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. MONTROY DEVELOPMENT LLC, Respondent.	OSHRC Docket No. 23-1731

DECISION AND ORDER

APPEARANCES:
For the Complainant:
Marc Sheris, Esq., Senior Trial Attorney
Office of the Solicitor
U.S. Department of Labor
New York, NY

For the Respondent:
Timothy Crumb
Pittsford, NY

BEFORE: Heather Daly
Administrative Law Judge

INTRODUCTION

The Occupational Safety and Health Administration (OSHA) has a national emphasis program to address the hazard of excavations, which present "high fatality" situations when they collapse. (Tr. 27-28, 151-55.) Compliance Health and Safety Officer Ashley Irwin (CO) observed people in an excavation while in Camillus, New York, on May

8, 2023. (Tr. 28-29.) She quickly began an investigation at 5579 Rolling Meadows Way, Camillus, NY 13031 (the Worksite). (Tr. 27-29.)

The investigation led to the issuance of one serious Citation, with two separate items, to Montroy Development, LLC (Montroy). *Id.* Citation Item 1 alleges a violation of 29 C.F.R. § 1926.651(j)(2) for failing to protect an employee from excavated or other materials or equipment that could pose a hazard by failing or rolling into excavations. Citation Item 2 alleges a violation of 29 C.F.R. § 1926.652(a)(1) for failing to ensure an employee in an excavation was protected from cave-ins by an adequate protective system.

Montroy timely filed a Notice of Contest challenging the Citation, which brought the matter before the Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act (OSH Act). A hearing was held on August 12, 2024, in Syracuse, New York. Both parties timely submitted Post-Hearing Briefs for consideration. The joint request to permit Reply Briefs was granted. The Secretary filed a Reply Brief. Montroy did not file a Reply Brief.

Citation 1, Items 1 and 2 are AFFIRMED, and penalties totaling $11,250 for the two violations are ASSESSED.

OSHRC HAS JURISDICTION

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the OSH Act and that, at all times relevant to this proceeding, Montroy was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the OSH Act, 29 U.S.C. §§ 652(3) & (5). *See Slingluff v. OSHRC*, 425 F.3d 861, 867-68 (10th Cir. 2005). Specifically, the parties stipulated:

1. Many of the materials and supplies used and/or manufactured by Respondent originated and/or were shipped from outside of New York State.

2. On or about May 8, 2023, [Montroy] was performing work at a site located at 5579 Rolling Meadow Way, Camillus NY 13031.

(Stip. 1-2; Sec'y Br. 2-3.) The parties also agreed that:

> Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act ("the Act").
>
> Respondent was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and is an employer within the meaning of section 3(5) of the Act.

(Jt. Preh'rg Stmt. 3; Sec'y Br. 2.) The record supports finding a timely Notice of Contest and that Montroy is an "employer" under the OSH Act. 29 U.S.C. §§ 654(a), 652(5), 659(a).

FACTUAL BACKGROUND

Montroy was at its Worksite in Camillus, NY. (Stip. 2; Sec'y Br. 3.) The CO was in the area after investigating another location nearby. (Tr. 26-27.) She noticed an excavation with an individual standing at the edge looking into it. (Tr. 27.) It appeared that he was bending over to speak with someone, but she could not see whether anyone was in the excavation. (Tr. 27-28, 54.)

The CO determined it was necessary to investigate whether anyone was in the excavation. (Tr. 28.) OSHA has a national emphasis program to minimize worker deaths associated with excavations. (Tr. 28-29.) She parked her car and walked toward the Worksite. (Tr. 27-29, 32.) She turned on her phone's video feature and began recording. (Tr. 28-29, 32; Ex. C-1.) As she approached the Worksite, she identified herself as an OSHA official. (Tr. 28-29; Ex. C-1.) She was concerned about the excavation collapsing,

so as she walked toward the Worksite, she asked everyone to exit it. (Tr. 29-30, 141; Ex. C-1.) Once she got closer to the excavation, she could see two people in it near the man standing on the upper edge. (Tr. 29, 33; Ex. C-1.)

After the two individuals exited the excavation, she continued her investigation by interviewing those at the Worksite, taking measurements, and photographing conditions. (Tr. 33-35; Ex. C-1.) The individual standing on the excavation's upper edge was David Montroy, the owner of Montroy. (Tr. 27, 33-34, 138-39, Exs. C-1.) One person in the excavation worked for Montroy. (Tr. 29, 34-35, 66; Exs. C-1, C-7.) The other person, Mr. Komuda, owned a different company. (Tr. 26, 29, 34-35; Ex. R-7.)

Mr. Montroy and the CO discussed the excavation. (Tr. 34-36, 59.) The CO did not see any evidence of an adequate protective system in the excavation. (Tr. 27-28, 33, 36, 64; Ex. C-1.) Mr. Montroy acknowledged that there was no trench box on site. (Tr. 36; Ex. R-7.) The excavation was not in stable rock. (Ex. C-1.) Mr. Montroy admitted he did not know what type of soil the excavation was dug in. (Tr. 35, 59; Ex. R-7.) The spoil pile consisted of disturbed materials removed from the ground to create the excavation. (Tr. 55, 58, 60-62, 64-65, 156.) There was some aggregate in the soil, which supports characterizing it as loose. (Tr. 60-62, 156; Exs. C-2, C-3, C-4.)

The CO investigated how close the spoil piles and 320 CAT Excavator (Excavator) were to the excavation. One spoil pile was more than two feet away. (Tr. 59.) The Secretary does not rely on it to support his contentions. (Tr. 96-97.) Another pile was right at the excavation's upper edge. (Exs. C-1, C-4.) It was between the path of egress (exit route) from the excavation and the Excavator. (Tr. 32-33, 50-51, 54, 64; Exs. C-1, C-4.) Little distinguishes the end of the spoil pile and the excavation's beginning. (Tr. 33, 50-51, 54, 77, 151, 155; Exs. C-4, C-7.) There was no way to safely measure the exact

distance between that spoil pile and the excavation's edge. (Tr. 33-34, 48, 50-51, 151, Ex. C-4.)

As for the Excavator, it was at the edge of the spoil pile and parked at a slight angle to the excavation's rim. (Tr. 50-52, 56-57, 77, 155; Exs. C-1, C-4, C-7.) A portion of the Excavator's tread appears to be in the upper part of the excavation. (Tr. 50-51, 155-156; Exs. C-1, C-2, C-4.)

The CO also assessed the excavation's depth. She could not safely enter it to take measurements because it was unprotected and had a large spoil pile and the Excavator on the edge. (Tr. 34, 37-38, 40, 48, 50, 155-56; Exs. C-1, R-6 at 2.) Still, she gathered multiple sources of information to corroborate her conclusion that the excavation was greater than five feet in depth. (Tr. 34, 47-50, 52-53, 76, 89, 100, 103-5, 109, 112, 114; Exs. C-1, C-7, R-6.) A stud board was laid across the excavation to help ensure an accurate measurement between the ground and the area near the bottom of the excavation. (Tr. 37-42, 45, 121-22; Exs. C-5, C-6, R-2 at 2.) The deepest part of the excavation was near the middle. (Tr. 47-48; Ex. R-2 at 2.) Along one of the sidewalls, there was a ledge before the deeper part of the excavation. (Tr. 45-48; Exs. C-1, R-2, R-4.) The CO used a measuring tape suspended from a rod to determine the distance between the ledge and the bottom of the stud board. (Tr. 47-48, 50, 62, 117-19; Exs. C-5, R-2, R-4.) In calculating that the excavation was deeper than five feet, the CO did not include the height of the board. (Tr. 38-39, 45-46, 115; Exs. C-5, R-4.) Nor did she measure the excavation's deepest part. (Tr. 37-38, 47-50, 53, 88, 121-22; Exs. R-2, R-6.)

Including the stud board, the CO measured the depth of the excavation's sidewall (i.e., not the lowest point but a higher area) as five feet and three inches (63 inches). (Tr. 41-42, 48-49, 121; Exs. C-5, R-7.) The tape was vertical when she measured the

excavation's depth. (Tr. 115-16.) She then asked Mr. Montroy to hold measuring tape so she could photograph it. (Tr. 38.) Instead of a photograph, she ended up taking a brief video. (Ex. C-5.) At the start of the video, a measurement of approximately sixty-three inches (5'3") is depicted above the board. (Tr. 39, 42-45; Exs. C-5, C-6, R-7.) The measuring tape then begins to move upward before the video ends. (Tr. 39, 41-42, 121-22; Ex. C-5.)

The stud board was 1.5 inches thick. (Tr. 39, 46, 121-22.) If the CO had just subtracted the stud board from the 63-inch depth, the depth measurement would have been 61.5 inches. (Tr. 38-39, 121-22; Exs. C-5, C-6.) However, the CO also considered whether the measurement shown at the end of the video when the tape was being pulled up would have resulted in an excavation of less than five feet. (Tr. 39, 42, 47-49, 121-22; Ex. C-5.) Near the end of the video, one can see a measurement of approximately 62 inches. (Tr. 39; Exs. C-5, R-6, R-7.) The CO considered whether even the lowest measurement seen in the video yielded a depth greater than five feet. (Tr. 39, 41-43; Exs. C-5, C-6, R-6, R-7.) Subtracting the stud board from a conservative estimate of where the measuring tape is at the end of the video still yields a depth greater than five feet. (Tr. 38-39, 41-42, 47-49, 89, 121-22, 154; Exs. C-5, R-6, R-7.)

The CO is trained in taking measurements, and she gathered other evidence that supports finding that the excavation was more than five feet deep. (Tr. 26, 29, 35, 39-41, 47-53, 74-76, 88, 103-06, 108-9, 112-14, 124; Ex. C-1, C-7.) She visually observed the height of the individuals who were in the excavation. (Tr. 40; Ex. C-1.) She is 5 feet and 3 inches tall and stood near Mr. Komuda and the employee after they exited the excavation. (Tr. 40.) Mr. Komuda and the employee were taller than she was. (Tr. 40, 132.) The employee testified that he was "five feet eight inches." (Tr. 132.) Despite both

people being over five feet tall, neither could be seen above the excavation when the CO arrived at the Worksite. (Tr. 27-29, 52, 132; Exs. C-1, C-7.)

The CO also looked at the objects in the excavation and used them to evaluate the depth. (Tr. 39, 49-50, 76, 88, 104, 124; Exs. C-1, C-7.) The employee in the excavation was holding a GPS Spectra Rod. (Tr. 29, 35, 51, 104; Exs. C-1, C-7.) The GPS Spectra Rod has measurement markings, which the CO could use as an approximate scale to corroborate her actual measurement. (Tr. 52-53, 106, 109; Ex. C-7.) The CO took a still from the video to examine the markings and the position of the bolt on the rod. (Tr. 47, 52-53, 104-5, 108-9.) That examination supported concluding that the excavation was greater than five feet. (Tr. 53, 104-5.) The CO also considered the typical height of the brand of bucket seen in the excavation. (Tr. 103, 112-14; Ex. C-7.) She found no evidence that the excavation was less than five feet deep.

DISCUSSION

To establish the violation of a safety standard under the OSH Act, the Secretary must prove: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, No. 90-1747, 1994 WL 682922, at * 6 (OSHRC, Dec. 5, 1994).

Citation 1, Item 1, Violation of 29 C.F.R. § 1926.651(j)(2)

Citation 1, Item 2 concerns an alleged violation of 29 C.F.R. § 1926.651(j)(2), which addresses protection from materials or equipment for workers in excavations:

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

The Secretary alleges Respondent violated 29 C.F.R. § 1926.651(j)(2) because an employee was not protected from excavated materials, which could have fallen into an excavation at its Worksite. In addition, equipment, specifically the Excavator, was parked on the excavation's edge. The Secretary argues this created a struck-by hazard, violating the cited standard.

The Standard Applies and was Violated

The cited standard requires employers to protect employees from "excavated materials or equipment that could pose a hazard by falling or rolling into excavations." 29 C.F.R. § 1926.651(j)(2). Materials and equipment must be placed and kept "at least 2 feet" from the edge of the excavation, or there must be retaining devices. *Id.*

It is undisputed that a spoil pile and an excavation were present at Respondent's Worksite. *See* 29 C.F.R. § 1926.650(b) (defining excavation). (Tr. 27-29, 33, 35, 151, Exs. C-1, C-4, C-7.) The photographs and video from OSHA's investigation depict an excavation with the Excavator and spoil pile along the upper edge. *Id.* There was at least one other spoil pile at the Worksite, but the Secretary relies on the closest one and the presence of the Excavator to support the violation of 29 C.F.R. § 1926.651(j)(2).

Having found there was an excavation at Respondent's Worksite with a spoil pile and equipment nearby, we turn to whether their presence violated the cited standard. The cited standard requires employees to be protected from excavated materials or equipment that "could pose a hazard" by falling or rolling into the excavation. 29 C.F.R.

§ 1926.651(j)(2). When, as was the case at the Worksite, excavated materials or equipment are present, employees must be protected from the hazard of materials falling or rolling into the excavation. *Id.* Generally, materials and equipment must be kept at least two feet from the excavation's edge. *Id.* Depending on conditions, an employer may also need retaining devices. *Id.* There is no evidence of any retaining devices. (Exs. C-1, C-4, C-7.) Nor does Respondent claim that there was.

Thus, as there were no retaining devices, we consider whether the materials and equipment were sufficiently far from the edge to prevent either from falling or rolling into the excavation. 29 C.F.R. § 1926.651(j)(2) (requiring at least a 2-foot distance, the use of retaining devices, or both). While the Secretary did not provide an exact measurement of how far from the edge the spoil pile and equipment were, it is readily apparent that it was less than two feet. (Exs. C-1, C-4, C-7.) There is no discernible distance between the Excavator's tread and the top of the excavation. (Tr. 33, 51, 58; Exs. C-4, C-7 at 2.) Likewise, the end of the spoil pile aligns with the excavation's edge. (Tr. 33, 51; Exs. C-1, C-4, C-7 at 2.) The Secretary showed that the materials and equipment were within two feet of the excavation.

Respondent attempts to rebut the Secretary's evidence by, (1) alleging that the Excavator and spoil pile were further from the edge, (2) contending that the work was exempt from the cited standard, and (3) alleging that the Excavator did not fall within the standard's reference to "equipment." (Resp't Br. 9-10, 13-14.) Its contentions do not undermine the Secretary's evidence of applicability and a violation.

1. The materials and equipment were too close to the excavation's edge

The CO acknowledged that she did not physically measure the distance between the spoil pile's end and the excavation's start. (Tr. 58.) Nor did she measure the distance (if any) between the Excavator and the excavation's upper edge. (Tr. 57.) The CO obtained measurements when it was safe. (Tr. 34, 37, 48, 57.) When measuring could not be done safely, she took photographs and recorded her observations. (Tr. 34, 58, 98, 124; Exs. C-1, C-4.) The CO's testimony and the documentary evidence support finding that the equipment and materials were not placed and kept "at least 2 feet" from the excavation's edge, as the cited standard requires.

To rebut the CO's credible testimony and documentary evidence, Respondent points to the testimony of Mr. Montroy and its employee. (Resp't Br. 11-12.) The employee claimed that the Excavator was more than two feet away and that the spoil pile was at least five feet away. (Tr. 130-31, 133-136, 144-45.) As explained below, their testimony and Respondent's exhibits do not undermine the conclusion that the employee in the excavation was not adequately protected from "excavated materials or equipment that could pose a hazard by falling or rolling into excavations." 29 C.F.R. § 1926.651(j)(2).

a. Excavator's Was at the Excavation's Edge

The employee claimed that he measured the distance between the Excavator and the excavation's edge, along with the CO and Mr. Montroy. (Tr. 131, 136.) He claimed it showed a distance of more than two feet. (Tr. 131.) During cross-examination, the employee first indicated that the distance between the Excavator and the excavation was approximately five feet. (Tr. 133-34.) After reviewing Exhibit C-4, the employee then corrected his prior statement. (Tr. 134.) He stated that the distance between the Excavator and the excavation was "twenty-eight inches." (Tr. 134 ("Well, I said twenty-

eight inches, didn't I?").) Respondent's representative then called out, "You did." (Tr. 134, L. 8.)

Mr. Montroy acknowledged that he did not personally measure the distance between the Excavator and the excavation. (Tr. 144.) He testified that the CO measured the distance, and he believed "it was like twenty-eight inches." (Tr. 144-45.) Mr. Montroy claimed that the employee took a picture of this measurement but said the image "didn't really" show the numbers on the measuring tape. (Tr. 145.) The employee was not asked whether he photographed the measurement between the Excavator and the excavation. No photograph of such a measurement was offered as evidence.

Instead, Respondent points to Exhibit R-2, which shows the excavation from a different perspective than the video (Exhibit C-1). Mr. Montroy indicated that when he took the photograph, the Excavator was behind him, and he was "in between the track and over the excavation." (Tr. 144; Ex. R-2.) He could not recall when he took the photograph but thought the CO was on-site at the time. (Tr. 147.)

Mr. Montroy's testimony about standing between the equipment and the excavation to take a photograph in the CO's presence appears to conflict with other evidence, including his own testimony, about the CO wanting everyone to keep away from the unprotected excavation. (Tr. 29, 37, 48, 50, 57, 98, 141; Ex. C-1.) Exhibit R-2 does not show a clear start to the excavation. (Ex. R-2.) Considering the whole record, if Mr. Montroy had been in front of the Excavator when he took the photo, he could have been in the upper part of the excavation. (Exs. C-1, C-4, C-7, R-2.) Exhibit R-2 does not refute the evidence as to the closeness between the Excavator and the excavation's edge.

In contrast to the testimony of Mr. Montroy and the employee, strong documentary evidence backs the CO's testimony. (Tr. 33, 51, 59-60, 125, 131, 144-45; Exs.

C-1, C-2, C-4, C-7.) Neither Mr. Montroy nor the employee provided adequate detail about the measurement they claimed was taken between the Excavator and the excavation. Neither explained between which two points the measurement occurred. The Excavator is a large piece of equipment. (Exs. C-1, C-4.) While part of the Excavator was further away from the edge, the back track of the equipment is at or in the excavation. (Tr. 33, 51, 59-60, 125-27, Exs. C-1, C-2, C-7 at 2.) The photographic evidence refutes the testimony on the distance between the Excavator being more than two feet from the edge of the excavation. As the CO explained and the photographs show, there is no clear distinction between the excavation and where the Excavator is, let alone two feet. (Tr. 33, 54-57, 60, 125; Exs. C-1, C-2, C-4, C-7.) The CO was forthright and direct. Her testimony, along with the Secretary's exhibits, are credited.

b. Spoil pile was closer than 2 feet from the excavation's edge

As for the spoil pile, the parties agree that the CO did not measure the distance between it and the excavation's edge. (Sec'y Br. 6; Resp't Br. 9.) However, the employee testified that the spoil pile was about five feet from the excavation's edge. (Tr. 130, 135.) Respondent argues that if the spoil pile was not five feet away, the employee would have struck the pile as he was moving the load. (Resp't Br. 13.)

The employee's testimony regarding the distance between the spoil pile and the excavation is unreliable. (Tr. 130-31, 135; Ex. C-4.) Mr. Montroy did not corroborate Respondent's position that the spoil pile shown in Exhibits C-1 and C-4 was five feet from the excavation's edge. (Tr. 144-45; Resp't Br. 10.) Nor did he corroborate the testimony that the employee would have struck the spoil pile if it was closer than two feet from the excavation's edge.

The CO could not safely measure the distance between the spoil pile and the excavation. (Tr. 34, 37, 57.) Her conclusion that a spoil pile and the Excavator were closer than two feet from the edge is supported by the photographic evidence. At the time of the inspection, the spoil pile was so close to the edge that there is little discernible distinction between where it ends and where the excavation begins. (Tr. 33, 54-57; Exs. C-1, C-7.) The CO's testimony and the Secretary's exhibits are weighed more heavily. *See Fla. Gas Contractors, Inc.,* No. 14-0948, 2019 WL 995716, at 6-7 (OSHRC, Feb. 21, 2019) (upholding the judge's rejection of the employer's claim that a spoil pile was more than two feet from an excavation's edge).

The Secretary showed that the employee in the excavation was not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations, violating the cited standard.

2. *Exemption in Letter of Interpretation Is Not Applicable*

Besides challenging the measurements, the Respondent also claims that the Citation should be vacated because the work it engaged in at the Worksite was exempt from the cited regulation. (Resp't Br. 10, 13.) As support, it references "OSHA LOI June 3, 1995." *Id.* This appears to be a reference to a June 30, 1995 Letter of Interpretation regarding the application of 29 C.F.R. § 1926.652(a)(1) to House Foundations and Basements (1995 LOI).

The 1995 LOI offers no recourse to Respondent. It specifies that when "front-end loaders" are used to dig excavations, the soil surcharge load must be placed "as far back from the edge of the excavation as possible, but never closer than two (2) feet." The 1995 LOI also sets forth a formula that the materials and equipment be placed the same

number of feet horizontally from the edge as the excavation is deep. (1995 LOI ("All soil, equipment, and material surcharge loads are no closer in distance to the top edge of the excavation than the excavation is deep").)

Given the type of equipment used to dig the excavation and how close to the edge it was parked, the 1995 LOI is inapplicable by its express terms. (Tr. 56-58; Ex. C-4.) Here, a "front end loader" was not used. *Id.* It was an excavator. *Id.* Front-end loaders lack the long arm of excavators. (Tr. 57; Ex. C-4.) Excavators have a greater reach for removing dirt from an excavation before placing it down. (Tr. 57.) Nor was the second prong of the 1995 LOI's test, which required soil to be placed as far back as possible, met. Here, there was little distance between the spoil pile and the excavation's edge. (Tr. 33, 50-51, 54-57; Exs. C-1, C-4, C-7.) It was certainly less than the two or more feet contemplated by the 1995 LOI. *Id.*

The exemption in the 1995 LOI is not applicable here.

3. *Excavator falls within the standard's reference to equipment*

Respondent also contends that the parked Excavator should not be considered "equipment" within the meaning of the cited standard because it "is a 'piece of mobile' equipment." (Resp't Br. 9.) There is no dispute that the Excavator was used on the inspection day. (Tr. 130-31, 140.) Still, while the Excavator could move, it was not operating when the CO arrived at the Worksite. (Exs. C-1, C-4.) The CO did not say it was in motion or "mobile" when she observed it. (Tr. 83; Exs. C-1, C-4.) The operator was away from the equipment and standing in the excavation. (Tr. 111, 132; Exs. C-1, C-7.)

In asserting that the Excavator does not fit within the cited standard's reference to "equipment," Respondent misconstrues the CO's testimony. (Resp't Br. 10.) The CO

agreed that the Excavator could move. (Tr. 83.) Indeed, there was no reason for it to be right on the edge of the unprotected excavation when the employee entered it to measure the depth. (Tr. 57, 82, 132.)

The Excavator falls within the type of "equipment" contemplated by the cited standard. (Tr. 83, 153.) The parked Excavator was subject to the requirements of the cited standard. *See Garney Constr.,* No. 02-2134, 2003 WL 21693001, at *1, 3 (OSHRCALJ, July 18, 2003) (finding an excavator subject to the requirements of 29 C.F.R. § 1926.651(j)(2)). Further, the Secretary sustained his burden by the spoil piles alone. Even if the parked Excavator was exempt from the definition of "equipment," the spoil pile alone would support the finding of a violation.

Employee Exposure

Spoil piles located fewer than 2 feet away from the edge of an excavation expose workers in the excavation to a serious hazard. *See Fla. Gas*, 2019 WL 995716, at *1, 4-7 (quoting Occupational Safety and Health Standards-Excavations, 54 Fed. Reg. 45,894, 45,925 (Oct. 31, 1989) (to be codified at 29 C.F.R. pt. 1926), "[M]aterials such as excavated soil . . . can superimpose loads on the walls of an excavation. Such loads can be the cause of cave-ins and must be considered when determining what protection is necessary to safeguard employees.") In *Florida Gas*, like the present matter, the spoil pile was right at the excavation's edge. *Id.* at *1. In addition, the Excavator's location presented a further cause for concern because it could have entered the excavation in the event of a sidewall collapse. (Tr. 54-57, 152-53, 155-56; Exs. C-1, C-4.)

An employee was in the excavation near the Excavator and spoil pile. (Tr. 29, 33-34, 54-47, 132, 139-40; Exs. C-1, C-7, R-1; Resp't Br. 5.) Before entering the excavation, the employee was operating the Excavator. (Tr. 36, 131.) The Excavator had a GPS feature

to let him know how deep it was digging. (Tr. 36.) However, the feature was not functioning. (Tr. 36, 132.) He got out of the Excavator and entered the excavation to measure the depth with the GPS Spectra Rod. (Tr. 36, 132; Exs. C-1, C-7.) The employee said he was in the excavation for at most a minute before the CO arrived and asked him to come out. (Tr. 111, 132; Ex. C-1.)

The Secretary offered indirect evidence of the length of the employee's exposure. The CO saw someone standing near an excavation. (Tr. 27.) She parked her car and walked toward the Worksite. (Tr. 27, 33-34.) She recorded herself as she got closer to the Worksite. (Tr. 28-29, 32.) She then asked anyone in the excavation to come out. (Tr. 28-29; Ex. C-1.) The video of her doing just that task is about thirty seconds long. (Ex. C-1.)

To meet his burden, the Secretary was not required to show that an employee was exposed to a violative condition for a particular length of time. The OSH Act requires protection before employees are exposed to the risk. *See A.J. McNulty & Co., Inc. v. Sec'y of Lab.*, 283 F.3d 328, 336 (D.C. Cir. 2002) (stating the OSH Act requires protection before employees are exposed to the risk); *Fla. Gas*, 2019 WL 995716, at *6-7. The record provides adequate evidence of exposure to the cited hazards.

Knowledge

The Secretary must prove the employer either "knew, or 'with the exercise of reasonable diligence, could have known of the presence of the violative condition.'" *New York State Elec. & Gas Corp. v. Sec'y of Lab.*, 88 F.3d 98, 105 (2d Cir. 1996). An employer has constructive knowledge of conditions that are "readily observable." *Kokosing Constr., Co.*, No. 92-2596, 1996 WL 749961, at *2 (OSHRC, Dec. 20, 1996) (constructive knowledge found when the condition was in plain view); *Hamilton Fixture*, No. 88-1720, 1993 WL 127949, at *13, 16, 18-22 (OSHRC, Apr. 20, 1993) (an accident is not needed to

find knowledge and the test is satisfied if the employer could have known of the violative condition), *aff'd*, 28 F.3d 1213 (6th Cir. 1994).

The spoil pile was in plain view, as was the Excavator. (Exs. C-1, C-4, C-7, R-1.) Mr. Montroy was at the Worksite. (Ex. C-1.) He is the owner of Montroy and was in charge. (Tr. 33-34, 139; Exs. C-1, R-1.) The CO observed him standing next to the Excavator and spoil pile. (Tr. 29, 33-34; Exs. C-1, R-1.) He was leaning over the area of the excavation where the employee was. (Tr. 29, 33-34, 54; Exs. C-1, R-1.)

Mr. Montroy acknowledged that he was facing the excavation and that an employee was in it when the CO arrived. (Tr. 139-40.) He did not measure the distance between the spoil pile and the start of the excavation before the employee entered it. Nor did he measure the distance between the Excavator and the excavation's rim. (Tr. 144.) He took no steps to ensure an adequate distance between the excavation, the spoil pile, and the Excavator.

It was readily apparent that the Excavator and spoil pile were located on the excavation's edge, well closer than the two-foot minimum distance. (Tr. 33; Exs. C-1, C-4, C-7.) The employee parked the Excavator either at the edge or partially into the excavation. (Exs. C-1, C-4, C-7.) Mr. Montroy had the authority and ability to abate the hazards. *Century Cmtys., Inc. v. Sec'y of Lab.*, 771 F. App'x 14, 15-16 (D.C. Cir. 2019) (unpublished) (Controlling employer held liable where it "had actual knowledge of the specific hazard and the authority to abate it but did nothing to correct it").

The Secretary met his burden of establishing knowledge. *See Simplex Time Recorder Co. v. Brock*, 766 F.2d 575, 589 (D.C. Cir. 1985) (finding knowledge where the violations cited were "based on physical conditions and on practices . . . readily apparent to anyone who looked-and indisputably should have been known to management");

Hamilton, 1993 WL 127949, at *16, 18-19, 21-22, 28 (discussing knowledge requirement and finding the Secretary established constructive knowledge of violations); *Odyssey Cap. Grp. III, L.P.*, No. 98-1745, 2000 WL 1728274, at *2, n.7 (OSHRC, Nov. 21, 2000) (employer was aware of all the conditions constituting the violation). *See also Capform, Inc.*, No. 91-1613, 1994 WL 530815, at *2 (OSHRC, Sept. 29, 1994) (finding defense was not met because a reasonably prudent employer would have done more to protect an exposed worker).

Violation of 29 C.F.R. § 1926.651(j)(2) Established

The Secretary showed that the cited standard applied and was violated. One employee was exposed to the cited hazard and Respondent had knowledge of it. Respondent did not establish any affirmative defense. The violation is affirmed. The classification and penalty for the violation are discussed below.

Citation 1, Item 2, Violation of 29 C.F.R. § 1926.652(a)(1)

Citation 1, Item 2 concerns adequate protection inside excavations. The cited standard requires employees to be protected from cave-ins by an adequate protective system. 29 C.F.R. § 1926.652(a)(1); *Angel Bros. Enters., LTD*, No. 16-0940, 2020 WL 4514841, at *1, n.1, n.2 (OSHRC, July 28, 2022) (affirming a violation of 29 C.F.R. § 1926.652(a)(1)), *aff'd*, 18 F.4th 827 (5th Cir. 2021). The Secretary alleges that Respondent failed to ensure an adequate protective system protected an employee working in an excavation greater than five feet deep. (Sec'y Br. 8.)

Applicability and Violation

Section 1926.652(a)(1) requires that employees in an excavation be protected from cave-ins by an adequate protective system. The standard applies "to all open excavations made in the earth's surface." 29 C.F.R. § 1926.650(a). The term "excavation" is defined

as follows: "*Excavation* means any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." 29 C.F.R. § 1926.650(b). The cited standard "applies to *any* excavation" and "does not depend on the existence of a hazard." *Bardov, Inc.*, No. 10-1055, 2014 WL 5025977, at *4 (OSHRC Sept. 30, 20214) (emphasis in original).

At the Worksite, an excavation, as defined by the standard, was present, so the standard applies. *Id.* There is no dispute that the excavation lacked a protective system. (Tr. 33; Ex. C-1.) There was no trench box at the Worksite. (Tr. 27-28, 36, 64, 66, 69-70, 72, 110; Ex. R-7.) The photographs and video show a lack of any protective system. There was no benching or sloping. (Tr. 33, 46, 64; Exs. C-1, C-4, C-7.) That is not disputed.

What is at issue is the excavation's depth. The cited standard includes an exception for excavations less than five feet deep when a competent person has examined the ground and found no indication of a potential cave-in. 29 C.F.R. § 1926.652(a)(1)(ii). Respondent argues that the Secretary failed to establish that the depth was greater than five feet. (Resp't Br. 6-8, 11-12.) The Secretary maintains that he sustained his burden, and Respondent failed to adduce sufficient evidence that it met the criteria for the exception it relies upon. (Sec'y Br. 9-15; Reply Br. 2, 6.)

Under Commission precedent, the employer has the burden to establish that the excavation was shallower than five feet and that a competent person determined there was no indication of a potential cave-in. *A.E.Y. Enters.*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006) (finding that when determining whether the exception to 29 C.F.R. § 1926.652(a)(1) was met, the burden is on the employer to prove (1) the excavation was less than five feet, and (2) an examination of the ground by a competent person provided no indication of a potential cave-in); *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2011 (No. 90-

1505, 1992) (employer failed to show excavation was less than five feet deep), *aff'd*, 16 F.3d 1219 (6th Cir. 1994).

The CO explained how she took a conservative measurement of the excavation. She also looked at other evidence to determine whether her measurement was accurate. The CO was forthright and direct. She explained how she considered both her original measurement and the lower one seen at the end of Exhibit C-5. The Secretary showed that the excavation was greater than five feet in depth. *See Ford*, 15 BNA OSHC at 2011 (standard focuses on the excavation's depth, not the employee's position in it).

In its post-hearing brief claims, Respondent claims it took measurements of the excavation. (Resp't Br. at 6 citing Tr. 141-42 and Ex. R-4.) Mr. Montroy said he took the photograph that constitutes Exhibit R-4. (Tr. 140-41.) He did not directly state that Exhibit R-4 is a picture of a measurement he took. (Tr. 141.) Mr. Montroy claimed to have "other pictures," but none were offered or received into the record. *Id.*

Exhibit R-4 does not show where the bottom of the measuring tape is inside the excavation. It is unclear if it is a photograph Mr. Montroy took while the CO measured the excavation or reflects some other point in time. (Tr. 38, 41-42, 141; Exs. C-5, R-4; Sec'y Reply Br. 2.) Mr. Montroy did not explain what part of the excavation the measurement seen in the photograph is supposed to correlate with or his position when he took the picture. (Tr. 140-42.) Nor did he give a precise measurement of the depth he found. (Tr. 142.) Exhibit R-4 does not refute the CO's corroborated testimony that the excavation was greater than five feet deep.

Mr. Montroy testified that he knew the excavation was "around sixty inches." (Tr. 142.) He did not testify that the excavation was less than sixty inches. The exposed employee initially stated that he was digging for the footings at a depth of "about five feet."

(Tr. 131.) He hedged this statement by adding that it was "less than five feet but more than four." *Id*. However, he also acknowledged that the Excavator's GPS unit, which is capable of measuring depth, was not working on the day of the inspection. (Tr. 131-32.) He did not explain the basis for his belief that the excavation was less than sixty inches deep.

This testimony and Respondent's other evidence are inadequate to rebut the Secretary's showing that the excavation was greater than five feet deep. The exception set forth in the cited standard is not proven.

Exposure and Knowledge

The CO observed an employee working in the unprotected excavation upon her arrival at the Worksite. (Tr. 28-29, 33; Ex. C-1, C-7.) Mr. Montroy stood above the excavation and over the area where the employee was located. (Tr. 27, 29, 33-34, 54, Exs. C-1, C-7 at 2.) He acknowledged there was no protective system in place. (Tr. 33-34, 36.) He saw the employee in the excavation without any benching, sloping, or protective system. (Tr. 27-29, 33-34, 46; Ex. C-1.)

Respondent's claims that the hazardous condition was "imperceptible" misses the mark. (Resp't Br. 12.) Mr. Montroy knew the excavation was "around" five feet deep. (Tr. 142.) There is no confirmation he took an actual measurement, either before the employee entered it or after OSHA's investigation commenced. He was standing on the side while his 5'8" worker was in the excavation. (Tr. 27, 29, 54, 132; Ex. C-1.) The worker's head was not visible when the CO approached from the road. (Tr. 28, 52, 54, 68; Exs. C-1, C-7 at 2.) In the video, as the worker begins to walk up the path of egress, his head appears to remain below the excavation's upper edge. *Id*.

Respondent appears to assert that the Secretary had to prove actual knowledge of the excavation's exact depth. (Resp't Br. 12-13.) That is incorrect. The test is whether the Respondent had knowledge of the violative condition. *See, e.g., Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996). "Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation." *Id.* The Secretary does not have to show that the employer "understood or acknowledged that the physical conditions were actually hazardous." *Id.*

In this case, the condition is an unprotected excavation. Mr. Montroy was standing in plain view of the unprotected excavation. (Tr. 27, 29, 34, 54; Ex. C-1.) He knew the employee was out of the Excavator and had entered the unprotected excavation. (Tr. 27, 29, 34, 139; Ex. C-1.) His actual knowledge satisfies the knowledge requirement.

The Secretary notes that in addition to Mr. Montroy's actual knowledge, the record establishes constructive knowledge of the violative condition. (Sec'y Br. 2, 7; Reply Br. 6.) Mr. Montroy was standing above the excavation and looking into it when the CO arrived. (Tr. 54, 139-40; Ex. C-1.) There is no evidence of Respondent taking appropriate action to prevent the employee from entering the excavation, to ensure adequate protection from a cave-in, or to measure the depth before the employee entered it. *See Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1060 n. 3 (No. 79-4945, 1979) (knowledge requirement satisfied if employer knew or could have known of the violative condition and the lack of protection), *aff'd*, 723 F.2d 410 (5th Cir. 1984). As noted, there was no trench box on-site and no benching or sloping of the sides of the excavation.

The Secretary met the burden of showing exposure to the cited condition and Respondent's knowledge of it.

Respondent Fails to Rebut the Secretary's Prima Facie Case

The cited standard includes certain narrow exemptions. The first, for excavations made "entirely in stable rock," is not applicable here. (Ex. C-1.) *See Bardav,* 2014 WL 5025977, at *4. The evidence shows that the excavation was not in stable rock. (Tr. 55, 58, 60-62, 67, 152-53, 155-56; Exs. C-1, C-2, C-3.) The CO explained that the soil was loose with some aggregate. (Tr. 55, 58, 60-62.)

The documentary evidence corroborates this characterization. (Exs. C-1, C-2, C-3, C-4, C-7.) Mr. Montroy said he picked up a handful of soil but acknowledged he did not do any tests to assess the soil consistency. (Tr. 59, 143; Ex. R-7.) Although he described the soil as "hard," his ability to grab the soil by hand supports the CO and Area Director's characterization of the soil as loose and disturbed. *See Stark Excavating, Inc.,* No. 09-0004, 2014 WL 5825310, at *3 (OSRHC, Nov. 3, 2014) (consolidated) (evidence of past utility work in the area supported finding that the soil was previously disturbed), *aff'd*, 811 F.3d 922 (7th Cir. 2016). The testimony of the CO and the Area Director is supported by the video and photographs of the Worksite and is credited.

The second exemption relates to the excavation's depth. It requires proof of two things. First, the excavation must be "less than 5 feet" in depth. Second, a competent person examined the ground and found no indication of a potential cave-in. *Bardav,* 2014 WL 5025977, *4 (stating that it is the employer's burden to show that when an excavation is not in stable rock, "it was less than five feet … in depth and that an examination by a competent person found no indication of a potential cave-in"); 29 C.F.R. § 1926.652(a)(1).

Respondent challenges the accuracy of the CO's measurements, each of which showed a depth greater than five feet. The Secretary argues that the CO's measurements were reliable and supported by the record.

a. Excavation was more than five feet deep

Respondent claims that the measurements of the excavation's depth are inaccurate. (Resp't Br. 6-9.) The Secretary's response is multi-faceted. He points to the evidence regarding how the excavation's depth was assessed and the corroboration for the conclusion that the excavation was greater than five feet deep. (Sec'y Br. 4, 10, 12-15; Reply Br. 1-4.) The CO explained how she was conservative in assessing the excavation's depth and corroborated her findings. She was trained in taking measurements and detailed her methodology for measuring the excavation. (Tr. 37-39, 48-49, 121-22; Exs. C-5, C-6.) At one point, she briefly misspoke and indicated that the most conservative measurement of the excavation was 5 feet, .5 inches (60.5 inches), but immediately, she corrected herself. (Tr. 76.)

The CO explained how the video of the measuring tape was taken. (Tr. 115-17, 121-24.) Exhibit C-6 is a screen shot from a brief video the CO took. (Tr. 43; Exs. C-5, C-6.) It depicts the measuring tape. *Id.* The shot was taken at a tilt, which makes its perspective difficult to assess appropriately. (Tr. 116; Ex. C-6.) The CO was certain that the measuring tape was vertical when she read it and wrote down the measurement. (Tr. 115-17, 121, 124.) After writing down her measurement of five feet and three inches (i.e., 63 inches), she took a brief video with Mr. Montroy holding the measuring tape. (Tr. 121-22; Exs. C-5, R-7.) The measurement of 63 inches is seen at the start of the video. (Ex. C-5.) But the CO also considered the lower distance seen at the end of the video. (Exs. C-5, C-6, R-7.) After the height of the stud board is subtracted, the excavation's depth still exceeds sixty inches regardless of whether the measurement at the start of the video or the end is used.

Respondent's brief confuses the Alleged Violation Description, which is in the Citation and part of the Secretary's Complaint, with the violation worksheet, which was Respondent Exhibit R-6. (Reply Br. 4; Resp't Br. 7.) The Citation states that the excavation was "greater than five feet in depth." That description was based on the CO's investigation, which included multiple attempts to verify that the excavation was greater than five feet deep. (Tr. 29, 37-54, 90, 100, 102-109, 111-12, 115-22, 132; Exs. C-1, C-5, C-6, C-7 at 2, R-1, R-2, R-6, R-7.) The violation worksheet reflects the CO's careful investigation. (Tr. 49-53, 121-24; Exs. C-7, R-6.) Respondent tries to cast the CO's verification and her use of the smallest possible depth as incompetence. In fact, these actions reflect a thorough investigation in which she did not simply rely on the measurement of the excavation she wrote down. The CO looked for other evidence to either support or refute the measurement taken during the investigation. Ultimately, she reached the well-founded conclusion that the excavation exceeded five feet in depth. Her testimony is credited over the unsubstantiated estimates of the excavation's depth given by Mr. Montroy and the employee.

Classification and Penalty

The Secretary classified the violations as serious. (Exs. R-1, R-6.) When the Citation was issued, the statutory maximum penalty for a serious violation of the OSH Act was $14,502. The Secretary proposed a penalty of $5,625 for Citation 1, Item 1, and the same amount, $5,625, for Citation 1, Item 2. *Id.*

Serious Classification is Appropriate

Respondent argues that violations are "de minimis." (Resp't Br. 14-15.) Under the OSH Act, de minimis violations "have no direct or immediate relationship to safety or health." 29 U.S.C. § 658(a), *Otis Elevator Co.*, No. 90-2046, 1995 WL 147877, at *2

(OSHRC, Apr. 4, 1995). Respondent identifies no case where the Commission concluded that violations of the standards cited here, 29 C.F.R. §§ 1926.651(j)(2), 1926.652(a)(1), were classified as de minimis.

Minimal exposure to a hazard like the one contemplated by 29 C.F.R. § 1926.652(a) is not adequate support for classifying the violation as de minimis. *See, e.g., H.H. Hall Constr. Co.*, No. 76-4765, 1981 WL 18913, at *1, 6 (OSHRC, Oct. 7, 1981) (rejecting argument that the violations are de minimis because the employees were exposed to a hazard for a minimal amount of time); *Stark*, 2014 WL 5825310, at *7-10, 15 (affirming violation § 1926.651(a)(1) as serious and upholding the classification of repeat for a violation of § 1926.651(j)(2)). "The hazard of an excavation cave-in could be considered neither 'slight' nor as having 'no direct or immediate relationship to safety or health.'" *H.H. Hall*, 1981 WL 18913, at *6. *See also Calang Corp.*, No. 85-319, 1990 WL 140086 (OSHRC, Sept. 12, 1990) (noting substantial penalties warranted for willful violations of cave-in protection requirements because "the incidence of cave-ins is high, and the likelihood of death or severe injury to employees in a collapsing trench is … high").

The Commission has also upheld classifying violations of 29 C.F.R. § 1926.651(j)(2) as serious. *Fla. Gas*, 2019 WL 995716, at *5, 10 (discussing evidence that if the spoil pile rolled into the excavation, it could cause "serious internal injuries, serious fractures, and even death"). *See also Stark*, 2014 WL 5825310, at *1, 12, 15 (upholding violation of 29 C.F.R. § 1926.651(j)(2) as repeat); *Star-Brite Constr. Co., Inc.*, No. 95-0343, 2001 WL 1668967, at *4 (OSHRC, Dec. 20, 2001) (rejecting contention that violations were de minimis).

The Area Director gave credible, compelling testimony regarding the seriousness of excavation violations. (Tr. 151-55.) Excavation violations often relate to deaths or

serious physical harm. (Tr. 151, 154-55.) As explained, the exception for excavations *under* five feet deep is narrow. The excavation here was more than five feet deep. Further, the CO attempted to give Respondent considerable benefits in taking a conservative measurement. She did not measure the excavation at the deepest point. (Tr. 39, 47-49, 87-88, 117-120; Exs. C-1, C-7, R-2, R-6.) Nor did she include the height of the spoil pile when determining that the excavation exceeded five feet. (Tr. 41-42; Exs. C-1, C-7, R-6.)

Respondent fails to rebut the Secretary's evidence supporting the serious classification. *See Calang*, 1990 WL 140086, at *1, 6 (upholding the characterization of a citation for violation 29 C.F.R. §§ 1926.651, 652 and noting that the likely consequence of a cave-in would have been death or serious physical harm and that cave-ins have been "one of the most severe problems in occupational safety"); *see also Mosser Constr.,* No. 08-0631*,* 2010 WL 711322, at *3 (OSHRC, Feb. 23, 2010) ("excavation work is one of the most hazardous types of work done in the construction industry [and] [t]he primary type of accident of concern in excavation-related work is [the] cave-in"); *Triumph Constr. Corp.,* No. 15-0634, 2016 WL 6472834, at *5, 25 (OSHRCALJ, Sept. 19, 2016) (discussing the severity of a violation of 29 C.F.R. § 1926.652(a)(1)), *aff'd*, 885 F.3d 95 (2d Cir. 2018).

The violations are appropriately characterized as serious.

Penalties of $5,625 are Assessed for Each Violation

In assessing penalties, the Commission must give due consideration to the violation's gravity, the employer's size, history, and good faith. 29 U.S.C. § 666(j); *J. A. Jones Constr. Co.*, No. 87-2059, 1993 WL 61950, at *15 (OSHRC, Feb. 19, 1993). Generally, gravity is the principal factor to be considered. *Id.* Once a matter is contested, it is for the Commission to determine the appropriate penalty. *Andrew Catapano*

Enters., 16 BNA OSHC 1949, 1952 n. 7 (No. 89–1981, 1994) ("the Commission and its judges have authority to assess penalties independent of the Secretary's proposal.")

Starting with size, there is no dispute that Respondent is a small employer with ten employees. (Tr. 66-67; Ex. R-7.) As for history, Respondent has not previously been inspected or cited. (Tr. 71, 141.) In terms of good faith, the Secretary does not allege Respondent was uncooperative during the inspection. Respondent did not have a written safety plan. (Tr. 72; Ex. R-7.)

Turning to gravity, both violations had the potential for serious injuries and death. (Tr. 68, 70-71.) The sheerness of the side wall with both a spoil pile and equipment on top supports a finding of significant gravity. (Tr. 67-68, 151-56.) The spoil pile was also adjacent to the path of egress. (Tr. 67, 71; Ex. C-1.) Thus, if excavated materials (spoil) entered the excavation, it could have impeded the employee's exit. (Tr. 67-68, 71, 151-53.) Likewise, a collapse of the side where the CO observed the employee would have had serious consequences because the equipment and additional spoil pile would have entered the excavation. (Tr. 67-68, 70-71, 151-52, 155-56; Ex. C-1.) These factors increased the probability of injury even though the employee was not in the excavation for long before the CO arrived. (Tr. 67-68, 70-71, 151-56.)

The record supports a serious characterization for items 1 and 2. Penalties of $5,625 for Citation 1, Item 1, and $5,625 for Citation 1, Item 2 are assessed.

ORDER

The foregoing decision constitutes findings of fact and conclusions of law in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that as to Citation 1:

1. Item 1, alleging a violation of 29 C.F.R. § 1926.651(j)(2), is AFFIRMED as a serious violation, and a penalty of $5,625 is ASSESSED.

2. Item 2, alleging a violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED as a serious violation, and a penalty of $5,625 is ASSESSED.

SO ORDERED.

/s/ *Heather Daly*

Heather Daly
OSHRC, Administrative Law Judge

DATED: February 13, 2025
Washington, DC