. 53-54, 371).

The Secretary's arguments are rejected. Having heard the testimony and observed his demeanor, the testimony of JBC's superintendent is credible. Nothing in his testimony suggests that he was not truthful. Moreover, the CO never denied that the spreaders were welded. Rather, he testified only that he "was not aware" that the welds were made (Tr. 406). The Secretary points out that the CO testified that the superintendent told him that he could not install the spreader bars because of the location of the existing pipes and lines (Tr. 408). This testimony does not contradict the superintendent's testimony. Rather, it comports with the superintendent's assertion that he could not use the pins to attach the spreaders because of the location of the pipes (Tr. 53). The superintendent's statement to the CO that he was unable to install the spreader bars referred to the pins, and did not refer to the welds. Finally, at the hearing, another PMI welder testified that he welded the trench boxes, thereby corroborating the superintendent's assertion (Tr. 710). This was confirmed by the PMI superintendent who testified that his employees welded the spreader bars (Tr. 621).

With the record establishing that JBC welded the spreader bars, the crux of the Secretary's argument is that JBC failed to obtain written permission to weld the spreader bars from the manufacturer (Secretary's Brief, p.15). However, the instructions provide for the use of the pins "or equal." This language demonstrates that the manufacturer envisioned situations where the pins could not be used and explicitly allowed substitution where the substitution would be equal to the pins. By these terms, any method used that is "equal" to the pins would not be considered a modification or alteration requiring written approval.

The burden is on the Secretary to make out every element of her *prima facie* case. Under the cited standard, the employer is required to obtain written approval from any "[d]eviation from the specifications, recommendations, and limitations issued or made by the manufacturer." However, the manufacturer's instructions allow the use of the pins or *equal.* In *Honey Creek Contracting, Co.,* 1998 WL 138687, *7; 18 BNA OSHC 1652, 1655 (No. 97-0353, 1998),

petition for review vacated, , the employer was cited for welding a metal plate to one end of a trench box that the Secretary alleged was inconsistent with the manufacturer's recommendations. The Judge observed that "the clear meaning of what is required to show a violation of the standard is that the box was either used or maintained in a manner which was inconsistent with the manufacturer's recommendations." Although an un-reviewed decision, the Court agrees with the Judge's conclusion. The burden is on the Secretary to demonstrate that the welds were not *equal* to the pins.

The Secretary has failed to adduce any evidence that the welds were not equal to the use of the pins. The CO noted that the instructions require the use of the spreader bars and pins *or equal,* but admitted that he had no foundation to determine whether the welds were equal to the pins (Tr. 519). His opinion was based on his own knowledge rather than on the manufacturer's recommendations (Tr. 526). This opinion was formed after issuance of the citation, since the CO did not realize that the spreader bars were welded to the panels until after he recommended the citation. He admitted that his conclusion was based on viewing photographs of the trench rather than an actual physical inspection of the welds. Unlike JBC's superintendent, who is a certified competent person, the CO has no certifications (Tr. 389). Besides his compliance officer training, his experience with trenches was limited to 25 trench inspections with only half of those involving trench boxes (Tr. 309, 486). His only experience with trench boxes has been as a safety inspector (Tr. 488).

In contrast, the superintendent testified that, based on his knowledge and training as a competent person, the welds were an appropriate way to connect the panels and did not hinder the structural integrity of the shields (Tr. 55). He determined the strength of the welds by ascertaining the size of the welding rods used by the welder (Tr. 56). He testified that he talked with United Rentals and asked for their permission to weld the boxes. United Rentals told him verbally that the method he was using did not hinder the structural strength of the trench box (Tr. 57-58, 91). In the superintendent's opinion as a competent person, welding was an appropriate method of connecting the panels (Tr. 55). The trench was also inspected by Marine Base Safety who raised no objection to the condition of the trench boxes (Tr. 95). There is no evidence of trench box failure.

The CO also alleged that a spreader bar failed to connect the end plate to the trench box (Exh. C-31 at E; Tr. 522-523). However, there was no slot for the installation of a spreader bar to the end piece. The CO did not know how the manufacturer intended the end plate to be installed and based his decision to cite on his own opinion (Tr. 525).

Finally, the Secretary contends that the pipe installation project was behind schedule and installing the pipe on the top of the spreader bar would have hindered removing the box when work was completed. Having found that the Secretary failed to show that welding the spreader bars was not equivalent to using the pins, the motives behind JBC's decision to weld them is not relevant.

The Secretary failed to establish a violation of § 1926.652(c).

Citation No. 1, item 2 – Alleged Violation of § 1926.652(d)(1).

The citation alleges a serious violation of 29 C.F.R. § 1926.652(d)(1) on the grounds that "at the job site-on March 11, 2011, employees worked inside the 10-12 foot deep trench where one section of the trench shield was damaged, exposing employees to cave-in hazards." A penalty of $2,100.00 is proposed.

Section 1926.652(d)(1) provides:

> Materials and equipment used for protective systems shall be free from damage or defects that might impair their proper function.

During the inspection, the CO observed a gash in one of the two walls of a double walled trench box (Exh. C-10 at A). The CO estimated the size of the gash to be 7-8 inches long (Tr. 418). JBC's superintendent, however, estimated the size at 3 inches (Tr. 60). Neither man actually measured the gash. The CO testified that he could not get inside the trench to measure it. Both based their size estimates on their observations and visual check of the gash (Tr. 60, 419). There is no evidence that the gash went through both walls of the trench shield (Tr. 527).

There also is no evidence that the gash actually or might have impaired the function of the trench shield. The CO testified that he recommended the citation because "[t]he standard says that the trench shield should not have any damage" (Tr. 419). In his view, any damage could weaken the trench shield (Tr. 419-420, 527). The CO admitted that he had no evidence

that the gash impaired the ability of the trench box to function (Tr. 530). The superintendent testified that, in his view, there was nothing about the gash that impaired its structural strength (Tr. 89-90).

In her post-hearing brief, the Secretary somewhat diverges from the views expressed by the CO. The Secretary points out that the standard requires only that the damage "might impair" the shield (Secretary's Brief, p. 16). Therefore, it is not necessary that she actually show that the damaged actually impaired the trench shield. She argues that JBC offered no testimony that its competent person evaluated whether the damage impaired the integrity of the shield or whether it was suitable for continued use.

The Secretary is attempting to shift the burden of proof. In *Honey Creek Contracting Co.*, 18 BNA OSHC *id.* at 1655, the Secretary cited the employer for a violation of this standard on the grounds that trench boxes were damaged to the degree that their function might have been impaired. As here, the only evidence adduced by the Secretary was testimony of the CO that the damage might have impaired its ability to function. Again, as here:

> The Secretary relied on testimony of the compliance officer who had no engineering degree or technical background, nor did she have significant experience in which she could have developed knowledge or skill in formulating valid opinions as to whether certain conditions found in a trench box would or would not impair its functioning. The Secretary did qualify her as an expert in any technical or scientific field but only as a compliance officer.

To conclude that *any* damage to a trench box "might" impair its ability to function would, in essence, remove the burden of proof from the Secretary. Without evidence there is no way to determine when damage goes beyond the cosmetic and begins to compromise structural integrity. Such has not been shown to be the case here. While there is a dispute as to the actual size of the gash, the photograph shows that the gash was smaller in overall dimension than the slot in the panel (Exh. C-10). Yet there is no suggestion to suggest why the hole caused by the gash was more likely to impair the functioning of the shield than the hole created for the slot.

The Secretary has failed to establish that the gash "might" impair the ability of the trench shield to function. The alleged violation of § 1926.652(d)(1) is not established.

Citation No. 1, item 3 – Alleged Violation of § 1926.652(g)(1)(ii).

The citation alleges a serious violation of 29 C.F.R. § 1926.652(g)(1)(ii) on the grounds that "at the trenching area-on March 11, 2011, employees worked inside a 10-12 foot deep trench where several sections of the trench shields were not flush against the side walls of the trench, exposing employees to crush-by and struck-by hazards." A penalty of $3,500.00 is proposed.

Section 1926.652(g)(1)(ii) provides:

> Shields shall be installed in a manner to restrict lateral or other hazardous movement of the shield in the event of the application of sudden lateral loads.

The CO identified several locations where the trench boxes were not flush with the wall of the trench (Exhs. C-7, C-26, C-32; Tr. 423-426). The CO did not identify the distances, but in the photographs, they appear to be at least 12 inches. This is particularly true with exhibits C-26 and 32, which clearly show a substantial distance between the shield wall and the trench wall (Tr. 426). According to the CO's observations, the trench boxes were not jammed into the ground, which would have helped anchor the shields (Tr. 535-536).

JBC asserts that it is not practical to expect a trench shield to be flush with the wall. Trench shields are dragged into the trench. Therefore, by definition, the trench must be wider than the box (JBC's Brief, p. 13). The CO agreed that trench shields need not be flush against the wall. Rather, the shields should be close enough to restrict lateral movement in the event of trench failure or material falling between the trench wall and the box (Tr. 530, 607). Where the shields cannot be flush with the wall, the Secretary asserts that the gap should be filled with dirt. The CO admitted that the only evidence he had that the trenches were subject to lateral movement was his personal opinion, based on the photographic exhibits and his understanding of the facts (Tr. 540).

In the *Honey Creek* case, the Secretary asserted that a violation of the standard could be established where any gap existed. Rejecting that position, the Judge stated that the mere fact that gaps exist are not sufficient to establish that the trench was subject to lateral movement. *Honey Creek,* 1998 WL 138687 at 8.

Here, however, the gaps were substantial and, in several places, far exceeded what was necessary to insert the trench shields. The exhibits demonstrate that the gaps went far beyond what might normally be expected due to the natural deviation in the size of a trench along its

length. The gaps were of the size that was specifically intended to be addressed by the standard. Had a failure occurred, the quantity of material that could have fallen into the gaps could well have been sufficient to allow lateral movement of the shields.

The employees of PMI were exposed to the hazardous conditions. PMI employees were working in the trench all week before the accident (Tr. 427). The employees told the CO that they were laying pipe as fast as JBC was installing the trench shields. Indeed, they were right behind JBC as it was installing the trench shields (Tr. 430-431). None of JBC's employees were exposed to the violative conditions (Tr. 406, 420, 440).

As the contractor that created and controlled the condition of the trench, JBC had a duty to protect the employees of other contractors working in the trench boxes. Where an employer creates or controls a hazard, the employer has a duty under the Act to protect its own employees and the employees of others employers on multi-employer worksites. *Summit Contractors, Inc.,* 23 BNA OSHC 1196 (No. 05-0839, 2010). JBC was responsible for digging the trench and ensuring that it complied with OSHA's excavation standards (Tr. 13, 32, 67-68, 401, 408, 420, 440-441, 669). JBC's superintendent was the competent person on the site and was responsible for ensuring that the trench shields were properly installed and the employees protected from cave-ins (Tr. 15, 67, 441). JBC, in its post-hearing brief, does not dispute the issue of employee exposure or assert a multi-employer worksite defense. JBC does dispute that there was a hazard to employees. The exposure element of the Secretary's burden of proof is satisfied.

JBC knew, or with the exercise of reasonable diligence should have known, of the hazardous condition. JBC's superintendent was the competent person on the site charged with ensuring that the trench shields were constructed safely and in accordance with OSHA standards. The gaps between the trench shields and the trench walls were obvious and in plain view. As the superintendent on the site, his knowledge is imputed to JBC. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3rd Cir. 1994).

The evidence also establishes that the violation was serious. Under § 17(k) of the Act, a violation is "serious" if there is "a substantial probability that death or serious physical harm could result from a condition which exists.. . ." 29 U.S.C. § 666(k). The Secretary 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 could result. *Whiting-Turner Contracting Co.,* 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

Here, if the trench failed or material fell into the gaps, the shields were not installed to prevent lateral movement and employees working within could have been seriously injured (Tr. 432). As discussed, JBC was aware of the unsafe condition. The violation was serious.

JBC's serious violation of § 1926.652(g)(1)(ii) is established.

Citation No. 2, item 1 – Alleged violation of § 1926.652(a)(1)

The citation alleges a willful violation of 29 C.F.R. § 1926.652(a)(1) on the ground that "at the job site, on March 11, 2011, employees worked inside a 10-12 foot deep trench with Type B soil, with the top of the trench shields 2-4 feet below the top of the trench, exposing employees to cave-in hazards." A penalty of $49,000.00 is proposed.

Section 1926.652(a)(1) provides:

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

According to Appendix B to the excavation standards, trench boxes or shields in trenches dug in Type B soil, need to extend at least 18 inches above the top of the trench, or the soil needs to be sloped away from the box. Figure B-1.2 states: "3. All excavations 20 feet or less in depth which have vertically sided lower portions shall be shielded or supported to a height at least 18 inches above the top of the vertical side. All such excavations shall have a maximum allowable slope of 1:1." The accompanying figure demonstrates that the top of the shield may not be below the top of the vertical side.

The CO testified that the top of most of the trench boxes were between 2 and 4 feet below the top surface of the ground (Exhs. C-7, C-11; Tr. 435-436). When marking the distance on one photograph, the CO specifically drew the arrows from one of the trench shields to the bottom of the concrete pad (Exh. C-11; Tr. 436). JBC's superintendent also testified that the distance from the top of the trench to the concrete pad was greater than 18 inches (Tr. 63). Exhibit R-7 shows that the distance between the top of the shield to the top of the concrete at the pictured location was 25 inches. The section of the trench with trench shields measured 9-12 feet deep (Tr. 495).

The CO testified that the area marked "E" on exhibit C-7 had a slight angle, but did not know the slope (Tr. 562). He testified that he did not measure the slopes at the areas where he found gaps between the top of the shields and the top surface of the ground (Tr. 561-562, 587). The CO explained that, in his view, there was no need to measure the slope because the walls were nearly vertical (Tr. 503). The superintendent testified that the area marked "B" on exhibit C-7 was not sloped at all (Tr. 40). He testified that the trench was sloped in other areas "to some degree " (Tr. 107).

In its brief, JBC points out that, under 29 C.F.R. §1926.650(b) "faces" or "sides" "means the vertical or inclined *earth* surfaces formed as a result of excavation work" (*Emphasis added)*. Therefore, it argues the 18-inch limit imposed by the standard applies only to the soil and does not include the thickness of any concrete slab sitting above the earthen surface (JBC's Brief, p. 15). JBC contends that the concrete slab was 12-18 inches thick.

JBC also argues that in the only area of the trench specifically measured, depicted in exhibit R-7, the distance from the top of the shield to top of the surface was at 2 feet, 1 inch. (JBC's Brief, p. 16; Tr. 581-582). If the concrete slab was 12-18 inches thick, the exposed earth was only 13-17 inches thick. 2 JBC contends that the gaps between the trench wall and shield, cited under Citation 1, item 3, were estimated at 7-13 inches wide. This evidence demonstrates that the trench could have been sloped at the required 1:1 ratio. Having failed to actually measure the slope, JBC argues the Secretary failed to meet her burden of establishing the violation (JBC's brief, p. 27).

2 The superintendent testified that the slab was 1 foot thick (Tr. 86).

JBC's arguments are rejected. JBC confuses the gap between the shields and the trench walls with a slope. A vertical rise of soil above a trench shield is not a slope and does not provide protection against a collapse of that soil simply because it is recessed from the shield.[3] Under JBC's argument, 5 feet of vertical soil above a shield would be permissible if the gap between the shield and the trench were also 5 feet.

To comply with the standard, the soil *above* the trench shield must be sloped at a maximum angle of 1:1. The CO testified that the trench was nearly vertical. This was corroborated by the superintendent who admitted that the area depicted in exhibit C-7 was not sloped and that, in other areas, the trench was only sloped "to some degree" (Tr. 107). That the trench was not properly sloped is further established by the photographic exhibits which demonstrate that the trench walls were nearly vertical. Regardless of the distance of the soil from the trench shields, the operative fact is that the soil above the trench shields were minimally sloped or not sloped at all. Also, there were areas of the trench where the gap was substantially smaller. Even under JBC's theory, these areas would have been in violation of the standard.

As discussed *supra*, the evidence establishes that employees of PMI were exposed to the hazardous conditions. PMI employees were working in the trench all week before the accident (Tr. 427). The employees told the CO that they were laying pipe as fast as JBC was installing the trench boxes. The employees were right behind them as JBC was installing the trench boxes (Tr. 430-431). Through his interviews with PMI employees, the CO determined that PMI employees were working in areas of the trench on March 11, 2011, where the trench shields went no higher than ground level (Tr. 439). As discussed *supra*, having created and controlled the violative condition, JBC was responsible for the exposure of the employees of other contractors.

The evidence also establishes that JBC knew, or with the exercise of reasonable diligence should have known, of the violations. JBC's superintendent was on the site daily and JBC's owner was on site about twice a week (Tr. 17-18). The superintendent was the competent person, responsible for the excavation and installation of the shields (Tr. 67, 81-82). He testified that he was aware that the top of the trench shields were below the surface of the trench and

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3 Moreover, the concrete slab superimposed a load over the vertical layer of soil which could only exacerbate the hazard of collapse.

explained that he could not stack them because of the danger of contact with the overhead power lines running by the trench (Tr. 44, 50, 114, 440-441). Indeed, in some areas, the trench shield was properly elevated, demonstrating that he knew the requirements of the standard (Tr. 441). Nonetheless, the superintendent never explored alternative methods of compliance, such as obtaining taller trench boxes or using a hydraulic jack (Tr. 52, 439).

The Secretary has established, by a preponderance of the evidence, that the standard applied to JBC's worksite, that the trench was not in compliance with the cited standard, that employees were exposed to the violative conditions, and that JBC knew, or with the exercise of reasonable diligence should have known of the violation. The violation of § 1926.652(a)(1) is established.

Willful Classification

The Secretary asserts that JBC's violation of § 1926.652(a)(1) was willful. A violation is "willful" if it was committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Continental Roof Systems, Inc*., 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). The employer's state of mind is the key issue. *AJP Construction, Inc*., 357 F.3d 70, 74 (D.C. Cir. 2004). The Secretary must differentiate a willful from a serious violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Valdak Corp.,* 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff'd* 73 F.3d 1146 (8th Cir. 1996). A violation is willful where either (1) the employer knew of an applicable standard prohibiting the conduct or condition and consciously disregarded the standard, or (2) although it did not know of an applicable standard's requirements, "it exhibited such 'reckless disregard for employee safety or the requirements of the law generally that one can infer that the employer would not have cared that the conduct or conditions violated the standard.'" *Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1240 (11th Cir. 2002)(quoting *J.A.M. Builders v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000)).

The Secretary's primary basis for alleging that the violation was willful is the testimony of JBC's superintendent that he did not take steps to protect the area between the top of the trench shield and the concrete pad because he did not consider the situation hazardous (Tr. 49-

50). Similarly, he testified that he installed the shields to the best of his ability "due to what we had present at the site" (Tr. 42). The superintendent explained that the shields could not be stacked due to the risk of running into the overhead power lines (Tr. 43-44). Although he acknowledged that shields more than 8 feet in height probably exist, neither he nor anyone at JBC explored the possibility of obtaining them (Tr. 51-53). Therefore, the Secretary concludes that JBC substituted its judgment for the requirements of the standard, which is a quintessential example of a willful violation. *Fluor Daniel,* 295 F.3d at 1241 (Secretary's Brief, pp. 12-13).

It is accurate to state that the superintendent knew that the trench was "probably not" in conformance with the OSHA standards (Tr. 43). However, the situation must be viewed in context. The superintendent specifically discussed the height of the trench shields with safety officials from SRS, construction manager Chevron and Military Base Safety, none of whom had any objection to the configuration (Tr. 50, 93-95). Although on a technical level it could be argued that the superintendent substituted his judgment for the technical requirements of the standard, his judgment was confirmed by safety officials of SRS, Chevron and Military Base Safety, all of whom had authority over JBC for safety at the site. On that basis, the superintendent had reason to believe that the construction of the trench was acceptable. The superintendent testified that, had they had any objection, he would have made the required changes (Tr. 94).4

It is also not accurate to conclude that the superintendent was indifferent to or exhibited flagrant disregard of employee safety. The superintendent believed the trench was safe (Tr. 73). As noted, the trench was inspected and passed by each of the three entities on site that had the authority to demand changes to the trench (Tr. 93-95). Accordingly, the record fails to establish that JBC's failure to properly install the trench shields as required by the cited standard constituted a willful violation of the Act.

Although not willful, the Secretary established that the violation was serious. Rocks, soil and debris falling from the top of the trench to employees below could have resulted in serious physical harm (Tr. 442).

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4 Indeed, it might be questioned whether, once approved by SRS, Chevron and Base Safety, the superintendent had the authority to delay the work to bring the trench into compliance.

Penalty Consideration

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *J. A. Jones Construction Company*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

With 45 employees, JBC is considered a small employer and a reduction is given for size. A reduction is also given for history because there is no showing JBC has received prior citations. No deduction is given for good-faith (Tr. 432-433).

A penalty of $3,000.00 is reasonable for JBC violation of § 1926.652(g)(1)(ii) (Citation No. 1, item 3). Employees of PMI were exposed to the potential hazardous movement of the shields. JBC had installed the shields and was responsible for ensuring compliance.

A penalty of $4,500.00 is reasonable for JBC serious violation of § 1926.652(a)(1) (Citation No. 2, item 1. Having found the violation to be serious, JBC is entitled to a substantial reduction in the proposed penalty of the Secretary. The violation was of high severity due to the potential seriousness of any injuries had the trench collapsed. The possibility of a trench collapse was increased because of the heavy equipment operating in the area, particularly from vibrations from the crane that was being used (Tr. 443). The top portion of the trench contained a concrete slab which superimposed a load on the trench and exacerbated the possibility of trench failure.

Findings of Fact and Conclusions of Law

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

Order

Based upon the foregoing decision, it is ORDERED that:

1. Citation No. 1, item 1, alleging a serious violation of 29 C.F.R. § 1926.652(c) is vacated.

2. Citation No. 1, item 2, alleging a serious violation of 29 C.F.R. § 1926.652(d)(1) is vacated.

3. Citation No. 1, item 3, alleging a serious violation of 29 C.F.R. § 1926.652(g)(1)(ii) is affirmed and a penalty of $3,000.00 is assessed.

4. Citation No. 2, item 1, alleging a willful violation of 29 C.F.R. § 1926.652(a)(1) is affirmed as serious and a penalty of $4,500.00 is assessed.

_/s/__Ken S. Welsch_____

Ken S. Welsch

Administrative Law Judge

Dated: June 10, 2013

Atlanta, Georgia