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SECRETARY OF LABOR, Complainant, v. ROBERTS PIPELINE CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 91-2051

DECISION

BEFORE: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

The sole issue in this case is whether Administrative Law Judge James D. Burroughs abused his discretion in his assessment of a total penalty of $30,800 for two serious citations that involved eight separate violations. On review, Roberts Pipeline Construction, Inc. ("Roberts") argues that in arriving at his assessment, the judge did not give adequate consideration to the gravity of the violations, or the size, good-faith, or safety history of Roberts as required by section 17(j) of the Act, 29 U.S.C. § 666(j).[1] Having considered the arguments of the parties, we find no basis for overturning the judge's penalty assessments.

[1] That section provides:

> The Commission shall have the authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

For all but one violation, the judge assessed the penalties proposed by the Secretary.[2] In arriving at the assessed penalties, the judge found facts relevant to the section 17(j) factors, and explicitly stated that his assessment was made after giving "due consideration" to those factors. The judge found that Roberts has 150 employees, was inspected three times under Indiana's State OSHA Plan, and exhibited good faith. After noting that "gravity of the offense is the principal factor to be considered"[3] the judge found the gravity of the violations to be severe.[4]

We find nothing in Roberts arguments that warrant reversing the judge's penalty assessments. On review, Roberts states that, because only a small number of employees were exposed to the violative conditions for only a short period of time, it "believes that the danger that was actually present was not as severe as believed by the Secretary and the Judge." However, Roberts has not provided us with any arguments as to how the judge's

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[2]The one item that varied from the Secretary's penalty proposal was the citation that originally alleged that Roberts willfully violated 29 C.F.R. § 1926.652(a)(1) for failing to properly shore or slope a trench. Although the judge affirmed the violation, he found that the Secretary failed to establish that the violation was willful. In accord with that finding, he rejected the $28,000 proposed by the Secretary and assessed a $4000 penalty.

[3]*Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972)

[4] Citation 1,
Item 1 § 1926.21(b)(2)-(Failure to train)
Item 2 § 1926.100(a)-(Failure to wear head protection)
Item 3 § 1926.350(a)(4)-(Failure to secure compressed gas cylinder)
Item 4 § 1926.404(f)(6)-(Missing ground on cords)
Item 5 § 1926.404(f)(7)(iv)(C)-(Missing ground on cords)
Item 6 § 1926.651(c)(2)-(No ladder in trench)
Item 7 § 1926.651(k)(1)-(Failure to inspect trench daily by a competent person)
Citation 2 § 1926.652(a)(1)-(Failure to shore or slope trench)

assessment of gravity was in error with regard to the specific items that were cited. There is no reason to believe that the judge did not consider the number of employees exposed and the duration of exposure in finding the gravity to be high. Moreover, the violations exposed the employees to death from electrocution and trench collapse. Absent any specific allegation of error, we find no basis to upset the judge's conclusion that the gravity of the violations was severe.

Roberts also points out that, in proposing his penalties, the Secretary allowed a 20 percent reduction for size, but allowed no credit for history or good faith. Roberts argues that even though the judge found that it exhibited good faith, he assessed the Secretary's proposed penalties. According to Roberts, this shows that the judge failed to give adequate consideration to the penalty factors set forth in section 17(j) of the Act. We disagree.

The Act requires us to "consider" the gravity of the violation, the size of the employer, its good faith and safety history when assessing a penalty. However, nothing in the Act sets forth any particular relative weight to assign to these factors. Although the Secretary has devised a formula to calculate uniform proposed penalties that assigns certain percentage discounts to some of these factors, that formula is not binding on the Commission. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, 1994 CCH OSHD ¶ 30,363, p. 41,882 (No. 88-1962, 1994). Therefore, a judge may reasonably differ with the Secretary over the relative importance of the various penalty factors, yet still find that the penalty amounts proposed by the Secretary were appropriate. Clearly, the judge took the section 17(j) factors into consideration when assessing the penalties here. Despite the high gravity of the violations, the judge's penalty assessments were, in each instance, substantially below the $7000 maximum for each violation.

Aside from general allegations of error, Roberts provides no specific reasons why the judge's assessments are inappropriate. Roberts, which is represented by counsel in this proceeding, did not file an opening brief on review. Rather, it chose to rely on its Petition for Discretionary Review which set forth, in general terms only, its contention that the judge failed to adequately consider the section 17(j) factors when assessing the penalties. Following the filing of the Secretary's brief, Roberts filed a reply brief which again contended, in general terms only, that the judge erred in his penalty assessment. We have considered the general contentions raised by Roberts. However, to the extent that our dissenting colleague suggests that the Commission is required, in every case, to develop arguments not articulated by the parties whenever exception is taken generally to the size of the penalties assessed by the judge, we disagree. In our view, that is neither required by the Act nor an appropriate allocation of Commission resources. We thus find no basis for overturning the judge's penalty assessments.

Accordingly, the judge's decision is Affirmed.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Velma Montoya
Velma Montoya
Commissioner

Dated: September 26, 1994

Foulke, Commissioner, concurring in part, dissenting in part.

In one of its earliest decisions, the Review Commission stated:

> . . . There is no escaping the clear Congressional mandate that the Commission's consideration of penalties when they are contested are to be made independently of the Secretary's computations. This is especially important where, as in the instant case, Respondent has . . . specifically contested the Secretary's proposed penalties. Under such circumstances, [the employer] is entitled to a determination thereof by the body created by Congress "for carrying out adjudicatory functions under the Act."
>
> The Judge's decision does no more than reiterate and adopt the Secretary's computations, a disposition which, if allowed to stand, would effectively vest in the Secretary the power to assess (as well as to propose) penalties, a prerogative in no way authorized by the Act.

Dreher Pickle Co., 1 BNA OSHC 1132, 1133, 1971-73 CCH OSHD ¶ 15,470, p. 20,745-6 (No. 48, 1973) (citations omitted).

Since that time, the Commission has steadfastly held that it makes penalty determinations *de novo*. *See e.g. Caterpillar, Inc.*, 16 BNA OSHC 2153, 2178, 1993 CCH OSHD ¶ 29,962, pp. 41,005, 41,011 (No. 87-0922, 1993). Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that, when assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1993 CCH OSHD § 29,964, p. 41,033 (No. 87-2059, 1993). These factors need not be given equal weight and, generally, the gravity of the violation is the primary factor in penalty assessment. *Id.*

In this case, the judge's penalty analysis was perfunctory. It amounted to little more than a mechanical recitation of the relevant penalty factors and, as my colleagues point out, resulted in the assessment of the Secretary's proposed penalties for all but one of the items. However, as part of our *de novo* review, we must consider the entire record, which often reveals facts that were unknown to the Secretary at the time he issued the citation and proposed penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1623, 1994 CCH OSHD ¶ 30,363, p. 41,882 (No. 88-1962, 1994) These facts frequently cast a light on the violative

conditions that warrant penalties different than those proposed by the Secretary. In my view, an examination of the record regarding several of the items strongly suggest that a reduction in the penalty is warranted. Because the judge failed to properly evaluate the Section 17(j) factors, we cannot determine whether the Secretary has met his burden of establishing the propriety of his proposed penalties. Given Roberts' exception to the propriety of those assessments, I must respectfully disagree with my colleagues insofar as they affirm the penalties assessed by the judge and justify such on the absence of "any specific allegation of error" by Roberts.

The record establishes that Roberts had not previously been inspected by federal OSHA and, therefore, has no history of final orders against it. The record also shows that only five employees were on the worksite and that the company employees a total of only 150 employees. Therefore, I would consider Roberts to be a small to mid-size employer. Moreover, Roberts fully cooperated with OSHA during the inspection and abated the hazards pointed out by the compliance officer immediately following the inspection. Thus, while its total safety program appears to have been lacking in some respects, I would grant Roberts some credit for good faith. The remaining factor to be considered is the gravity of the individual violations.

With respect to items 1,2,6, and 7 of citation 1 and item 1 of citation 2, I concur with the assessed penalties because I believe those assessments are supported by the evidence of record. Despite my belief that the judge's analysis is wanting, I find no basis on review to overturn these penalties. In my view, however, the penalties assessed by the judge for the remaining items are not supported by the evidence.

Item 3 alleges a violation of 29 C.F.R. § 1926.350(a) on the grounds that Roberts failed to secure a compressed gas cylinder. A $2800 penalty was assessed. The record shows that the Secretary considered the probability of an accident occurring to be high. At the hearing, however, evidence was adduced that established that, except for "remnant gas," the cylinder was empty. Moreover, the cylinder had a safety cap in place which further reduced the likelihood of any discharge. Even though these facts establish that the likelihood of the an accident was lower than the Secretary estimated when determining the

gravity of the violation, the judge assessed the penalty proposed by the Secretary. In my view, the record requires a reduction in the penalty.

Items 4 and 5 alleged violations of 29 C.F.R. § § 1926.404(f)(6) and (f)(7)(iv)(C) on the grounds that missing grounds on electrical cords exposed employees to the hazard of electrocution. The judge assessed the proposed penalty of $4000 for each item. As with item 3, facts adduced at the hearing revealed that the duration of the exposure, and therefore the gravity of the violation was lower than initially determined by the Secretary. The evidence shows that the grounding plugs on both cords had been replaced approximately a week before the inspection. Moreover, unrebutted testimony revealed that grounding plugs were present on both cords the night before the inspection.

I find it particularly disturbing that the penalties assessed for items 4 and 5 are the same as that imposed for the trenching items which, the evidence establishes, were of a far higher gravity. This uneven result leads to the unmistakable conclusion that, in his penalty assessment, the judge failed to give adequate consideration to the facts adduced at the hearing. For both items, a lower penalty is clearly justified.

Edwin G. Foulke, Jr.
Commissioner

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SECRETARY OF LABOR, Complainant, v. ROBERTS PIPELINE CONSTRUCTION, INC., Respondent.	Docket No. 91-2051

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 26, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 26,1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-2051

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SECRETARY OF LABOR
Complainant,
v.
ROBERTS PIPELINE CONSTRUCTION, INC.
Respondent.

OSHRC DOCKET
NO. 91-2051

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on January 6, 1993. The decision of the Judge will become a final order of the Commission on February 5, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 26, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: January 6, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2051

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v.	:	OSHRC Docket No.: 91-2051
ROBERTS PIPELINE CONSTRUCTION, INC., Respondent.	:	

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For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

Roberts Pipeline Construction, Inc. (Roberts), contests two citations issued to it by the Secretary on July 11, 1991. The citations resulted from an inspection of an excavation at Roberts' worksite conducted on Wednesday, May 22, 1991, by James Denton, a compliance officer for the Occupational Safety and Health Administration (OSHA). Citation No. 1 contains seven items, each alleging a serious violation of the Occupational Safety and Health Act of 1970 (Act), and each relating to the conditions of the excavation. Citation No. 2 contains one item that charges Roberts with the willful violation of § 1926.652(a)(1) for failure to provide an adequate protective system to prevent cave-ins in the excavation. Roberts denies that it violated any of the cited standards and asserts that,

if any of the alleged violations did occur, they were the result of unpreventable employee misconduct.

On May 22, 1991, Roberts was engaged in installing a gas pipe for Cincinnati Gas and Electric along Beechmont Avenue in Cincinnati, Ohio (Tr. 14). Compliance officer Denton observed Roberts' worksite as he drove by the excavation. He noted that there was no access ladder in the excavation, nor was it sloped or shored. In accordance with OSHA's National Emphasis Program, which requires compliance officers to inspect any worksite excavations that they observe, Denton stopped and conducted an inspection of the worksite (Tr. 131-132). Denton held an opening conference with Bobby Westrater, Roberts' foreman on the site (Tr. 134).

Westrater's crew at the Beechmont Avenue site consisted of four men: Richard Smith, Rodney Smith (no relation to Richard), Mike Long, and Joe Kenan (Tr. 355). Jerry Gehring is a vice-president and supervisor for Roberts who occasionally looked in on the Beechmont Avenue site (Tr. 27). Roberts had excavated in two distinct areas and was installing a lot of "T sections" (Tr. 19). The main trench was 7 feet deep, 8 feet long, and 8½ feet wide. Adjoining it was a smaller trench that measured 4 feet deep, 5 feet long, and 2½ feet wide (Exhs. C-4, C-5, C-6, C-7; Tr. 139). The trenches had been excavated two or three days prior to Denton's inspection (Tr. 20). The pipe that Roberts was installing was 12 inches in diameter (Tr. 19). The soil had been previously disturbed when a gas and water main had been installed (Tr. 501). The soil was type C, the least stable soil classification (Tr. 148).

Denton arrived at the site when Roberts' crew was "[j]ust getting ready to start the day, actually, just bringing tools to the hole, getting ready to do some pipe fitting there" (Tr. 18). Foreman Westrater had done some welding on the pipe in the excavation the previous day. Welding the bottom of the pipe required Westrater to lie down in the trench (Tr. 22). On the day of the inspection, Richard Smith testified, "[W]e all pitched in together and took tools to the hole. We all helped each other out. I know I was in the hole that morning" (Tr. 24). Denton observed two employees in the excavation (Tr. 264). Denton photographed Rodney Smith in the trench, standing on the pipe (Exh. C-3; Tr. 17-18, 21).

Citation No. 1

Item 1: § 1926.21(b)(2)

Section 1926.21(b)(2) provides:

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

Richard Smith and Rodney Smith both signed a statement on the day of the inspection stating, "I have not received any verbal training from the company in the OSHA Trenching and Excavation requirement covered under 1926.651 and 1926.652" (Exh. C-9). Denton interviewed the two Smiths and determined that they were lacking basic knowledge regarding the recognition and avoidance of unsafe conditions and the applicable OSHA regulations. They were not aware of the classifications of soil, nor of the sloping and shoring requirements (Tr. 180-181).

Roberts had distributed copies of its safety manual to its employees the Friday before the May 22 inspection (Exh. C-10; Tr. 414). Richard Smith and Rodney Smith told Denton that they had received copies of the safety manual, but that "they had not really had a chance to read the book" (Tr. 182).

Richard Smith recalled only "one meeting that was just, I guess you would call it, a safety meeting. A supervisor came to the job and talked to us for, I don't know, 20 minutes about things" (Tr. 49). Part of those 20 minutes was taken up with admonishing Roberts' employees to refrain from using obscene language in front of members of the general public (Tr. 49). Rodney Smith could not recall any safety meetings held by Roberts prior to the May 22 inspection (Tr. 284). Foreman Bobby Westrater confirmed that, prior to the inspection, Roberts had not held any safety meetings that the Beechmont Avenue crew might have attended (Tr. 421).

Roberts claims that if a violation of § 1926.21(b)(2) occurred, it was the result of unpreventable employee misconduct.

> To prove the affirmative defense of unpreventable employee misconduct, the employer must show that it had established a work rule designed to prevent the violation, adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover

violations of those work rules; and effectively enforced those work rules when they were violated.

Pride Oil Well Service, *slip op.,* (No. 89-888, 1992).

Section 1926.21(b)(2) is not an apposite standard for the assertion of the unpreventable employee misconduct defense. The standard requires the employer to instruct each employee. It is difficult to see how the behavior of Roberts employees could have prevented Roberts from carrying out its obligation under the standard.

Roberts had no structured safety program. It distributed copies of its safety manual to employees, but no follow-up was done to ensure that the employees had read it. Westrater admitted that he had never taken any disciplinary action against employees who he observed violating Roberts' work rules (Tr. 476-477).

The Secretary has established that Roberts failed to instruct each of its employees in the recognition and avoidance of unsafe conditions and the regulations applicable to trenching operations. The employees were not instructed in soil types or the sloping and shoring requirements. As a result, the employees were exposed to the possibility of death or serious physical injury caused by a cave-in (Tr. 183-184). Roberts' violation of § 1926.21(b)(2) is serious.

Item 2: § 1926.100(a)

Section 1926.100(a) provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shocks and burns shall be protected by protective helmets.

Denton observed Rodney Smith and Richard Smith working in the excavation while not wearing hard hats (Tr. 186). Denton explained OSHA's position on the use of hard hats in trenches: "In excavations, our rule of thumb is that it's 100 percent use in an excavation" (Tr. 185). This position may be debatable, but it is clear that hard hats were required under the circumstances in the present case.

Richard Smith, Rodney Smith, and foreman Bobby Westrater all admitted that they did not wear hard hats while working in the trenches. Rodney Smith explained that hard hats "just get in the way sometimes when you're down in a bell hole making a weld. They just fall off and they are just in the way a lot" (Tr. 281). Westrater and the Smiths wore

cloth welding helmets when they were welding in the trench (Tr. 31). The welding helmets do not meet the requirements of § 1926.100(a) for protective helmets (Tr. 572-573).

Protective helmets were important for Roberts' crew because they spent much of their time with their heads below ground level while they were in the trenches. Richard Smith knelt in the trenches to perform grinding on the pipe (Tr. 31). Westrater, who performed all the welding on the project, lay in the bottom of the trench to make the weld. He spent six hours the day before the inspection lying at the bottom of the trench (Tr. 376).

Roberts had hard hats available in the welding truck at the site (Tr. 396). Westrater claimed they were unnecessary at the time of the inspection because his crew was all above ground (Tr. 396). But Westrater admitted that he wears only a welding helmet on his head when welding (Tr. 398). There are welding helmets available that can be worn with hard hats (Tr. 570).

Roberts asserted the unpreventable employee misconduct defense to this charge, as well as all the other changes. Roberts' safety manual contains this rule: "Wear hardhats at all times while performing construction work - - all observers at a construction site must wear hardhats" (Exh. C-10, pg. 2). It is obvious from Westrater's explanation as to why his crew was not wearing hard hats at the time of Denton's inspection that Westrater and his crew paid little or no attention to the work rule found in Robert's safety manual. The fact that the crew's foreman so readily ignored the work rule underscores the fact that there was no real attempt at enforcement.

Roberts violated § 1926.100(a) by failing to require its employees to wear protective helmets while working below ground level in the trenches. The violation exposed the employees to serious or fatal injuries resulting from falling tools, earth material, or cave-in (Tr. 189-190). *See Trumid Construction Co.*, 14 BNA OSHC 1784, 1990 CCH OSHD 29,078, pg. 38,859 (No. 86-1139, 1990). The violation is serious.

Item 3: § 1926.350(a)(4)

Section 1926.350(a)(4) provides:

> When cylinders are transported by powered vehicles, they shall be secured in a vertical position.

Exhibit C-16 is a photograph showing the inside of Westrater's truck. In the photograph, a black cylinder containing acetylene is lying on its side (Tr. 191-192). Exhibit C-16 is *prima facie* evidence that Roberts violated § 1926.350(a)(4).

Westrater had used the acetylene cylinder with his cutting torch on the Monday before the inspection. He testified that the cylinder was empty at the time he put it in his truck (Tr. 464-465). Denton pointed out that even when a compressed gas cylinder is "empty" for functional purposes, "there is still product in there" (Tr. 192).

Furthermore, the standard does not distinguish between empty and full cylinders. It refers to "cylinders," and requires that, when transported, they be secured in a vertical position. Westrater had been driving his truck from Monday until the Wednesday inspection with the acetylene cylinder lying horizontally and unsecured in the bed of his truck.

The unpreventable employee misconduct defense is of no assistance to Roberts. Robert's safety manual does contain this rule: "Compressed gas cylinders are to be upright at all times" (Exh. C-10, pg. 10). The person who is directly responsible for violating this rule is, however, one of Roberts' supervisory personnel. Westrater's violation of the work rule is another example of just how lightly the safety manual was taken. Roberts was in violation of § 1926.350(a)(4).

The hazards posed by the improperly stored cylinder are twofold: Acetylene is a flammable substance which could cause second degree burns if ignited. In addition "if a cylinder has a valve knocked off or becomes punctured, then it could become a projectile which could strike somebody" (Tr. 193). The hazards posed are serious. Roberts was in serious violation of § 1926.350(a)(4).

Item 4: § 1926.404(f)(6)

Section 1926.404(f)(6) provides:

> The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

Exhibit C-17 is a photograph showing the ends of two electrical cords. One of the plugs is orange and is the end of a 100-foot extension cord that Westrater had connected to his welding machine. It is missing its ground pin (Tr. 97, 401-402).

Westrater stated that he had replaced the ground pin on the extension cord a week or two before the inspection (Tr. 402-403). He was aware that a ground pin was required (Tr. 402). Westrater stated that, as far as he knew, the ground pin was in the extension cord the night before the inspection (Tr. 405-406).

Despite Westrater's claim that he did not know the ground pin was missing from the extension cord, a violation of § 1926.404(f)(6) must be found. Exhibit C-5 shows the extension cord plugged in to the welding machine in the trench. The extension cord was used the morning of the inspection. Anyone using reasonable diligence would have to have noticed that the ground pin was missing. Again, Roberts' safety manual had a specific work rule to cover this violative condition: "All portable cord and all plug connected equipment must be grounded, except for those protected with an approved double insulation system" (Exh. C-10, pg. 11). If this work rule had been effectively communicated and enforced, the missing ground pin would not have gone unnoticed. Roberts was in violation of § 1926.404(f)(6).

Denton explained the hazard posed by the missing ground pin (Tr. 197-198):

> The purpose of the ground pin is to see if there are any kinds of shorts in the tool that is being used, and the ground wire will carry off that current that is leaking through the tool and carry it back to ground through the system that they're using.
>
> * * *
>
> [I]f the situation was right, the circumstances could be [the employees] could be electrocuted and killed. They could die from that not being properly grounded.
>
> * * *
>
> In this case, they're standing on soil. The moisture content of the soil could play a role in it . . .

The violation of § 1926.404(f)(6) is serious.

Item 5: § 1926.404(f)(7)(iv)(c)

Section 1926.404(f)(7)(iv)(c) provides:

> Under any of the conditions described in paragraphs (f)(7)(iv)(A) through (f)(7)(iv)(C) of this section, exposed noncurrent-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded:

* * *

> (C) If the equipment is one of the types listed in paragraphs (f)(7)(iv)(c)(1) through (f)(7)(iv)(c)(5) of this section. However, even though the equipment may be one of these types, it need not be grounded if it is exempted by paragraph (f)(7)(iv)(c)(6).

This item is similar to the previous one. The plug on the cord of Robert's Black and Decker grinder was missing its ground pin (Exhs. C-5, C-6, C-17; Tr. 202-203). The hazard, electrocution, is the same as explained under item 4. As in item 4, Westrater claims that the ground pin was in place the night before. For the same reasoning given in the previous item, a serious violation of § 1926.404(f)(7)(iv)(c) is found.

Item 6: § 1926.651(c)(2)

Section 1926.651(c)(2) provides:

> A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

There was no ladder in the trench when Denton arrived at the worksite (Tr. 167). Westrater had a ladder available for use in his van, but he admitted that he had not used the ladder either that day or the day before (Tr. 417-418). The employees just climbed out of the trench (Tr. 28-29). Denton observed Rodney Smith climb out of the trench (Tr. 167-168). The employees were climbing out at the shallow end of the trench, but the shallow end measured 4 feet deep (Tr. 168). Roberts' safety manual provides "Place exit ladders in excavations 4' or more" (Exh. C-10, pg. 6).

Westrater's only explanation for the violation of this standard is "from the top of the water main, I had the ground sloped to where you could just walk up and down it" (Tr. 418). This does not excuse Roberts' noncompliance with the standard. A violation occurred.

The purpose of the standard is to provide quick access out of the trench in case of a cave-in. Without a ladder or other safe means of exit, the possibility of death or serious physical injury is increased. The violation is serious.

Item 7: § 1926.651(k)(1)

> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that

could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

The definition section of Subpart P, § 1926.650(b) provides:

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

The preamble to the excavation standard states that "it is important to note" that under the excavation standard, a competent person "must have had specific training in, and be knowledgeable about, soils analysis, the use of protective systems, and the requirements of this standard. One who does not have such training or knowledge cannot possibly be capable of identifying existing and predictable hazards in excavation work or taking prompt corrective measures" 54 Fed. Reg. 45,909(1989).

Denton concluded that Bobby Westrater was not a competent person within the meaning of the standard. Denton testified as to how he reached this conclusion (Tr. 175-176):

> I asked [Westrater] questions about the standard in regard to soil analysis, sloping requirements, and he was unable to answer those questions.
>
> I asked him about the new standard under § 1926.651 and 652, and he advised me that he was not thoroughly familiar with that standard and couldn't even relate to even having seen the standard.
>
> So it was through that interview with him that I determined that there was some deficiencies in his training and background in the OSHA standards in 1926.651 and 652.
>
> * * *
>
> [H]e had read the company safety manual and was aware that one you reach a certain depth in excavation, that you have to provide some type of protection. So, he was aware that some type of protection was necessary. It's just that he had not had any real training in how to classify soils. So, he couldn't tell me what type of soils were under the new standard and was not able to tell me what the sloping requirements would be depending on the type of soil.

* * *

The only thing that he could tell me about a daily inspection was that he would visually inspect the surrounding area.

At the hearing, Westrater established that he did have a knowledge of the classification of soils, learned from his experience in FFA when he was in high school (Tr. 472-473). When asked about sloping requirements, however, he was unable to demonstrate a level of knowledge that would qualify him as a competent person (Tr. 473-474):

Q. What is the type of benching that the new excavation standard provides for type C soil?

A. I haven't looked at it.

Q. Do you know the type of sloping that is required for type C soil?

A. I have a copy of the standards, and if I run into something like that, I just go review the book and do it how I need to do it.

Westrater's lack of knowledge regarding sloping requirements prevents him from being a competent person within the meaning of the standard. Therefore, Roberts was in violation of § 1926.651(k)(1).

The hazard presented by the violation of § 1926.651(k)(1) (Tr. 1780179):

> would be that due to weather conditions, rain, movement of the soil, things that could occur to change the conditions of the excavation. If you don't have that person there that is knowledgeable in the requirements, not only to see that the proper steps are taken to protect them from a cave-in, but also to have the knowledge to know what changing conditions are taking place, then there is a potential for a situation to occur where things have changed, the soil has changed the soil has moved or it is cracking or a potential cave-in is going to occur.

Roberts was in serious violation of § 1926.651(k)(1).

Citation No. 2

Item 1: § 1926.652(a)(1)

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(i) Excavations are made entirely in stable rock: or

(ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The Secretary charged Roberts with a willful violation of this standard. The Secretary's case rests in large part on the testimony of Richard Smith. Smith's credibility is questionable. Roberts protrayed him as a disgruntled former employee who lied to get back at the company for laying him off.

Richard Smith had heard rumors that Roberts was going to lay off some employees. Jerry Gehring, a vice-president for Roberts, testified that the company was being restructured and he confirmed that Roberts had made the decision to lay off Smith before the May 22 inspection (Tr. 407, 503). Rodney Smith testified that Richard Smith had said to him before the inspection that "if he was laid off, that he would get back to the company" (Tr. 332).

Westrater testified that the excavation had been shored the day before the inspection, and that he was planning to shore it the day of the inspection, only he had not gotten around to it yet (Tr. 373). Rodney Smith corroborated Westrater's testimony that the excavation had been shored (Tr. 273). Denton observed the metal shoring plates at the site (Tr. 147). He did not see the jacks used with the shoring plates (Tr. 157). Westrater stated that he kept the jacks in his van (Tr. 379).

According to Westrater, when Denton asked to speak to Richard Smith, Westrater spoke to Smith (Tr. 371-372):

> I said, "Richard," I said, "the OSHA inspector wants to talk to you."
>
> He said, "What's he want?"
>
> I said, "I don't know. He just wants to ask you some questions about the hole." I said, "The hole was shored yesterday when we was in it," because Richard wasn't up there yesterday. He was down the street flagging.

This testimony is in direct contradiction with that of Richard Smith's (Tr. 36):

> Smith: [Westrater] told me to tell [Denton] that we usually use shoring. And, we didn't usually do it, but I went ahead and said that, you know, in order to keep my job. I had to say that.
>
> He just told me, we usually use the shoring . . .

He told me to tell him that we were going to use [metal shoring plates] and that we had been using them.

Q. Had you, in fact, been using them the day before?

Smith: No.

Richard Smith stated that after the inspection, Westrater came up to him and said, "You didn't do me any good. We still got fined" (Tr. 545). Denton acknowledged that he told Westrater that Roberts would be fined (Tr. 575).

The Friday after the Wednesday inspection, while handing out paychecks, Westrater told Smith that he was being laid off. Westrater testified that Smith responded, "Well, I'm going to start some trouble" (Tr. 411). Richard Smith denies making this statement (Tr. 495). Rodney Smith was present on this occasion. He testified that Smith "said that he busted his butt for the company, and he would get back at the company (Tr. 332).

The following Monday, Richard Smith called Gehring to see if he might get his job back. According to Smith (Tr. 60-61):

> [Gehring] said to me, "Well I watched you all winter," and he says, "you didn't do a thing for us." He says, "You didn't work for us."
>
> And, I told him, "I broke my back for that company." And I said, "I've got to do what I've got to do."
>
> And when he said I didn't work for him, this just hit me the wrong way, and I thought it was best to do the right thing and call OSHA and tell them the truth. I figured if that's the way they're going to treat me, then I might as well tell the truth.

Richard Smith then called Denton and retracted his interview statement that Roberts had been using shoring. Smith now told Denton that there had been no shoring used in the trenches Denton inspected: "Most of the time, none of us there ever had used shoring" (Tr. 39).

Denton testified that the alleged violation of § 1926.652(a)(1) was classified as willful because Roberts used no protective system in the excavation. He conceded that his only evidence that Roberts had not been using any shoring was Richard Smith's post-lay-off statements (Tr. 241).

In making this credibility determination, an important fact must be kept in mind. Richard Smith himself admitted that he had lied on at least one occasion (Tr. 107): "I had

lied to an OSHA official. I didn't think it was right to be laid off right after that happened when I know there was somebody there that had less seniority than me."

Based upon the record, Richard Smith's testimony regarding Robert's failure to shore the excavation will be given no credence. The testimony of Westrater and Rodney Smith that the excavation was shored the day before the inspection will be accepted as fact.

The Secretary's evidence on this issue has narrowed then to what Denton observed on the morning of May 22. It is undisputed that Rodney Smith and Richard Smith were in the unshored trench. Westrater stated that work had not yet begun and that he was unaware that the employees were in the excavation (Tr. 382, 387). He testified that he had not instructed the employees to go in the excavation (Tr. 387). But this is not the same as instructing them not to enter the excavation in the absence of shoring. In bringing the tools to the excavation, the two Smiths appear to have been following normal procedure. Roberts was in violation of § 1926.652(a)(1).

The violation was alleged as willful. "A violation of the Act is willful if it was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety.' *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1595, 1984-85 CCH OSHD ¶ 27,456, p. 35,571 (No. 82-12, 1985)." *E. L. Jones and Son, Inc.*, 14 BNA OSHC 2129, 2133, 1991 CCH OSHD ¶ 29,264 (No. 87-8, 1991).

If Richard Smith's testimony regarding the shoring were credited, the Secretary could make a good case for the finding of a willful violation. Discounting Smith's testimony, however, removes any basis for a willful violation. Roberts was not exhibiting intentional disregard for § 1926.651(a)(1) or plain indifference to employee safety. Westrater intended to shore the excavation before work began in it. Roberts was lax in allowing the two Smiths to be in the excavation even briefly while it was unshored, but the violation does not rise to the level of willful.

> [W]hen a respondent is charged only with a willful violation and the evidence establishes a violation which is not willful, a nonserious violation may be affirmed but, ordinarily, a serious violation will not be. An exception to this rule exists when the issue of whether the violation is serious is tried by the express or implied consent of the parties.

Toler Excavating Co., 3 BNA OSHC 1420, 1421, 1975-76, CCH OSHD ¶ 19,875 (No. 2637, 1975).

In the present case, the violation of the cited standard presented the hazard of a cave-in. Cave-ins are notoriously deadly. There is no question that they often result in death or serious physical injury. While Roberts did not expressly consent to the trial of the issue of whether the violation is serious, the nature of the cited standard and the evidence of record implies consent. A company that specializes in pipeline construction cannot claim that it is unaware of the hazards created by failing to shore a trench excavated in type C soil. The violation is serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.,* 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.,* 1 BNA OSHC 1001, 1071-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

Roberts has a total of approximately 150 employees (Tr. 163). Roberts had been previously inspected three times under Indiana's state OSHA plan (Tr. 165). Roberts exhibited good faith in dealing with OSHA during and after the inspection. The gravity of all of the violations is severe. Trenching is one of the most potentially deadly activities that can occur at a worksite. Upon due consideration of the relative factors, the following penalties have been deemed appropriate for the violations:

Citation No. 1

Item	Penalty
1	$4,000.00
2	4,000.00
3	2,800.00
4	4,000.00
5	4,000.00

6	4,000.00
7	4,000.00

Citation No. 2

Item	Penalty
1	$4,000.00

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing decision, it is hereby

ORDERED: That the two citations be disposed of as follows:

Citation No. 1

Item	Standard	Disposition	Penalty
1	§ 1926.21(b)(2)	Affirmed	$4,000.00
2	§ 1926.100(a)	Affirmed	4,000.00
3	§ 1926.350(a)(4)	Affirmed	2,800.00
4	§ 1926.404(f)(6)	Affirmed	4,000.00
5	§ 1926.404(f)(7)(vi)(c)	Affirmed	4,000.00
6	§ 1926.651(c)(2)	Affirmed	4,000.00
7	§ 1926.651(k)(1)	Affirmed	4,000.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1926.652(a)(1)	Affirmed as serious	$4,000.00

James D. Burroughs

JAMES D. BURROUGHS
Judge

Date: December 14, 1992