UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. D.T. CONSTRUCTION COMPANY, INC., Respondent.	Docket No. 99-0147

Appearances: Gayle Green, Esq.
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For Complainant

Andrew Reinhart
Sinclair, Jackson, Reinhart & Hayden, LLC
Cannonsburg, Pennsylvania
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678 (1970) (the Act). Respondent's work sites in Central City, Cottagetown and Richeyville, Pennsylvania give rise to this matter. As a result of OSHA inspections, D.T. Construction Company, Inc., Respondent, was issued three citations on December 15, 1998 alleging willful, serious and other than serious violations of various construction safety, general industry and record-keeping standards in various parts of Title 29 of the Code of Federal Regulations (CFR). Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in Pittsburgh, Pennsylvania. No affected employees sought to assert party status. Both parties have filed post-

hearing briefs.

Jurisdiction

Complainant alleges, and Respondent does not deny, that it is an employer engaged in the installation of underground water and sewer systems. It is undisputed that at the time of these inspections Respondent was engaged in excavating and installing water and sewer lines in a number of locations in Pennsylvania. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act. Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Alleged Willful Violations

Citation 2, Items 1, 2 and 3
29 CFR § 1926.652(a)(1)

Citation 2 alleges three separate, distinct instances of violations of the standard at 29 CFR § 1926.652(a)(1). The standard requires that excavations greater than 5 feet in depth, in materials other than solid rock, be sloped, shored, sheeted, braced or otherwise properly protected against cave-ins.[1]

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[1] The standard provides:

> (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:
> (a)(1)(i) Excavations are made entirely in stable rock; or
> (a)(1)(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent

The citation alleges that Respondent was in violation of the standard at the following locations on the following dates: 1) Chestnut and Central Avenues in Central City, Pennsylvania, on or about September 10, 1998 (Item 1); and 2) River Avenue and Popular (sic.) in Central City, Pennsylvania, on or about September 9, 1998 (Item 2); and 3) an unidentified location in Cottagetown, Pennsylvania., on or about June 22, 1998 (Item 3).[2] It is alleged that the violation in each instance was willful. A penalty of $ 70,000 is proposed for each of the three alleged violations.

Citation 2, Item 1

The only alleged willful violation actually witnessed by the Compliance Officer (CO) is embodied in Item 1. The CO testified that he observed an employee of Respondent, Chris Leighy, working in an excavation on September 10, 1998. He photographed the scene. (GX-4, 5, 6) The CO stated that he measured the depth of the trench in "four or five" locations using a 25-foot steel tape measure. He recorded depths on one side of the trench to be between 6' 4" and 6' 7" and 4' 6" on the other side. The trench was benched back approximately 1 foot on the shallow side. (Tr. 120, GX

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person provides no indication of a potential cave-in.

[2] In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew, or, with the exercise of reasonable diligence could have known, of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

The cited standard unequivocally requires cave-in protection for employees working in all excavations. The following sub-parts, (i and ii) create exceptions for excavations "made entirely in stable rock" or for those "less than 5 feet. . . in depth. . . ." The Commission has held that the principle regarding allocating burdens of proof regarding exceptions is applicable to the cave-in protection requirements imposed by this particular standard. *C.J. Hughes Construction, Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996). Consequently, once the Secretary showed that Respondent's employees worked in an excavation, the standards in Subpart P are applicable under the scope and applicability provisions of 29 CFR § 1926.650(a), and the existence of the violative condition is established unless rebutted. Where, as here, both parties have introduced much evidence as the depths of the trenches involved and the evidence is sufficient enough to base factual findings as to actual depth, resolution of the issue is based on the merits and relative weight of the evidence.

-4, 9) The trench was equipped with no shoring, sheeting or bracing of any kind. (Tr. 131) A trench box arrived at the site some 20 minutes after the CO arrived. (Tr. 123) An area near a manhole measured 7' to 7'2" in depth. (Tr. 120-24) Based upon a sample taken by the CO and analyzed by OSHA's laboratory, the soil was found to be "sandy clay" classified as Type B. (Tr. 126-31, 514-18; GX-9, 10). The CO described the sides of the trench as showing cracks and sloughing soil (Tr. 122-23, 136; GX-8) The Secretary's soils expert described a photograph as showing a fracture or fissure which indicated weakened strength or instability. (Tr. 519)

Respondent does not directly deny that the violation existed or point to evidence conflicting or rebutting that of the CO. Rather, primarily through cross-examination of the CO, Respondent appears to urge the conclusion that the Secretary has not made out a *prima facie* case of reliable evidence. For the following reasons, I credit the testimony of the CO and find sufficient reliable evidence to fulfill the Secretary's burden of showing that the violative condition existed.

Respondent's brief cannot be relied upon for a fair statement of the case. While it is accepted that a brief should set forth arguments in the submitting party's favor, it should set out the evidence accurately. Respondent's brief does not do so.

For example, Respondent deals with the CO's measurements of the trench by first pointing out that "the CO admitted that any bending of the tape measure could increase the depth of the trench being measured. (Tr. 309)." (Resp. brief, p. 15) The portion of the transcript cited by Respondent indeed contains the CO's agreement with Respondent's counsel on cross-examination that "if a tape measure was bent, it could affect the measurements" even to the degree that "it could" result in an improper measurement showing a trench to be over 5 feet deep when, in actuality, it was not deeper than 5 feet. (Tr. 309) Respondent's conclusion or suggested inference from such testimony that the measurements taken with the steel tape in this case were perhaps incorrect does not stand when compared to the CO's direct testimony, which raises just the opposite inference, *i.e.*, that even though a steel tape such as his could bend "if you bend it on purpose," it did not, in fact, bend in this case while he took his several measurements. (Tr. 124-25) In a similar fashion, Respondent seeks to make much of the CO's direct testimony that some "30 to 40 seconds" elapsed between the time he first saw an employee in the trench and the time he asked a foreman to remove the employee from the trench. (Resp. brief, p. 15; Tr.132-33, 306-07) but does not acknowledge the CO's explanation that

even though he perhaps should have had the employee out of danger as soon as possible, "sometimes employers get mad" when others order their employees about and that he responded in the "quickest [he] could to get that employee out of that trench." (Tr. 307)

Respondent's arguments regarding the use or non-use of "cut sheets" and "as-built" sheets is comparable.[3] Indeed, a careful analysis of Respondent's post-hearing brief regarding "cut-sheets" reveals significant misstatements as well as much hyperbole.

Respondent seeks to diminish the evidentiary weight of the CO's measurements by arguing that the CO relied on "cut sheets" to arrive at his trench depth figures, that "cut sheets" are less accurate that "as-builts," that the CO did not even know what "as-builts" are, and that the Secretary did not introduce into evidence the "as-builts" "from any of the subject trenches." (Resp. brief, pp. 15-16) Aside from the fact that the CO stated that he did not know anything about "as-builts," the remaining arguments are misleading. Respondent's brief states "[t]he CO testified that he also determined the depth of the trench through the use of "cut sheets." (p. 15). The actual testimony, however, shows that the word "determine" came from counsel, not the CO. The relevant dialogue is as follows:

> Q Did you do anything else to determine the measurement of this trench?
> A I looked at the cut sheet for this area.
> Q Okay. Did you discuss the cut sheet measurement with anybody? How did you find out where to look on the cut sheet?
> A Don Gindlesperger, the inspector.
> Q And was the cut sheet measurements similar to what you found?
> A Similar, yes. I believe they were a little bit deeper than what I had, if I remember correctly.

Respondent's brief (*Id.*) also cites to the following testimony:

> Q Are you saying we have to take your word [regarding measurements] on that?
> A I am saying that's what the depth of that trench was.
> Q But we are forced, out of necessity, to take your word for that, true?

[3] "Cut sheets" (GX-33) are prepared by surveyors before a trenching job starts, and "as-built" or "manhole" sheets (GX-34) are made by taking actual measurements of manholes after a project is done. (Tr. 609-10, 615-16)

A That and the cut sheets.
Q You said the cut sheets, though, are not the ultimate indicator or will not confirm the depth of a trench, true?
A They would confirm the grade of the pipe, the level of the pipe.
Q Didn't you testify earlier that a cut sheet will not confirm the depth of a trench?
A That's true. At times, that's true.
Q So, that's not true that the cut sheets will confirm in every instance the depth of a trench?
A The cut sheets would confirm the bottom of the pipe, the depth of that pipe; the bottom of that pipe in that trench.
Q But, it won't confirm the depth of the trench, will it?
A Normally, it would. It would only be on a rare occasion that it wouldn't.
Q Only on a rare occasion will a cut sheet not confirm the depth of a trench?
A From what I understand from cut sheets, yes.
Q And your understanding of cut sheets comes solely from Don Gindlesperger? Or do you have information on --
A On this job site, Don Gindlesperger mainly. Yes.
Q So, on this job site, your information from Don Gindlesperger is that in the majority of instances the cut sheet will confirm the depth of all the trenches?
A Generally speaking, yes.

The above dialogue is not fairly portrayed in Respondent's brief. It would have been more accurate to state that the CO's testimony raises the inference that he relied, at least in part, on the cut sheets to arrive at a conclusion as to the depth of the trench. In its brief, Respondent makes the factual statement that "work conditions may cause the cut sheet depth to be several feet different from the depth indicated on the final "as-built." There is some testimony that at least in one place the trench was actually dug 1.8 feet deeper than that shown on the "cut sheet." (Tr. 617-19).[4] The statement that the difference could be "several feet" is supported by no citation supplied by Respondent. There is testimony, however, from Respondent's most senior manager to that effect. (Tr. 696)

Based on the above, I find credible and unrebutted the CO's testimony as to the configuration

[4] At this particular point the "cut sheet" showed a depth of 7.6 or 7.86 feet and the actual depth was 9.40 feet. (Tr. 619-20)

of the trench and reject Respondent's arguments that his testimony was unreliable. I thus find that the violative condition existed as cited.

I also find that Respondent's knowledge of the existence of the violative condition has been established, given that the trench was in plain view and Respondent's foreman was right beside the trench. (Tr. 133)

There is no dispute that at least one employee was exposed by working (and being photographed) in the unprotected trench.

Under Commission precedent, a violation is serious if the probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Div.*, 8 BNA OSHC 1055, 1060 (No. 76-3942, 1980). Certain conditions, such as unshored trenches, pose hazards which are generally recognized to likely result in serious injuries. As discussed *infra*, at least twice in the past trenches dug by Respondent had collapsed. Respondent was fortunate that the collapses resulted in no fatalities and arguably no serious injuries. The essential nature of collapses in trenches over 5 feet deep is such that serious injury or death is the likely result. The Commission will not ignore the obvious. For example, the Commission has held serious violations to have been demonstrated under circumstances where the hazard was a fall of 10 to 15 feet. *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980); *P.P.G. Industries, Inc.*, 6 BNA OSHC 1050 (No. 15426, 1977).

The Secretary also alleges this violation to have been willful.

In a recent decision the Commission identified the employer's state of mind as the "focal point" for finding a violation willful. The Commission stated that there are two ways in which the Secretary can establish willfulness. First, the employer "knows of the legal duty to act," and knowing an employee is exposed to a hazard, nonetheless "fails to correct or eliminate the hazardous exposure." Second, the employer's state of mind was "such that, if informed of the duty to act, it would not have cared." *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No.98-0752, 1000)(*Branham*). Under the facts of this case, the violation was properly classified as willful.

Evidence that an employer knew of a an employees exposure to hazardous conditions but disregarded it and did nothing to eliminate the condition is directly within the Commission's precedent

and supports finding that the violation was willful.[5] Respondent's foreman in this instance not only allowed but watched as an employee worked in a trench over 5 feet deep on a work site at which there had been a trench collapse the day before in the very same trench. The same foreman had supervised the work the day before. Despite the collapse the day before, Respondent had done no testing of the soil and did not have trench shoring equipment or supplies at the site the following day when employees were, once again, in the trench.. In light of the general danger of trenching, but especially in light of the events of the previous day, I find that Respondent's conduct on September 10, 1998, demonstrated an employer's state of mind "such that, if informed of the duty to act, it would not have cared." *Branham*. I thus find that the violation was willful. Accordingly, Citation 2, Item 1 is affirmed as a willful violation.[6]

Citation 2, Item 2

Item 2 of Citation 2 alleges that a trench at River Avenue and Popular (sic.) in Central City failed to meet the requirements of the standard on or about September 9, 1998. The date of the alleged violation, September 9, 1998, is the day before the inspection. It is undisputed that a trench collapse occurred on that date.

Again, there is no disputing that the standard is applicable. In the absence of an inspection and measurements made by a CO, the Secretary relies on secondary evidence to show that the trench was at least 5 feet deep and was not shored, sloped, sheeted or braced as required by the cited standard. An employee who worked in the trench described a manhole excavation as approximately 8 feet by 10 feet. He described its walls as "mostly vertical" except that the wall directly under the excavator was "slightly undercut." (Tr. 17-18) He stated that he was almost 6 feet tall and agreed that

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[5] The Secretary cites "*Kirila Contractors, Inc.*, 18 OSHC BNA 1188 (1996)" (Sec. brief, p. 8) and "*Secretary v. E & R Erectors, Inc.*, 17 BNA OSHC 1028 (1994)" (Sec. brief, p. 13). The decisions cited are those of two Administrative Law Judges. While the decisions are informative, they are of no precedential value. *Leone Constr. Co.*, 3 BNA OSHC 1979 (No. 4090). Moreover, the citations should have included parenthetical notations that the references were to Administrative Law Judges' decisions as well as the Commission docket numbers. Rule 12(a)(2), 29 C.F.R. § 2200.12(a)(2).

[6] The penalty assessment for Items 1-3 is set out *infra* at the conclusion of the discussion relating to Item 3.

the walls of the trench were "considerably over" his head, estimating its depth as 10 feet or 12 feet.[7] He stated that he and another employee worked in the trench and that it was not shored. (Tr. 20-21) He described a partial trench collapse from which other employees dug him out. (Tr. 21-25) The employee, when freed, drove himself to a local hospital. The foreman on the job, who was operating an excavating machine, agreed that the trench was 6 to 8 feet deep and that it had one vertical side and one side with "a little bit of a slope." (Tr. 540-41) There was no shoring of any kind in the trench. (Tr. 541) The dimensions of the trench and the lack of shoring was also testified to by two independent witnesses. (Tr. 422-23, 430, 438, 630) There was water in the trench. (Tr. 18-22, 424-25) In a statement given to the CO and signed by the foreman, he indicated that on the day of the cave-in he realized that the trench was hazardous and told the employees working in it "to watch out, be careful." He also told the men in the trench that he would "yell out" if something "was wrong." (Tr. 544) He agreed that the trench did not meet OSHA standards. (Tr 545)

On this unrebutted evidence, I find that the trench into which employees entered and worked and which collapsed on September 9, 1998 was at least 5 feet deep. I also find that even if the soil was not Type C soil[8] as categorized by the CO (Tr. 114), the evidence does not show that the excavation was "made entirely in stable rock" or that it was "less than 5 feet in depth and examination of the ground by a competent person provide[ed] no indication of a potential cave-in." Thus, Respondent's failure to have in place "an adequate protective system designed in accordance with paragraph (b)," constitutes a violation of the cited standard. Accordingly, Respondent was in violation as alleged in Item 2 of Citation 2.

The fact that at least one employee was exposed to the violative condition is not disputed. Nor is there any issue as to employer knowledge, inasmuch as the foreman who was present operating the excavator at the trench testified that he knew that the configuration of the trench did not meet

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[7] The transcript of proceedings indicates that this witness described the trench as " I'd say it was maybe 8 foot wide, 10 foot wide and 12 feet deep, maybe 10 foot long - in or around there." (Tr. 17). Having heard and observed this witness, I am of the opinion that he misspoke when he stated the length of the trench. He meant to say "maybe 10 foot deep. . ." The difference is minor.

[8] Type C soil includes "submerged soil or soil from which water is freely seeping...." See Part 1926, Subpart P, Appendix B, referred to by the excavation standards.

OSHA requirements. (Tr. 486, 496) Moreover, while there is some disagreement as to the precise nature and degree of the injury to the employee who was caught in the collapse[9], there is little or no room for doubt that he was working in the trench which a cave-in would likely produce a serious injury or death. It is only fortuitous if the particular injuries to the employee caught in the cave-in were not serious. Given the nature of trenching and cave-ins, in the Commission's experience, the violation is properly categorized as serious. Thus, I find that employee exposure, employer knowledge and the seriousness of the violation have been shown.

The willfulness of the violation is evident from the record. Respondent's foreman knew the trench did not meet OSHA requirements but went ahead with the work. (Tr. 486, 496). His actions constitute conscious disregard of the requirements of a standard. Even if it was based on his belief that the trench was "safe," he directed that the work be done despite knowing that it did not meet OSHA requirements. This is a deliberate violation of safety requirements. His opinion as to the safety of the trench does not serve to relieve Respondent of the consequences of having a foreman who directed work under circumstances he knew to be a violation of OSHA standards. Citation 2, Item 2 is thus affirmed as a willful violation.

Citation 2, Item 3

Item 3 of Citation 2 alleges a violation of the same standard at an unspecified location in Cottagetown, Pennsylvania, on or about June 22, 1998. The Secretary again relies on secondary

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[9] As with Item 1, Respondent's post-hearing brief primarily takes issue with a number of details of the injured employee's testimony, his motivation, and matters surrounding his filing of a worker's compensation claim. A close examination of this plethora of minutiae is unnecessary. While these details can surely affect an evaluation of a witness's credibility, in this case they do not alter the most basic factual findings relative to issues in this case which are corroborated by other witnesses.

Moreover, if called upon to make specific findings as to credibility, based upon the opportunity to observe the verbal and nonverbal behavior of all of the witnesses focusing on each subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements, as well as any confused or nervous speech patterns, I would find the testimony of both injured employees and the engineering company inspector to be credible. On the same basis, I would find the testimony of Respondent's top management official to be self-serving and suspicious at best.

evidence to support this alleged violation. As above, there is no dispute that the cited standard applies to Respondent's construction activities at the subject work site.

The employee who worked in the trench estimated its depth as 11 feet based upon his height and a measurement. (Tr. 350-51) He described the soil as "solid clay" but progressing through fill or backfill to a point where "pieces [of the trench wall] were starting to drop in." (Tr. 351) The walls of the trench were vertical with benching close to the surface making it "a little bit wider on top." (Tr. 352) Another employee, a brother of the person in the trench was present at the time. He described the trench as being 10 or 11 feet deep with benching at the top for a "couple of feet on each side" and vertical walls for the remaining 8 feet. (Tr. 403-04). This employee said he warned his brother, who had worked in the trench all morning, that the soil was "no good" and was "backfill." (Tr. 406) He also described the collapse of the trench which buried his brother up to his waist. (*Id.*) The independent inspector for an engineering company described the walls of the trench as vertical up to about 1 or 1 ½' above the head of the employee working in it. (Tr. 609) He testified that the soil was "unstable" and "wet" and noted that the trench had been dug through an area that was formerly a "strip-cut area." (Tr. 608) Respondent concedes that its foreman at the site was told by the employee working in the trench that he "didn't like the ditch" (Tr. 355, 382) There is no dispute that the trench had no trench or other cave-in protection when the employee worked in it.

Respondent presented no evidence to contradict the foregoing testimony, but, once again, apparently takes the position that the Secretary failed to present a *prima facie* case. Respondent's reliance on this judge's opinion in *Scafar Contracting, Inc.*, No. 97-0960, (ALJ, 8/4/98) is misplaced. In this case, as opposed to *Scafar*, there is no evidence of any kind inconsistent with a finding that the depth of the cited trench was well over 5 feet and that even if it was benched at some point that at least the bottom 6 feet consisted of vertical walls. Respondent has not shown the testimony any witness to be unreliable. I find that all of the reliable evidence points in only one direction - that the trench did not meet the specifications of the cited standard. This is far more than the speculation, assumptions and inferences relied upon by the Secretary and rejected in *Scafar*. Even without direct observation or measurement by an OSHA official the violative condition in this case has been established by a preponderance of the reliable evidence on this record. As in the preceding items, I again find that the likely result of a trench collapse is serious injury or death despite the fact that the

injury caused by the partial collapse in this instance might not have risen to the level of serious under the Act.[10] That it did not do so is mere happenstance.

This violation was also properly classified as willful. The facts show that a supervisor, fully aware that the situation was dangerous, nonetheless directed work to continue in the trench. Although Respondent disputes the willful characterization because it had trench boxes ordered ahead of time which "were to be on the site" by the time of the collapse. (Resp. brief, p. 21). This position is rejected. The trench collapse clearly occurred under the supervision and control of a foreman who made a conscious, intentional decision to direct an employee into a trench he knew was dangerous and non-complying. Thus, while not finding the foreman to have an intent to injure employees, I nonetheless find that he acted intentionally in violating a known OSHA requirement. Thus, the violation is willful as alleged.

I also reject Respondent's claim that the actions of its supervisor were unforeseeable and unpreventable (Resp. brief, p. 21) is rejected. As with the other violations, a foreman on the site directed the employee in trench with full knowledge of the danger of the situation. Unrebutted testimony establishes that operations had been going on for some time in trenches over 5 feet deep at the site. Trench boxes were not present on the site on the day of the collapse. Respondent notes the evidence that the independent engineer had asked the foreman about the lack of trench boxes (Tr. 606) and that the foreman had asked higher company officials to supply trench boxes for the site. (Tr. 484) Even if true, that Respondent's highest management official did not know that work was progressing under these conditions is no defense to either the violation or its classification as willful. The knowledge of the foreman and his action in permitting work to be done in trenches known to be dangerous are imputed to Respondent because there has been no assertion or showing that Respondent's supervisors received adequate safety training. In fact, the record contains no evidence that supervisory personnel were properly trained or supervised in trenching safety, or that Respondent took any reasonable steps to detect and correct safety violations committed by its supervisors.[11] A

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[10] See footnote 8, *supra.*

[11] Testimony of Respondent's highest official to the effect that he had "let go" three employees for safety violations is rejected as not credible.

number of employees testified that they worked in unshored trenches repeatedly and that they knew of no instance where a supervisor (or any other employee) was disciplined for doing so. The hallmarks of an effective safety program have not been shown to exist. Accordingly, Item 3 of Citation 2 is affirmed as a willful violation.

Turning to the assessment of appropriate penalties for these items, the Commission has long held that in determining appropriate penalties for violations due consideration must be given to the four criteria under section 17(j) of the Act, 29 U.S.C. 666(j). Those factors include; the size of the employer's business, the gravity of the violation, and the good faith and prior history of the employer. *Nacirema Operating Co., Inc.*, 1 BNA OSHC 1001 (No. 4, 1972). In this case, the Secretary seeks the statutory maximum of $ 70,000.00 for each item.

The Area Director of the Pittsburgh OSHA office testified in support of imposing the maximum penalties by referring to OSHA's Field Inspection Reference Manual (FIRM). He stated that under FIRM guidelines, Respondent would have been allowed no more than a 30% reduction (from $70,000). He noted that he was permitted to deviate from the guidelines where "warranted to achieve appropriate deterrent effect." (Sec. brief, p. 45) The Area Director did so considering all of the violations together. (Tr. 574). Several factors, however, mitigate against assessing the maximum penalty for each of the three violations.

There are two constants in the penalty considerations for these three items. One constant s Respondent's size. It is a small employer with 30 to 40 employees. The other constant is Respondent's history. An employer's "history" as an element of penalty assessment consists of its prior OSHA violations. *Orion Constr., Inc.*, 18 BNA OSHC 1867, 1868 (No. 98-2014, 1999); *D. & S. Grading v. Secretary*, 899 F2d 1145 (11th Cir. 1990).[12] Until the OSHA inspection of September 10, 1998, which gave rise to all three alleged willful violations, Respondent had never undergone an OSHA inspection. Thus, when the three willful violations occurred, Respondent had a history of no prior violations.[13] While separated in time over a span of some six months, the three

[12] OSHA's FIRM would consider prior violations and prior citations. (FIRM, IV.C.2.i.(5)(c)). The appropriateness of considering prior alleged violations is, however, not at issue here.

[13] Nor were there any prior citations.

violations were the subject of one citation. Respondent was fairly put on notice by OSHA of all three wilful violations at one time. It is basically unfair to consider violations which occurred after the first cited instance as part of a respondent's "history," as the Secretary did in this case. (Tr. 680) Accordingly, in considering the penalties for all three willful violations, I consider Respondent to have no history of prior violations.

The concept of "gravity" includes consideration of such elements as "the number of employees exposed, the duration of the exposure, the precautions taken against injury and the likelihood that any injury would result." *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). In each item, one or two employees were exposed for about one-half day. In the two collapse instances, one or more additional employees jumped into the trench to assist the partially buried worker. In addition, in each of the three incidents, little or nothing was done to protect the employees. Having another employee standing at or near the edge of the trench ready to "holler" at the employees below should the walls begin to give way is vastly inadequate. Having a trench box at the site but not using it (Item 1) or having boxes on order but not yet delivered to the site (Item 3) is of little recompense to persons buried beneath a collapsed trench wall. Respondent's asserted safety program was of virtually no effect. Thus, in each of the three essentially no effective measures were taken. The gravity of the hazard in all three items, arising from the failure to properly protect employees in a trench over 5 feet deep, is severe. As discussed above, Respondent is very fortunate indeed to have had two trench collapses without death or grievous injury resulting.

Respondent's lack of "good faith" toward employee safety and health is the single most salient feature to be considered under the facts of this case. There are cases, such as this, where one penalty factor far exceeds the others in importance. While the Commission has noted that the gravity of the violation is generally "the primary element in the penalty assessment," it also recognizes that the factors "are not necessarily accorded equal weight." *Id.* In this regard, the Area Director's testimony is significant. He stated, "the disregard for employee's safety and health was . . . compelling." (Tr. 574) Even though Respondent is considered to have had a "clean slate" at the time of the earliest of the three violations, June 22, 1998, it is evident that Respondent condoned taking short cuts and rushing to do the job knowing that trench boxes were on order but not yet in place. It is the two subsequent violations which are particularly appalling. This record shows that

Respondent did virtually nothing different in its trenching operations after having had a trench collapse in June, 1998. Even more astounding is the fact that Respondent took no further precautions after its second trench collapse on September 9, 1998. The third violation, coming on the heels of two prior trench collapses while performing essentially the same operations, demonstrates the highest possible degree of willfulness. Respondent's platitudes and commensurate failure to take effective measures after not one but two trench collapses eliminates any possible finding of a good faith attempt to comply with the provisions of the Act. For these reasons, I find that while the maximum statutory penalty is not appropriate for the earliest violation, it is so for the latest. Based on the above, I find that a penalty of $10,000 is appropriate for Item 3, that a penalty of $25,000 is appropriate for Item 2, and that a penalty of $70,000 is appropriate for Item 1.[14]

Alleged Serious Violations

Citation 1, Item 1a
29 C.F.R. § 1926.651(k)(1)[15]

This item alleges that Respondent violated the cited standard at three work sites in Central City, Pennsylvania, on September 9 and 10, 1998 and October 1, 1998 and one in Cottagetown, Pennsylvania, on or about June 22, 1998, and one in Richeyville, Pennsylvania, on or about October 9, 1998.

This item is vacated in its entirety for the following reasons.

The Secretary argues, in essence, that the existence of violative conditions regarding these trenches establishes that daily inspections by competent persons were not made. She also points to

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[14] The same penalty factors apply to all further penalties assessed in this case.

[15] The cited standard, 29 CFR § 1926.651(k)(1), states:

> 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 testimony of several of Respondent's employees, including foremen, that they did not do any soil testing. The Secretary's argument is specious. The existence of violative trench conditions means only that the requirements of the standard requiring adequate cave-in protection were not met and raises no reasonable inferences as to inspections or soil testing. Moreover, the Secretary has not established that the trenches were not visually inspected daily, and, if they were, whether the inspections were conducted properly. Finally, the Secretary has not established the qualifications, or lack thereof, of those who might have done such inspections. In sum, the Secretary's leap in logic from the conditions that existed to the conclusion that the trenches were not inspected simply does not follow and is, accordingly, rejected.

Citation 1, Item 1b
29 C.F.R. § 1926.20(b)(1)[16]

It is alleged that as to each of the work sites in Central City and Cottagetown, Respondent did not have or carry out appropriate safety programs.

According to the CO, Respondent's employees consistently stated during interviews that they had not had any safety training or attended any safety meetings. (Tr. 195) Other reasons presented by the Secretary in support of this alleged violation are that appropriate safety equipment was not always available, that soils were not tested, that violations were in plain view, and at least one foreman had worked in a violative trench and that Respondent had had two trench collapses. (Sec. brief, pp. 32-33) Respondent, on the other hand, points to the testimony of employee witnesses who testified that they were shown how to do their job duties by more experienced employees and foremen and that they were told to work safely. Moreover, Respondent argues that such specific testimony rebuts the CO's testimony as to what employees "unanimously" had told him. Respondent maintains that the CO's testimony, without identifying employees who made such statements, is insufficient to carry the burden of proof as to the alleged violation. I disagree. The CO specifically stated that the employees he interviewed "unanimously" denied having had safety training. Moreover,

[16] The cited standard, 29 CFR § 1926.20(b)(1), provides:

> It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

even if fully credited, the evidence from employees, foremen and the company's senior official that employees were shown how to accomplish tasks and told to work safely does not comprise evidence that Respondent, in fact, had a safety program as contemplated by the cited standard. The evidence in this case, even taken in the light most favorable to Respondent, shows that, at most, any safety information or instructions imparted to employees was haphazard, unorganized and serendipitous. Respondent's most senior manager described Respondent's approach to safety as "[t]here is a standing policy...Everybody knows the policy, they know the drill, they know the safety precautions, it's passed on through the foremen and the rest of the workers." (Tr. 682, similarly, Tr. 687). Such an unorganized, unplanned approach does not constitute a "program." The alleged violation is affirmed.

The violation is serious. An employer's leaving safety training to happenstance means, perforce, that some employees might get good training, others might get mediocre training, and still others might get no training. An organized program helps ensure that all employees get safety training in the subjects which affect them in their particular jobs, while the lack of a program makes a statement to employees that safety is not of great concern to the employer, even if some general statements about "safe working" have been made. A stated, organized commitment to safety exemplified by an established safety program effectively demonstrates to employees their employer's commitment to safety. Accordingly, I find the failure to have such a program to be a serious violation. The Secretary proposed a penalty of $ 2,500 for Items 1a and 1b together. Having vacated Item 1a and affirmed Item 1b, I conclude that one-half of the total proposed penalty is appropriate for Item 1b alone. Further, for all of the reasons previously discussed, the penalty as proposed by the Secretary is appropriate. A penalty of $ 1,250 is therefore assessed for Item 1b

Citation 1, Items 2a and 2b
29 CFR § 1926.54(b) and .54(d).[17]

[17] The cited standards, 29 CFR. § §1926.54(b) and .54(d), provide, respectively, "[p]roof of qualification of the laser equipment operator shall be available and in possession of the operator

It is alleged that Respondent failed to comply with two requirements regarding the use of lasers at the Central City, Pennsylvania, work site on or about September 10, 1998.

Respondent does not directly deny the facts constituting the violation alleged in Item 2a, arguing only that the Secretary failed to fulfill her burden of proof in that "employee exposure is speculative." Similarly, as to Item 2b, Respondent maintains only that the CO's admission on cross-examination that the photographs of the site "do not indicate that the laser is actually in use" fails in the same manner. (Resp. brief, p. 9) Both arguments are rejected.

The use of a laser in the process of trenching and laying pipe is well established on this record. (Tr. 13, 63-64, 76-77, 110, 122, 138, 462, 614, 633; GX - 5, 6) Respondent does not directly challenge the CO's description of the lack of laser placards or his description of the use of lasers for each 13-foot section of pipe. (Tr. 140-41). The claim that the record does not establish use of lasers is clearly contradicted by the evidence of record. Further, Respondent's argument that "the Secretary's evidence concerning employee exposure is speculative," is not sufficient in law. Under well established Commission precedent, in order for the Secretary to establish employee exposure to a hazard, she must show that it is reasonably predictable, either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003-4 (No. 504, 1976). Under this precedent, the Secretary need not have evidence of actual employee exposure to the hazard created by a violative condition. Rather, it is a sufficient showing of exposure if there is evidence, or a reasonable inference, that employees are, have been, or are likely to be within the zone of danger.[18] In this case, having a laser operating very frequently in areas where employees are working and moving about makes it reasonably likely that entry into the zone of danger will occur. Both alleged violations are affirmed.

The hazard in having lasers operated by persons not having proof of their qualifications "available and in possession of the operator at all times," as required by the standard at 1926.54(b), escapes both logic and the evidence on this record. The violation of a standard, however, raises the

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at all times," and "[a]reas in which lasers are used shall be posted with standard laser warning placards."

[18] Respondent makes the very same argument in regard to numerous items. The argument is rejected for the same reasons without repetition of this rationale.

legal presumption that a failure to comply will create some hazard. Perhaps, as with driver's licenses, having such documentation in the possession of the operator might deter non-licensed operators from using lasers. The hazard created by a failure to comply with this standard, described by the CO as employee exposure to laser energy leading to eye damage, has no connection to what is or is not in the operator's pocket or wallet at the time. Accordingly, I affirm the alleged violation in Citation 1, Item 2a as a *de minimis* violation because there is no evidence that it has any direct or immediate relationship to employee safety or health and the"the hazard is so trifling that an abatement order would not significantly promote the objectives of the Act." *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991).

Item 2b is another matter. In the absence of placards advising other employees that a laser is in use, it is possible for a worker to inadvertently place himself in a position of looking into the laser thus exposing himself to possible eye damage. There is no reliable evidence on this record that severe injury or death could possibly occur were this to happen. Nor is this a hazard, such as trench collapse, where the Commission would find severe consequences to be apparent. I therefore conclude that the violation is not of a serious nature. This item is affirmed as an other-than-serious violation. I also conclude, considering the frequent use of lasers and the few number of employees in the trenches when they are used, that a penalty of $250 is appropriate for this item.

Citation 1, Item 3
29 CFR § 1926.100(a)[19]

This item alleges that on or about October 9, 1998, an employee of Respondent at the Richeyville site was installing water pipe while not wearing a hard hat.

The Secretary maintains that the standard applies because the construction at which Respondent's employees worked exposed them to the dangers of falling objects, including pieces of pipe, as well as rocks, dirt and tools. The CO stated that he observed an employee not wearing a hard hat bent over working in a trench. He noted that the employee did not even have a hard hat in

[19] The cited standard, 20 CFR § 1926.100(a)(1), 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 shock and burns, shall be protected by protective helmets.

his possession. Former employees testified that they did not generally wear hard hats while working in trenches and that Respondent did not insist that they do. Respondent points to the testimony of a foreman to the effect that he stressed the use of hard hats and that the employees " had hard hats all the time." Respondent argues that since the CO testified that he may not have been wearing a hard hat during the inspection, his citing Respondent for this alleged violation "is another example of the CO's arbitrary and capricious enforcement of his interpretation of OSHA regulations, inasmuch as every person on a construction site not protected within a machine cab is at risk for possible head injury, and as such the CO violated the very rule for which he cited the employer." Once again, Respondent addresses the CO's actions and motivations without showing unfair or prejudicial enforcement. Indeed, in this instance, Respondent's own argument concedes the applicability of the standard, the exposure to the hazard and the risks involved. It does not deny the alleged violation either. For the reasons previously stated, I find the CO's testimony to be credible and supported by and consistent with other credible evidence of record. The violation cited in Citation 1, Item 3 is affirmed as a serious violation, the proposed penalty of $1,250 is appropriate.

Citation 1, Item 4
29 CFR § 1926.251(a)(1)[20]

Instance a alleges that "a badly cut shackle was in use on one of the lifting bars" at the Central City site on or about October 10, 1998. The Secretary points to photographic evidence and the CO's description of lifting equipment with a damaged shackle. The equipment was in plain view of supervisors subjecting any employees in the area to the danger of falling concrete manhole sections. (Tr. 144) The CO described the possible injuries as broken bones or more serious injuries. (Tr. 148)

Instance b alleges a violation of the same standard in Central City on or about October 1, 1998. The CO testified as to the presence of defective equipment and took photographs of a 12 foot long alloy steel chain sling missing a hook at the end. (Tr.146, GX-11, 12) According to the CO, neither the foreman nor the employees present knew where the hook was. (*Id.*) He stated that the

[20] The cited standard, 20 CFR § 1926.251(a)(1), provides:

> Rigging equipment for material handling shall be inspected prior to use on each shift and as necessary during its use to ensure that it is safe. Defective rigging equipment shall be removed from service.

lack of a hook rendered the sling more likely to release the load, exposing employees in the vicinity or in the trench to the danger of falling loads. (Tr. 148-50).

Respondent claims that the Secretary presented no "conclusive evidence" as to the two cited instances. (Resp. brief, pp. 11-12). Respondent is incorrect. Based on the Compliance Officers's testimony as to his observations which I fully credit, both instances contained in Item 4 are affirmed. I conclude that the proposed penalty of $1,000 is appropriate.

Citation 1, Items 5a and 5b
29 CFR § 1926.251(a) and .251(b)(1)[21]

The Secretary alleges that accessories and slings used for lifting were not properly marked with their weight limits at the Central City site on or about October 1, 1998. The two cited standards are very similar in nature in that they require that lifting accessories and slings be marked or tagged to indicate their lifting capacity.

The CO's testified that two lifting devices at the site were identified as to capacity and were ready and available for use. This unrebutted testimony is sufficient to make a *prima facie* case for a violation of these standards, even without photographs or eyewitness accounts of the use of the devices. It is reasonable to infer that equipment generally used in the on-going operations which was available and ready to use was, in fact, used with the defects the CO found in that equipment and that employees were exposed to the hazards posed by the equipment. Respondent's claim that the evidence of employee exposure was "speculative" is rejected.[22] If an employee were to be hit by an object falling out of a sling, the likely result would be serious injury. Thus, the instances are serious.

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[21] Title 29 CFR §§ 1926.251(a)(4), provides:

> Special custom design grabs, hooks, clamps, or other lifting accessories, for such units as modular panels, prefabricated structures and similar materials, shall be marked to indicate the safe working loads and shall be proof-tested prior to use to 125 percent of their rated load.

and 29 CFR § 1926.251(b)(1) provides:

> Welded alloy steel chain slings shall have permanently affixed durable identification stating size, grade, rated capacity, and sling manufacturer.

[22] See note 18.

Accordingly, Items 5a and 5b are affirmed as a serious violations of the Act and the proposed penalty of $1000 is found to be appropriate.

Citation 1, Item 6
29 CFR § 1926.651(c)(2)[23]

The CO measured the depth of the trench at the Richeyville work site and found it to be over 4 feet deep. (Tr. 120) I find that his testimony of the depth of the trench is more reliable and credible than Respondent's oblique complaint that there was no depth measurement indicated in the photographs. I also find the CO's testimony more reliable and credible than that of Respondent's highest management official, who reasoned that the depth was not over 4 feet because the pipes were planned to be buried at a depth of 4 feet and Respondent generally tried to dig trenches at a lesser depth than that planned for. (Tr. 715-16) There is no dispute that no ladder or other similar means of exit were present for distances over 25 feet laterally. The Secretary has established the violation. Difficulty in getting out of a trench may well lead to serious injuries in the event of a collapse or other dangerous conditions. Also, employees climbing in and out of trenches without an effective means of egress are more likely to slip and fall. All employees working in the trench were thus exposed to the hazards. Thus, the violation is serious. Item 6 is affirmed and the penalty of $2500 proposed is found to be appropriate.

Citation 1, Item 7
29 CFR. § 1926.651(h)[24]

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[23] The standard at 29 CFR 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.

[24] The cited standard provides:

> Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation,

It is alleged that this violation occurred at the Central City work site on or about September 9, 1998, the day of one of the trench collapses. The standard requires that additional precautions be taken where employees are working in an excavation in which water has accumulated.

The Secretary relies on the CO's testimony noting that he "obtained the evidence (that wet conditions existed and that no additional precautions were taken) in talking with people that were at the job site on September 9, 1998 at the trench involving the collapse that [an employee] was involved in." (Tr 162) There is also direct evidence from that employee, who has been found to be credible, that the trench wall which fell was "wet and cracked" and that there was knee deep mud in the bottom of the trench. (Tr. 18-19, 62) The foreman's testimony at the hearing to the contrary was not credible, especially in light of his earlier deposition testimony that water was present. (Tr. 454-55) In regard to the terms of the standard, I note that while walls of a trench might be wet or damp without any significant accumulation of water, knee-deep mud is more than mere dampness. The presence of knee-deep mud raises the reasonable inference that a significant amount of water was present and, as discussed previously, there were virtually no cave-in protections in place. This evidence is sufficient to meet the requirements set down by the court in *Dakota Underground, Inc., v. Secretary of Labor*, 200 F.3d 564, 568 (8th Cir. 2000). I find that the Secretary has shown the existence of the violative condition by a preponderance of the reliable evidence of record, as well as employee exposure and employer knowledge of the condition. Citation 1, Item 7 is affirmed as a serious violation and the proposed penalty of $ 3500 is appropriate.

Citation 1, Item 8
29 CFR. § 1926.651(j)(2)[25]

> but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

[25] The standard at 29 CFR § 1926.651(j)(2) provides:

> 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

The CO testified as to his observations of the spoils pile at the Richieville work site on October 9, 1998 (Tr. 166, 170, GX 14, 15). He stated that they were approximately 12 inches high and contained stones about the size of a baseball. An employee was in the trench below without a hard hat and the condition was in plain view of foremen at the site. (Tr. 167)

Respondent maintains that there is insufficient evidence upon which to establish that the spoils piles presented a danger to employees in the trench. The CO's credible testimony, however, establishes that the pile was close enough to slough off into the trench and that they contained materials which presented a danger to those in the trench. Thus, a preponderance of the reliable, credible evidence of record shows that there were "excavated or other materials or equipment that could pose a hazard by falling or rolling into [the] excavation." The violation is serious in that falling materials, including stones the size of baseballs, hitting an employee from above are likely to result in serious injury. The item is affirmed and I find that a penalty of $1000 is found to be appropriate.

Citation 1, Item 9
29 CFR § 1926.652(a)(1)[26]

This item identifies two locations alleged to be in violation of the cited standard: Richeyville on or about October 9, 1998 (instance a) and Central City, on or about October 1, 1998 (instance b).

The cited instances relate to trenches other than the ones cited in the willful citation. In instance a, the Secretary relies on the CO's measurements while Respondent looks to its management official's memory and supposition that the job was to be a "4-foot bury. (Tr. 719-20) The CO's measurement, however, is insufficient to establish a violation. He measured the depth of the trench

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> prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

[26] The text of the standard is set forth in footnote 1.

from the bottom to the top of spoils piles on the side of the trench. (Tr. 169-70). He did not testify as to the specific heights of the spoils piles at the places where he took the depth measurements. The Secretary argues that the height of a spoils pile directly adjacent to the edge of a trench is to be included in measurements of the depth of the trench because "it contributes to the hazards associated with the trench's depth." (Sec. brief, p. 27). There is no legal support for this proposition. There are specific standards dealing with the hazards created by spoils piles or by additional anticipated loads. See, 29 CFR § 1926.651(j)(2) and 29 CFR. § 1926.652(a)(2). The correct measurement of the depth of a trench for purposes of the cited standard is the distance from the deepest part of the trench to the ground level. *Trumid Constr. Co. Inc.*, 14 BNA OSHC 1784 (No. 86-1139, 1990). The application of this standard requires that the Secretary show by a preponderance of the evidence that the cited trench was 5 feet or more in depth. The CO's measurements in this case do not demonstrate this, nor does any other reliable evidence. Accordingly, instance a is vacated.

Instance b refers to an excavation at the Central City site that was inspected by the CO on October 1, 1998. His testimony and photographs show an excavation containing a trench box which only partially supports the walls. (Tr. 176-79, GX 17, 18, 19). The CO measured the depth of the trench as "approximately 10 feet." (Tr 178). The CO's testimony as to the depth was credible, consistent with the phonographs and unrebutted, and Respondent's argument that there is "no evidence confirming the depth of the trench" is rejected. I find that the excavation was over 5 feet deep and lacked adequate cave-in protection in that the trench box in place did not cover the entirety of the trench. The evidence of employee exposure is, however, not persuasive. The CO relied on statements of two employees that "they were down there" without specifying whether they were in the protected or unprotected portion of the trench. Indeed, he conceded that the employees denied being in the trench outside the area of the box. (Tr. 181) In addition, the CO's reliance on boot prints on the bottom of the trench outside of the protected area is misplaced in light of his concession that the employees told him that the prints were put into the bottom at a time when the trench box was in a different position, one that afforded them protection at the time. (*Id.*) I find that a preponderance of the evidence of record does not support the conclusion that employees were in an unprotected area of the trench. Accordingly, instance b of item 9 is vacated.

Citation 1, Item 10
29 CFR § 1926.652(b)(2)[27]

This item refers to the same excavation as discussed in Item 9, instance b, above, that is, the excavation at the Central City site that was partially protected by a trench box. This item alleges that the trench box was not of the proper size or was not properly installed in that the 8-foot high trench box, having been installed in a 10-foot deep trench, allowed 22" of unshored, unsloped trench wall soil to extend above the sides of the box. (Tr. 186-188) The Secretary contends that the sides of the box should have extended at least 18 inches above the ground level. The CO identified the two employees who worked inside the trench box as those who were exposed to possible injuries such as bruises or broken bones if materials from the area of the wall above the top of the trench box had fallen into the trench. He described possible injuries ranging from bruises to broken bones and "perhaps even more severe injuries." (Tr. 188)

Respondent once again argues that the distance from the top of the trench box to the ground level cannot be determined merely by looking at the photographs in evidence (GX 18, 19) The argument is rejected in light of the CO's testimony that he measured the distance (Tr. 188) Respondent's further argument, that the CO did not personally witness employee exposure, is rejected based on the CO having been told by employees that they had been in the excavation laying pipe. This fact, coupled with their denial that they had worked in the unprotected area of the trench, necessarily raises the inference that they worked in the protected area where this violative condition existed. I find that the violative condition existed as alleged and that there was employee exposure to the hazard created by that condition. I also find that the soil falling on employees working below could result in injuries such as broken bones. The violation is thus affirmed as and without any indication as to the duration of employee exposure and upon considering the fact that a trench box was in place, a penalty of $1000 is appropriate. Accordingly, Citation 1, Item 10 is affirmed.

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[27] The cited standard provides;

> Option (2) - Determination of slopes and configurations using Appendices A and B. Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.

Alleged Other-than-serious Violations

Citation 3, Items 1a and 1b
29 CFR § 1904.4 and § 1904.5(b)[28]

The Secretary contends that Respondent failed to meet OSHA record-keeping requirements of section 1904.4 in two instances and of 1904.5(b) in one instance. A single other-than-serious violation is alleged with a proposed penalty of $7000.

Respondent does not dispute the alleged violations and argues only that the record demonstrates that the amount of the penalty proposed was an administrative error and should read $1000 for each instance. (Resp. brief, p. 26 Tr. 576) Respondent is correct as to the penalty amount, and, based upon the record, the violations are affirmed as other-than-serious violations and a penalty of $2000 is found to be appropriate. Accordingly, Citation 3, Items 1a and 1b are affirmed.

Respondent does not contest the violation alleged in Citation 3, Item 1b[29] for which no

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[28] The standard at 29 CFR § 1904.4 provides:

> In addition to the log of occupational injuries and illnesses provided for under §§1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and Health Administration Form OSHA No. 101. Workmen's compensation, insurance, or other reports are acceptable alternative records if they contain the information required by Form OSHA No. 101. If no acceptable alternative record is maintained for other purposes, Form OSHA No. 101 shall be used or the necessary information shall be otherwise maintained.

The standard at 29 CFR § 1904.5(b) provides:

> The summary shall be completed by February 1 beginning with calendar year 1979. The summary of 1977 calendar year's occupational injuries and illnesses shall be posted on form OSHA No. 102.

[29] Citation 3, Item 1b alleged a violation of the record keeping requirement at 29 CFR § 1904.5(b) which provides;

> The [annual] summary [of occupational injuries and illnesses for the

separate penalty was proposed. Accordingly, Citation 3, Item 1b is affirmed with no separate penalty being assessed.

Citation 3, Item 2
29 CFR § 1910.1200(e)(1)[30]

The cited standard requires that employers develop, implement and maintain a written hazard communication program and identifies the content of such a program. The CO testified that during his interviews with employees and management officials of Respondent, no one indicated the existence of such a program. (Tr. 211) Respondent does not deny that it had no hazard communication program but cites a portion of the transcript of the hearing (Tr. 212) and maintains that "the Secretary presented no evidence of employee exposure." (Resp. brief, p.26) Respondent refers to a dialogue during the course of the hearing during which an objection to testimony given by the CO was sustained. Respondent, however, misinterprets the ruling made at the hearing. The dialogue, in its entirety, was as follows:

> Q [By Ms. Green] And what is the hazard involved here?
> A [CO] Well, the hazard would vary with the diesel fuel, the hydraulic oil, the gasoline. You are looking at a potentially, a flammable hazard. I did a fatality about three years ago involving hydraulic oil. Even though hydraulic oil is a combustible liquid, once it's heated it gets turned into a flammable. And that situation existed and it was spilled about three or four years ago and an employee died from the burns that he suffered from hydraulic oil.

> prior calendar year] shall be completed by February 1 beginning with calendar year 1979. The summary of 1977 calendar year's occupational injuries and illnesses shall be posted on form OSHA No. 102.

[30] The cited standard provides:

> Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following . . . .

> MR. REINHART: Objection, Your Honor. Motion to strike. I would ask the court to strike all of [the CO's] anecdotal evidence that he has provided. There is no evidence that there was any exposure of any DT employee to the materials he is describing.
> JUDGE SCHOENFELD: Motion sustained.

Respondent's motion to strike did not strike the entire answer. The objection was directed at "the anecdotal evidence," no more. Moreover, while there may not be any observational evidence of exposure to hot, flammable hydraulic oil, it is reasonable to infer that gasoline, diesel fuel and pipe glues were used at the site, given the nature of Respondent's business and activities. Employee exposure to any such materials requires the development, implementation and maintenance of a written hazard communication program. Item 2 of Citation 3 is affirmed. No penalty was proposed and none is assessed.

Citation 3, Items 3 and 4
29 CFR §§1910.1200(g)(1) and 1910.1200(h)[31]

Respondent does not contest the violations alleged in Citation 3, Items 3 and 4. These items are accordingly affirmed as other-than-serious violations. No penalty was proposed and none is assessed for these items.

FINDINGS OF FACT

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[31] The cited standards provide:

> 1910.1200(g)(1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

and

> 1910.1200(h)(1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Conclusions as to the alleged violations are as follows:

Citation 1 - Alleged Serious Violations				
Item(s)	Instance(s)	Conclusion	Classification	Appropriate Penalty (Dollars)
1a	a & b	Vacated		
1b	a & b	Affirmed	Serious	1,250
2a	- - -	Affirmed	De minimis	0
2b	- - -	Affirmed	Other-than-serious	250
3	- - -	Affirmed	Serious	1,250
4	a & b	Affirmed	Serious	1,000
5a & b	- - -	Affirmed	Serious	1,000
6	- - -	Affirmed	Serious	2,500
7	- - -	Affirmed	Serious	3,500
8	- - -	Affirmed	Serious	1,000
9	a	Vacated		
	b	Vacated		

10	- - -	Affirmed	Serious	1,000
Citation 2 - Alleged Willful Violations				
1	- - -	Affirmed	Willful	70,000
2	- - -	Affirmed	Willful	25,000
3	- - -	Affirmed	Willful	10,000
Citation 3 - Alleged Other-Than-Serious Violations				
1a	a & b	Affirmed	Other-than-Serious	2,000
1b	- - -	Affirmed	Other-than-Serious	0
2,3 and 4	- - -	Affirmed	Other-than-Serious	0

ORDER

1. Citation 1, Item 1a is VACATED.
2. Citation 1, Item 1b, instances a and b are AFFIRMED.
3. Citation 1, Item 2a is MODIFIED and AFFIRMED as a de miminis violation.
4. Citation 1, Item 2b is MODIFIED and AFFIRMED as an other-than-serious violation.
5. Citation 1, Item 3 is AFFIRMED.
6. Citation 1, Item 4, instances a and b are AFFIRMED.
7. Citation 1, Items 5a and 5b are AFFIRMED.
8. Citation 1, Item 6 is AFFIRMED.
9. Citation 1, Item 7 is AFFIRMED.
10. Citation 1, Item 8 is AFFIRMED.
11. Citation 1, Item 9, instances a and b are VACATED.
12. Citation 1, Item 10 is AFFIRMED.
13. Citation 2, Item 1 is AFFIRMED.
14. Citation 2, Item 2 is AFFIRMED.
15. Citation 2, Item 3 is AFFIRMED.
16. Citation 3, Item 1a, instances a and b are AFFIRMED.
17. Citation 3, Item 1b is AFFIRMED.
18. Citation 3, Item 2 is AFFIRMED.
19. Citation 3, Item 3 is AFFIRMED.
20. Citation 3, Item 4 is AFFIRMED.
21. A total civil penalty of $ 119,750, apportioned as indicated in the Conclusions of Law, above, is ASSESSED.

Michael H. Schoenfeld
Judge, OSHRC

Dated: September 18, 2000
Washington, D.C.