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

SECRETARY OF LABOR, Complainant, v. FLORIDA GAS CONTRACTORS, INC., Respondent.	OSHRC Docket No. 14-0948

ON BRIEFS:

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For the Complainant

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For the Respondent

DECISION

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

On April 23, 2014, the Occupational Safety and Health Administration inspected an excavation dug by two employees of Florida Gas Contractors, Inc. Following the inspection, OSHA issued the company a citation alleging three serious violations of OSHA's excavation standard with a total proposed penalty of $14,700. Administrative Law Judge Heather A. Joys held a hearing at which Florida Gas contested all three citation items. The judge vacated Item 1, affirmed Items 2 and 3 as serious, and assessed a total penalty of $5,500. Both parties petitioned for review of the judge's decision. For the following reasons, we affirm the citation in its entirety and assess a total penalty of $9,000.

BACKGROUND

Florida Gas is engaged in the business of installing gas lines. On the day of the OSHA inspection, Florida Gas foreman Jonathan Horan and employee Isaac Perez were working to connect a main supply gas line to a restaurant in Tampa, Florida. The gas line was located beneath the sidewalk of an adjoining street outside the restaurant. Immediately adjacent to the sidewalk was a "curb-like" concrete structure with an attached metal handrail.[1]

The crew first removed a portion of the sidewalk, leaving the concrete structure in place. Using shovels, the two workers then began to dig along the east and west sides of the concrete structure to uncover the gas line below; Horan dug on the west side of the structure ("Horan section") and Perez dug on the east side ("Perez section"). When their sections met underneath the concrete structure, Horan and Perez continued to dig, leaving the bottom of a portion of the concrete structure exposed without anything below to support it. Upon reaching a depth of four feet, the workers installed a shoring system along two of the walls in the Horan section of the excavation but did not install shoring in the Perez section. After the shoring was installed, Horan noticed water beginning to collect at the bottom of his section, so they installed a "well point" pump system to remove it. Horan and Perez continued to dig until the excavation was more than six feet deep, at which point they left the worksite to take a lunch break.

OSHA Compliance Officer Christos Nicou approached Horan and Perez as the two were returning from their break. During his inspection, the CO observed water in the excavation, cracking and separation along two of the walls in the Perez section, and spoil piles on both sides of the excavation; the spoil pile on Perez's side was located at the very edge of the excavation.[2]

DISCUSSION

To establish a violation, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the employer failed to comply with the terms of the standard; (3) one or more employees had access to the cited condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

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[1] The concrete structure was approximately 28 inches tall (about half of it above the original ground level and half below), 18 inches wide at the bottom, and 12 inches wide at the top.

[2] Although there were two spoil piles, the citation specifically addresses only the spoil pile at the Perez section.

A. Item 1: Undermining of Sidewalks, Pavements, or Appurtenant Structures

The Secretary alleges that Florida Gas violated 29 C.F.R. § 1926.651(i)(3) because its employees dug under a concrete structure adjacent to a sidewalk without providing any method of protection to prevent the structure from collapsing. The cited provision states:

> Sidewalks, pavements, and appurtenant structure[s] shall not be undermined unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures.

29 C.F.R. § 1926.651(i)(3). The judge determined that this provision "incorporate[s] the hazard as a violative element the Secretary must establish . . . [because] [a]lthough the standard reads as a prohibition of undermining without the use of a support system, it limits that prohibition to circumstances in which there is the 'possible collapse of such structures.' " Concluding that the Secretary had failed to prove that it was possible for the concrete structure to collapse as a result of it being undermined, the judge vacated this item.

On review, the Secretary argues that this was error because § 1926.651(i)(3) presumes the existence of a hazard whenever a sidewalk, pavement, or appurtenant structure is undermined. Florida Gas does not defend the judge's decision in this respect and, in fact, conceded before the judge that the cited provision presumes the existence of a hazard. The company, however, raises a threshold argument on review concerning the applicability of the cited provision, which we address before turning to the Secretary's claim. According to Florida Gas, § 1926.651(i)(3) does not apply to the cited condition because a structure is not "appurtenant" to a sidewalk unless it is attached to it, and here the undermined concrete structure was not attached to the sidewalk. In support of this argument, the company relies on the excavation standard's preamble, which states that " 'appurtenant structures' (*that is, structures attached to sidewalks and pavements*), have been added [in the final rule] because of the danger they pose when undermined." Excavations Final Rule, 54 Fed. Reg. 45,894, 45,924 (Oct. 31, 1989) (emphasis added).

We disagree. Though not defined in the standard, "appurtenant" means "appertaining or belonging; pertaining," and "appurtenance" means "something subordinate to another, more important thing; adjunct; accessory." RANDOM HOUSE UNABRIDGED DICTIONARY 1643 (2d ed. 1987). *See Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term "carries its ordinary meaning"); *Animal Legal Defense Fund v. U.S. Dep't. of Agric.*, 789 F.3d 1206, 1216 (11th Cir. 2015) (referring to contemporaneous dictionary for the common usage and meaning of an undefined statutory term). Given these definitions, we find that

the term "appurtenant" represents a broader, less rigid concept than "attachment" and whether a structure is an "appurtenant structure" depends on the nexus between the structure and a sidewalk or pavement. Here, the undermined concrete structure was immediately adjacent to the sidewalk and supported a handrail that ran along the length of the sidewalk. Consequently, the concrete structure, and the handrail it supports, "belong[s]," "pertains," and is an "adjunct" or "accessory" to the sidewalk, regardless of whether the structure and sidewalk were physically attached. Because "the plain meaning of the regulatory language is sufficiently clear," our inquiry ends here. *Davey Tree Expert Co.*, 25 BNA OSHC 1933, 1934 (No. 11-2556, 2016); *cf. Gen. Motors Corp.*, 17 BNA OSHC 1217, 1218 (No. 91-2973, 1995) (consolidated) (no resort to legislative history when statute speaks with clarity), *aff'd*, 89 F.3d 313 (6th Cir. 1996). The undermined concrete structure is an "appurtenant structure" under the cited provision.[3]

As to whether the cited provision presumes the existence of a hazard, we agree with the Secretary that the cited provision "proscribes a certain condition—[the] undermining of a structure without a support system in place to protect against collapse—and provides no limitation on that proscription . . . that would indicate that undermining sidewalks [and appurtenant structures] without a support system is acceptable under some circumstances but not others." The first clause of § 1926.651(i)(3) generally prohibits undermining pavements and appurtenant structures; the

[3] Florida Gas also contends that the concrete structure is a "retaining wall" under 29 C.F.R. § 1926.651(i)(2), so that provision is more specifically applicable and preempts the cited provision. *See generally Vicon Corp.*, 10 BNA OSHC 1153, 1156 (No. 78-2923, 1981)), *aff'd*, 691 F.2d 503 (8th Cir. 1982). Even if the structure were a retaining wall, the two provisions address different hazards. Section 1926.651(i)(2), which provides that "[e]xcavations below the level of the base or footing of any foundation or retaining wall that could be reasonably expected to pose a hazard to employees shall not be permitted . . ." except in limited circumstances, addresses the hazard of a structure collapsing from an *adjacent* excavation, whereas the cited provision addresses the hazard of a structure collapsing because soil *beneath* it has been removed, which is the case here. Therefore, we find no basis for Florida Gas' preemption claim.

We also reject the company's contention that if a structure is a "retaining wall" under § 1926.651(i)(2), it cannot be an "appurtenant" structure under the cited provision. These terms are not mutually exclusive. The cited provision applies to structures that "pertain" to a sidewalk—a criterion that addresses the *nexus* between the structure and the sidewalk, rather than the *type* of structure. Thus, there could be circumstances where a retaining wall is also a structure appurtenant to a sidewalk or pavement as contemplated by the cited provision. Consequently, even if Florida Gas had established that the concrete structure was a retaining wall, this alone would not render it beyond the scope of the cited provision.

second clause provides an exception to this prohibition. The language at the end of the cited provision—"to protect employees from the possible collapse of such structures"—is a condition, but not of the prohibition against undermining appurtenant structures; rather, it is a condition of the *exception to* this prohibition: "*unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures*." 29 C.F.R. § 1926.651(i)(3) (emphasis added).

Because the conditional language concerning the possible collapse of such structures is not within the clause describing the proscribed conduct, but is instead within the clause describing the exception, § 1926.651(i)(3) does not incorporate the hazard as a violative element that the Secretary must establish.[4] *See StanBest, Inc.*, 11 BNA OSHC 1222, 1231 (No. 76-4355, 1983) (if "standards do not incorporate a requirement that a hazard be shown to exist, such a showing is not part of the Secretary's prima facie case."). *Accord Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 834 (5th Cir. Unit A March 1981) ("Unless the general standard incorporates a hazard as a violative element, the proscribed condition or practice is all that the Secretary must show; hazard is presumed and is relevant only to whether the violation constitutes a 'serious' one."). Thus, the cited standard presumes the existence of a hazard when sidewalks, pavements, or appurtenant structures are undermined.[5] Given that the parties have stipulated that the cited concrete structure

[4] The cited standard's prohibition is therefore unlike two of its neighboring provisions—29 C.F.R. §§ 1926.651(i)(1) and (2)—both of which contain conditions on the prohibited conduct. The former provision states that "*[w]here the stability of adjoining buildings, walls, or other structures is endangered by excavation operations*, support systems such as shoring, bracing, or underpinning shall be provided to ensure the stability of such structures for the protection of employees." 29 C.F.R. § 1926.651(i)(1) (emphasis added). Similarly, the latter provision states that "[e]xcavation below the level of the base or footing of any foundation or retaining wall *that could be reasonably expected to pose a hazard to employees* shall not be permitted" except under certain circumstances. 29 C.F.R. § 1926.651(i)(2) (emphasis added).

[5] Chairman MacDougall, like the judge, does not construe the standard as presuming a hazard. The judge reached this conclusion based on the phrase "from the possible collapse of such structures." Unlike the judge, however, the Chairman arrives at this conclusion by focusing on the word "undermine." Implicit in the Secretary's position is his claim that "undermine" *only* means to dig under, so he need not demonstrate any weakening of the structure above. If this were the Secretary's intent, he could have written the provision to prohibit "excavation below" such structures—terminology used elsewhere in the standard. *See* 29 C.F.R. § 1926.651(i)(1) (addressing "*[e]xcavation below* the level of the base or footing of any foundation or retaining wall"). Given the standard's definition of "excavation"—"any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal"—this would have expressed exactly the

intent the Secretary now asserts. 29 C.F.R. § 1926.650 (definitions). Instead, OSHA chose different terminology—"undermine"—which must be construed as having a different meaning than mere "excavation." *See Henson v. Santander Consumer USA Inc*., 137 S. Ct. 1718, 1723 (2017) ("when [courts] are engaged in the business of interpreting statutes, we presume differences in language . . . to convey differences in meaning."). *See also F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 515 (1963) ("There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in [one provision] the same . . . meaning" of a term "which it explicitly provided by inclusion in [another provision]; the reasonable inference is quite the contrary."). Therefore, "undermine" in this circumstance must be read to mean (as it commonly does) "to weaken or cause to collapse by removing underlying support, as by digging away or eroding the foundation." RANDOM HOUSE UNABRIDGED DICTIONARY 2062 (2d ed. 1987); *see also* CAMBRIDGE ADVANCED LEARNER'S DICTIONARY (4th ed. 2013) (defining "undermine" as "to *gradually weaken or destroy* someone or something") (emphasis added); ROGET'S INTERNATIONAL THESAURUS 1120 (5th ed. 1992) (listing "weaken" as a synonym for "undermine"); WEBSTER'S THIRD INTERNATIONAL DICTIONARY UNABRIDGED 2489 (8th ed. 1986) (listing "undermine" as a synonym for "weaken"); *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2139 (No. 89-2614, 1993) (noting that authoritative dictionary definitions are helpful); *McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133 (1988) (using thesaurus in determining common usage of statutory term).

This means that the Secretary must show that the appurtenant structure was in fact weakened by the excavating such that, according to the terms of the standard, "a support system or another method of protection [must be] provided to protect employees from the possible collapse." Because the concept of undermining is very much a matter of degree, ignoring whether the excavation has resulted in weakening the structure would trigger compliance with the requirements of the standard in situations where there is clearly no hazard, perhaps when a shovel-full or even handful of soil is removed for testing—in other words, at the very moment that digging begins. My colleagues' interpretation that *every time* there is *digging* around or associated with a sidewalk or pavement, a support system or another method of protection must be provided to protect employees from the possible collapse is illogical and therefore unreasonable. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citations omitted) (The "plainness or ambiguity of the [regulatory] language is determined . . . by reference to the language itself, the specific context in which that language is used, and the broader context of the [regulation] as a whole."); *U.S. v. Ryan*, 284 U.S. 167, 168 (1931) ("A[n] . . . application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.).

In addition, interpreting the provision to require proof of the hazard is consistent with the provisions in §§ 1926.651(i)(1) and (2), which do not presume a hazard. *See U.S. v. Morton*, 467 U.S 822, 824 (1984) ("We do not . . . construe statutory phrases in isolation. We read statutes as a whole."); *FTC v. Mendel Bros., Inc.*, 359 U.S. 385, 389 (1959) (noting that interpreting remedial legislation requires Court to "fit all parts, if possible, into a harmonious whole."); *see also U.S. Williams*, 553 U.S. 285, 294 (2008) ("a word is given more precise content by the neighboring words with which it is associated").

Finally, Commissioner's Attwood's concern—that requiring proof of a hazard before finding a violation of section 1926.651(i)(3) would necessitate a structural engineer at an excavation—is

unfounded. The Commission (as well as OSHA and employers) are frequently tasked with quantifying a hazard. *International Union, UAW v. Pendergrass*, 878 F.2d, 389, 392 (D.C. Cir. 1989) (quoting *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 655 (1980)) ("The Supreme Court has said that [OSHA] has 'no duty to calculate the exact probability of harm' . . . . Nevertheless, OSHA has a responsibility to quantify or explain, at least to some reasonable degree, the risk posed by each [hazard]."); *Corbesco, Inc. v. Dole*, 926 F.2d 422, 427 (5th Cir. 1991) (where cited standard does not presume a hazard, Secretary has burden to prove "actual or constructive notice" that protection is required); *see also Weirton Steel Corp.*, 20 BNA OSHC 1255, 1259 (No. 98-0701, 2003) ("Whether there exists a significant risk depends on both the severity of the potential harm and the likelihood of its occurrence."); *Anoplate Corp.*, 12 BNA OSHC, 1678, 1681 (No. 80–4109, 1986) (requirement to wear eye protection was conditioned by the presence of splashing hazard; Secretary must show significant risk when standard requires proof of a hazard as an element of the alleged violation); *Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1670 (No. 13401, 1981) (cited standard did not presume that unguarded, rotating lathe chucks, machine points of operation, ingoing nip points, and flying chips or sparks created hazards; proof of a hazard by a preponderance of the evidence required as part of the Secretary's burden of proof).

Here, however, by stipulating that the concrete structure was in fact undermined, Florida Gas has conceded applicability and non-compliance regarding the alleged § 1926.651(i)(3) violation; thus, Chairman MacDougall agrees with her colleagues' conclusion that Florida Gas failed to comply with its terms. Chairman MacDougall also agrees that §§ 1926.651(i)(2) and (3) are not mutually exclusive—in other words, a structure could be both appurtenant and a retaining wall.

was undermined and that no support system was provided, we find that Florida Gas failed to comply with the terms of § 1926.651(i)(3).[6]

With regard to employee exposure, the parties have stipulated that: (1) Horan and Perez "dug the trench manually"; (2) "Perez dug the east side of the trench and Horan dug the west side of the trench"; and (3) "Horan was in the west side of the trench and Perez was in the east side of the trench for at least two hours." In addition, knowledge is established by testimony from Horan, who the parties stipulated was the company's foreman responsible for the worksite; he testified that he was aware Perez was in the excavation and digging under the concrete structure.[7] *See, e.g.*, *Hamilton Fixture*, 16 BNA OSHC 1073, 1086-87 (No. 88-1720, 1993) (supervisor's knowledge of employee's misconduct can be imputed to employer) (citing *Pride Oil Well*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992)). Accordingly, we find that the Secretary has established a violation of § 1926.651(i)(3).

B. Item 2: Protection from Excavated Materials

The Secretary alleges that Florida Gas violated 29 C.F.R. § 1926.651(j)(2) by exposing its employees to a struck-by hazard from the spoil pile located at the edge of the excavation's eastern wall in the Perez section. The cited provision states:

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

29 C.F.R. § 1926.651(j)(2). The judge affirmed this item as serious and assessed a penalty of $2,000. On review, Florida Gas challenges only the noncompliance and exposure elements of the Secretary's burden of proof.

There is no dispute that the spoil pile in question was within two feet of the excavation's edge when the CO inspected the worksite and that no protective retaining devices had been provided to contain the spoil pile. Nonetheless, Florida Gas argues that the judge erred in finding that the company failed to comply with the terms of § 1926.651(j)(2) on several grounds, none of which are persuasive. First, it claims the Secretary must establish that material from the spoil pile had actually fallen into the excavation. However, the first sentence of the cited provision makes plain that the provision applies to excavated material which "*could* pose a hazard by falling or rolling into excavations." 29 C.F.R. § 1926.651(j)(2). *See Davey Tree*, 25 BNA OSHC at 1934

[6] Commissioner Attwood notes that—in dicta—the Chairman commits a number of legal and logical errors in rejecting the Secretary's interpretation of the standard in favor of her own.

There can be no dispute that the most common *contemporaneous* definition for "undermine" is to excavate, dig under, or tunnel beneath. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2489 (1986) ("1: to excavate the earth beneath"); RANDOM HOUSE UNABRIDGED DICTIONARY 2062 (2d ed. 1987) (first relevant definition: "to make an excavation under . . . ."); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1288 (10th ed. 1996) ("1. to excavate the earth beneath . . . ."); THE AMERICAN HERITAGE DICTIONARY 1396 (New College Edition 1976) ("1. To dig a mine or tunnel beneath"). Indeed, this definition is listed first in numerous dictionaries published at the time the standard was both originally promulgated in 1971 and subsequently revised in 1989. *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1544 (1971); WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2489 (1971); FUNK & WAGNALL'S STANDARD COLLEGE DICTIONARY 1458 (1973); WEBSTER'S NEW IDEAL DICTIONARY 582 (1973); WEBSTER'S NEW COLLEGIATE DICTIONARY 1275 (1975); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 1396 (1976); WEBSTER'S NEW COLLEGIATE DICTIONARY 1275 (1977); WEBSTER'S NEW COLLEGIATE DICTIONARY 1266 (1979); WEBSTER'S THIRD INTERNATIONAL DICTIONARY UNABRIDGED 2489 (8th ed. 1986).

On the other hand, the Random House Unabridged Dictionary definition cited by the Chairman in support of her definition of the word "undermine" follows "to make an excavation under." And the second dictionary she cites is a modern one published in 2013, some 42 years after the regulation was originally promulgated. The Commission cannot rely on modern day meanings when interpreting old regulatory terms because doing so would effectively amend the regulation outside the required notice-and-comment procedures. *See* 5 U.S.C. §§ 553-554; *see also New Prime Inc. v. Olieveira*, 139 S.Ct. 532, 539 (2019) ("After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands."). Moreover, given that the Secretary's interpretation invests "undermine" with the most common meaning of the word at the time of the standard's promulgation, it is unquestionably reasonable and therefore also entitled to deference. *See Martin v. OSHRC ("CF&I")*, 499 U.S. 144, 152-57 (1991) ("[T]he Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness.").

The Chairman's proposed interpretation is also contrary to the standard's regulatory history. In the preamble to the proposed rule, OSHA explains that "[p]aragraph (i)(3) prohibits *excavation under* sidewalks and pavements unless employees are protected from the collapse of such structures." Excavations, 52 Fed. Reg. 12,288, 12,305 (proposed April 15, 1987) (emphasis added). Likewise, the Chairman's assertion that "construction of [§ 1926.651(i)(3)] to require proof of the hazard is consistent with the provisions in § 1926.651(i)(1) and (2), which do not presume a hazard," fails to account for the origins of these three provisions. The predecessor to § 1926.651(i)(3) originated as 29 C.F.R. § 1518.650(a) and provided:

> Walkways, runways, and sidewalks shall be kept clear of excavated material or other obstructions and no sidewalks shall be undermined unless shored to carry a minimum live load of one hundred and twenty-five (125) pounds per square inch.

("If the plain meaning of the regulatory language is sufficiently clear, the inquiry ends there."). Nothing in the cited provision requires the Secretary to prove that material had fallen into the excavation to establish noncompliance.

Second, Florida Gas argues that there was no evidence material from the spoil pile could have entered the excavation because there is no proof that its "natural angle of repose" had been

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Safety and Health Regulations for Construction, 36 Fed. Reg. 7,340, 7,388 (April 17, 1971). Although it was later given its current number, its text remained the same until 1989 when the current version was promulgated in its current form. 54 Fed. Reg. at 45,923-24 (October 31, 1989). Section 1926.651(i)(1), on the other hand, originated in 29 C.F.R. § 1518.651(n), and § 1926.651(i)(2) originated in 29 C.F.R. § 1518.651(m). 36 Fed. Reg. at 7,389. Since these three provisions originated in separate sections of Subpart P, it would be inappropriate to interpret them as if they had originated in the same section.

Finally, as the Chairman makes clear, if her interpretation of "undermine" were to prevail, the Secretary would be required to prove that the structure had weakened sufficiently to constitute a hazard. Absent an actual collapse, it is likely that such proof would be impossible to obtain without the presence of a structural engineer at the scene of the violation. Even then there would be room for endless arguments regarding the *amount* of weakening that is necessary to establish a violation. In such circumstances a careless or unscrupulous employer, who fails to first determine whether the structure is in fact "weakened," would avoid a citation absent a collapse. Thus, the Chairman's interpretation is also contrary to the most basic purpose of the Act, which is *to protect workers*. 29 U.S.C. § 651(b) ("The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . .").

[7] This evidence would be sufficient to establish knowledge even under the Eleventh Circuit's precedent—relevant here given the location of the worksite and Florida Gas' principal office—in *ComTran Grp., Inc. v. Dep't of Labor*, 722 F.3d 1304, 1316-17 (11th Cir. 2013). *See* 29 U.S.C. § 660(a), (b) ("Pursuant to the Act, either the Secretary or an employer may appeal a Commission decision to "any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office . . . ."); *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (where it is probable that a decision will be appealed to a certain circuit, the Commission generally applies the law of that circuit). While *ComTran* limits imputation of a supervisor's knowledge of *his own* misconduct to situations where the Secretary establishes that such misconduct was reasonably foreseeable, the knowledge at issue here is foreman Horan's knowledge of Perez's misconduct. *Id.* at 1317 (" 'When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge[,] actual or constructive[,] of noncomplying conduct of a subordinate.' ") (quoting *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980)). *See also Samsson Constr., Inc. v. Sec'y, U.S. Dep't of Labor*, 723 F. App'x 695 (11th Cir. 2018) (unpublished); *Quinlan v. Sec'y, U.S. Dept. of Labor*, 812 F.3d 832, 836 (11th Cir. 2016).

exceeded, and even if it had been exceeded, the amount of material that would fall into the excavation would be limited to the first shovel-full that exceeded the natural angle of repose. This argument, however, fails to account for the potential that the spoil pile will fall into the excavation as a result of a collapse of the excavation's wall beneath it—a scenario referenced in the preamble to the final rule. *See* 54 Fed. Reg. at 45,925 ("[M]aterials such as excavated soil . . . also place a superimposed load on the edge of the excavation. Such loads can be the cause of cave-ins and must be considered when determining what protection is necessary to safeguard employees."). In addition, the CO testified that material from the spoil pile could weigh up to 100 to 200 pounds per cubic foot, and if a cave-in were to occur, the material would roll back into the trench and cause "serious internal injuries, serious fractures, and even death." Therefore, we find the Secretary established that Florida Gas failed to comply with the terms of § 1926.651(j)(2).

As to exposure, the company argues that the Secretary failed to prove that Perez performed work while inside the cited excavation. Relying on Perez's testimony, Florida Gas claims Perez was standing in a different, shallower trench at the top of the northeast corner of the excavation when he was digging the cited excavation. However, the parties stipulated that "Horan was *in* the west side of the trench and Perez was *in* the east side of the trench for at least two hours." (emphasis added). This stipulation clearly applies to the cited excavation: the citation references a spoil pile "placed right at the edge of the east side trench wall," and numerous other stipulations similarly reference a single "trench" (or "excavation," which the parties used interchangeably with "trench"). Therefore, irrespective of Perez's testimony, the parties' stipulation establishes his presence in the trench at issue. *See Pyramid Masonry*, 16 BNA OSHC 1461, 1463 (No. 91-0600, 1993) (relying on the plain language and intent of stipulation over subsequent factual arguments to the contrary).

Florida Gas argues in the alternative that even if Perez was working inside the cited excavation, the Secretary failed to show that the spoil pile was within 2 feet of the excavation's edge at that time. Based on testimony from Perez and Horan, the company claims the spoil pile was compliant prior to their lunch break, and that during their break (just prior to the OSHA inspection), the walls of the Perez section collapsed, resulting in "new" edges of the excavation right where the spoil pile was located. Specifically, Perez testified that the spoil pile was two feet from the excavation's edge before the lunch break, but a cave-in must have occurred during the break because when they returned, the spoil pile was closer to the excavation's edge. Horan

testified that the sides of the excavation collapsed while the employees were on break due in part to a failure of the well point pump system, which allowed water to accumulate in the bottom of the excavation. However, Horan could not recall how far back the spoil pile was located from the edge of the excavation prior to the lunch break. The judge rejected the company's argument as "unpersuasive," finding that Perez was not a credible witness and Horan "could not recall which sides [of the excavation] changed or how much the conditions changed."

We agree with the judge's decision to discredit Perez's testimony. His claim that he manually dug the eastern portion of the excavation while standing outside of it is not believable.[8] He was contradicted in this regard by Horan—for whom the judge made a favorable, demeanor-based credibility determination—as well as the parties' stipulation placing both employees in the cited excavation. In addition, the CO opined that "[t]o stand on a 2-foot ledge and pick up dirt that's 4 feet below you with a shovel would be physically impossible." As the judge stated, Perez's testimony "does not have the ring of truth." *Nordam Grp.*, 19 BNA OSHC 1413, 1416 (No. 99-0954, 2001) (citing *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297 (No. 14249, 1978)) ("The Commission will ordinarily accept a credibility finding when it is based on the judge's observation of a witness's demeanor and is clearly explained.").

Given that the record establishes that Perez was inside the excavation while he was digging, his testimony that the spoil pile on his side of the excavation had been at least two feet from the edge also lacks credibility. After the purported cave-in in the Perez section, the excavation was approximately 3 feet by 3½ to 4½ feet. If, prior to any such cave-in, the spoil pile had been compliant as Perez claims (that is, two feet back from the eastern and southern walls), the dimensions of the Perez section would have been approximately 1-foot wide by 1½ to 2½-feet long. It is utterly implausible that, with the excavation more than six feet deep, Perez could have worked in and shoveled out dirt from such a confined area.

[8] The judge found that "Perez's various statements regarding where he stood while assisting Mr. Horan were not consistent" and "Perez was often confused and equivocal while testifying, changing his testimony when prompted by counsel." Although we accept the judge's credibility determination with respect to Perez, we disagree with her additional finding that Perez's testimony was internally inconsistent. In fact, Perez's testimony regarding where he worked was consistent—he testified that he made the "small hole" on the east side of the excavation to remove the dirt Horan passed to him, but he never testified he was inside that "hole." As noted, he claimed that he stood in the shallower trench outside the excavation at issue.

As to Horan, we agree with the judge that his testimony on this point has no probative value due to his inability to recall the distance between the spoil pile and the edge of the excavation before the lunch break. Although lower sections of the walls may well have collapsed, Horan never asserted that the upper sections had previously afforded the requisite two-foot clearance from the spoil pile. Indeed, the photographs of the worksite show that the upper portions of the excavation walls of the Perez section were relatively straight and formed a right angle at the southeast corner, indicating that they remained as Perez had formed them prior to the lunch break. Thus, the Secretary has established by a preponderance of the evidence that Perez was inside the excavation when the spoil pile was less than two feet from the excavation's edge.

In sum, we find that the Secretary has established that Florida Gas failed to comply with § 1926.651(j)(2) and that Perez was exposed to the violative condition.

C. Item 3: 29 C.F.R. § 1926.652(a)(1)—Protective Systems Requirements; Cave-In Protection

The judge affirmed Item 3 as serious and assessed a penalty of $3,500. On review, Florida Gas does not raise any arguments concerning this citation item other than its general assertion as to all the citation items of the affirmative defense of unpreventable employee misconduct. Accordingly, we find that Florida Gas has abandoned any argument regarding the merits of Item 3. *See Midwest Masonry*, 19 BNA OSHC 1540, 1543, n. 5 (No. 00-322, 2001) (a party's failure to address an argument in brief on review that is within the scope of a broadly worded briefing notice results in abandonment of that argument).

D. Unpreventable Employee Misconduct (UEM) Defense

For all three citation items, Florida Gas argues that the judge erred in rejecting its UEM defense. To establish this defense, an employer must show that it: (1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered. *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). Where, as here, an employer defends against an alleged violation on the ground of unpreventable *supervisory* misconduct, "the employer's burden of proof [is] 'more rigorous' and the defense 'more difficult to establish . . . " because "supervisory involvement in asserted misconduct is strong evidence that the employer's safety program is lax." *CBI Serv's, Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001) (citing *L.E. Meyers Co*., 16 BNA OSHC 1037, 1041 (No. 90-0945, 1993)). The judge found, and neither party disputes, that

Florida Gas established the first three elements of the affirmative defense. However, the judge determined that the company failed to show its safety rules were effectively enforced when violations were discovered.[9]

Evidence of Enforcement of Safety Rules

Florida Gas argues that the judge improperly interpreted the company's evidence of discipline for safety rule violations, which consisted of disciplinary records and testimony from three supervisors (including Horan). The judge found, and the parties agree, that of the 32 records of discipline administered from 2006-2014 that were entered into evidence (including warnings issued to Horan and Perez after the OSHA inspection), six relate to safety infractions.[10]

Florida Gas argues that the judge erroneously discounted four of its disciplinary records: the two issued to Horan and Perez after the inspection and two issued before the inspection. The latter two records are employee warning reports indicating separate instances of discipline for "careless operation of a backhoe" and "spitting tobacco juice in others' work area." We agree that the judge erred in failing to consider the backhoe record as evidence of effective enforcement, but the other infraction does not constitute enforcement of a safety rule. As to the written warnings issued to Horan and Perez after the inspection, the judge found this discipline to be "[un]persuasive

[9] Relying on *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2220 (No. 09-0004, 2014) (consolidated), *aff'd*, 811 F.3d 922 (7th Cir. 2016), the judge found that the company's failure to adhere to its own disciplinary policy undermined the effectiveness of its enforcement. In *Stark*, the Commission concluded that the employer failed to establish that it effectively enforced its safety rules because its enforcement efforts were undermined by the following: (1) a lack of documentation of verbal warnings when verbal warnings alone were not permitted under its disciplinary policy; (2) advanced warnings of worksite visits by the safety director to supervisors; and (3) prior citations for two non-compliant excavations within a short time after its policy was established. *Id*. at 2220-22. We agree with the company's contention on review that *Stark* is factually distinguishable from this case. Under its disciplinary policy, Florida Gas employees generally receive oral warnings for safety violations, followed by written discipline for subsequent violations; if the issue remains uncorrected, other consequences such as suspension or termination may result. Although this policy requires that all verbal discipline be documented, unrebutted testimony establishes that the policy the company implemented did not require documentation of verbal discipline for minor violations. Also, there is no evidence Florida Gas supervisors engaged in conduct that purposefully undermined the company's safety policy, such as warning of unannounced worksite visits from supervisors.

[10] The judge erroneously found that two records relate to the same employee; in fact, they relate to two different employees with similar but differently spelled last names and different first names.

evidence of Florida Gas' enforcement of its safety policies" because: (1) the records referenced only one of the three cited conditions,[11] and (2) the employees were disciplined for failing to follow company procedures for responding to an OSHA inspection. The judge based this second finding on the text of the warnings and the minutes of a Safety Committee meeting at which Horan was required to give a presentation about the incident, which the judge found was focused "on [the] failure to follow company procedures with regard to conduct during an OSHA inspection . . . ." As the record supports these findings, the judge appropriately gave little weight to the post-inspection warnings issued to Horan and Perez. Accordingly, we add only the backhoe record to the six records the judge considered as proof of the company's enforcement.

In addition to these disciplinary records, two Florida Gas managers testified to administering written discipline for violations of its safety rules. Only one of these instances—the suspension of a foreman—is corroborated by the records in evidence,[12] and it is one of the seven instances discussed above.[13] Although Florida Gas did not require its managers to document verbal discipline for what the company considered minor safety violations, no documentation was

[11] Neither Horan's nor Perez's warning mentions spoil piles or undermining structures. Florida Gas claims—without citation to the record—that the employees were not disciplined in this regard because its "internal investigation led the employer to the conclusion that the only violation was the failure to use proper shoring." As there is no evidence supporting this assertion, we view these warnings as two instances in which safety violations were not addressed.

[12] Chairman MacDougall notes that she finds the nature of the post-inspection warnings issued to Horan and Perez—which she deems as evidence that Florida Gas did not effectively enforce its work rules when violations were detected—to be more probative than the number of examples of effective enforcement.

She also reiterates the concerns she noted in *Stark*, 24 BNA OSHC at 2221 n. 12—that an employer is not required to have written documentation of verbal warnings. "However, the Commission may 'count [ ] the absence of documentation against the proponent of [a UEM] defense.' " *Id.* (citing *P. Gioioso & Sons, Inc. v. OSHRC*, 675 F.3d 66, 73 (1st Cir. 2012)).

[13] The company's safety manager testified that Florida Gas maintains copies of all written discipline but submitted "just a sampling" into evidence because "we could not bring everything; it's too voluminous." The company, however, has the burden of proving its UEM defense. *Manganas*, 21 BNA OSHC at 1997.

provided to support any instances of verbal discipline that the managers testified to administering prior to the inspection.[14]

Third Party Safety Audit Reports

Florida Gas also argues that the judge improperly considered safety audit reports from its workers' compensation insurance carrier, which include photographs depicting safety violations, as evidence that the company failed to effectively enforce its safety rules. The carrier, CNA, performed unannounced monthly inspections of Florida Gas worksites and provided the company with its findings and recommendations.[15] The judge found that portions of CNA's reports showed "serious safety concerns" that had been brought to the company's attention but, because Florida Gas did not provide any evidence to show employees were disciplined as a result, she concluded that the reported concerns were never addressed.

As a threshold matter, Florida Gas argues that only one of the photographs the judge considered was mentioned at the hearing and the company was not given the opportunity to explain whether the employees pictured in the other photographs were disciplined for safety violations. It also argues that it is inappropriate to consider adverse information in CNA's reports because the company "should not be penalized for sending a consultant out on a proactive basis in an effort to identify and prevent potential hazards to the employees." It is true the Commission has recognized that "penalizing employers for their response (or lack thereof) to their own consultant's warnings might discourage employers" from taking such efforts. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1182 (No. 89-2883, 1993) (consolidated). *See also Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2007 (No. 89-0265, 1997) (employer's voluntary safety efforts generally insufficient alone to establish employer recognition of hazard). Here, however, Florida Gas itself introduced the reports (with the photographs) into evidence to support its UEM defense, so the company can neither claim surprise nor complain for policy reasons if aspects of this evidence that are adverse to its position are also considered in finding that its defense has not been proven. *See, e.g.*, *Union Pac. R.R. Co. v. U.S.*, No. 310-62, 1976 WL 4166, at *2 (U.S. Court of Claims Oct. 21, 1976) (finding that "[p]laintiff, having introduced into the record evidence" containing information adverse to its

[14] Horan and Perez did, however, corroborate Project Manager Mike Petralia's testimony that he verbally warned the two employees following the inspection.

[15] There are four CNA reports in evidence—two reports were provided to Florida Gas before the inspection and two were provided after.

position "cannot complain that the proof it introduced" was used against it); *cf. Ohler v. U.S.*, 529 U.S. 753, 755 (2000) ("Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted.").

Finally, Florida Gas claims that it did not take disciplinary action for conduct depicted in the reports' photographs (particularly one depicting a spoil pile violation) because the photographs do not show any exposed employees. However, exposure is evident in three of the photographs showing safety violations, including a photograph of an employee using a tamping machine without proper foot protection. Therefore, we find that the judge's consideration of the CNA reports was appropriate and support her conclusion regarding the company's lack of enforcement.

Based on the foregoing, we conclude that Florida Gas failed to satisfy its burden of proving that it effectively enforced its safety rules. The seven documented instances of discipline for safety violations in the eight years preceding the inspection (2006-2014) are outweighed by: (1) the company's focus on the failure of Horan and Perez to follow its procedures for OSHA inspections rather than the safety violations; (2) the absence of documentary evidence supporting all but one of the instances of written discipline attested to by Florida Gas managers; (3) the documentation of only one of the claimed instances of verbal discipline; and (4) the absence of discipline for the three violations evident in the audit reports. Accordingly, we agree with the judge that Florida Gas has not proven its UEM defense and affirm all three citation items.

E. Characterization and Penalty

The Secretary proposed a penalty of $4,900 for each citation item for a total penalty of $14,700. The judge assessed a penalty of $2,000 for Item 2 and $3,500 for Item 3. On review, the parties do not address the judge's characterization of these violations as serious or the assessed penalty amounts. Thus, we see no reason to disturb the judge's findings as to these items. *See, e.g.*, *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty where characterization and penalty were not in dispute).

As to Item 1, which the judge vacated, we find that the violation was properly characterized as serious and assess a penalty of $3,500. In assessing a penalty, the Commission must give due consideration to: (1) the employer's size; (2) the gravity of the violation; (3) the employer's good faith; and (4) the employer's prior history of violations. *Mosser Constr., Inc.*, 23 BNA OSHC 1044 (No. 08-0631, 2010) (citing 29 U.S.C. § 666(j)). "Gravity is the principal factor in the

penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury. *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005) (citations omitted).

Both Horan and Perez were exposed to the hazard posed by the undermined concrete structure, and if it had collapsed, they could have suffered serious injuries. *See* 29 U.S.C. § 666(k) (violation is serious when there is a substantial probability that death or serious injury could result from a violative condition). With respect to penalty, we find that the gravity of the violation was high as the parties stipulated that both employees were in the trench for at least two hours and no precautions against injury were implemented. As to the remaining penalty factors, a reduction for size was taken into account by the Secretary in calculating the proposed penalty amount; we find that a further reduction for good faith is warranted given the safety training Florida Gas provided to its employees, the audits that CNA performed for the company, and the fact that the violation was promptly corrected during the inspection.

ORDER

We affirm the citation in its entirety and assess a total penalty of $9,000.

/s/
Heather L. MacDougall
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
James J. Sullivan, Jr.
Commissioner

Dated: February 21, 2019

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Florida Gas Contractors, Inc., Respondent.	OSHRC Docket No. **14-0948**

Appearances:

Kristin R. Murphy, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

George E. Spofford, IV, Esquire, Gray Robinson, P.A., Tampa, Florida
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). Florida Gas Contractors, Inc., (hereinafter Florida Gas) is engaged in the business of installing gas lines. On April 23, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Christos Nicou conducted an inspection of Florida Gas at 5405 Sheldon Road in Tampa, Florida. Based upon CSHO Nicou's inspection, the Secretary of Labor, on May 15, 2014, issued a Citation and Notification of Penalty with three items to Florida Gas alleging serious violations of 29 CFR §§ 1926.651(i)(3), 1926.651(j)(2), and 1926.652(a)(1) for failure to protect workers in an excavation from hazards associated with collapse or cave-in of the excavation. The Secretary proposed a total penalty of $14,700.00 for the Citation. Florida Gas timely contested the Citation. All three violations are at issue.

A hearing was held in this matter on October 23 and 24, 2014, in Tampa, Florida. The proceedings were conducted pursuant to the Commission's Simplified Proceedings. 29 CFR §§ 2200.200-211. At the close of the hearing, the parties presented oral closing arguments. The parties submitted supplemental written closing arguments on December 10, 2014.

For the reasons that follow, Item 1 is vacated; Items 2 and 3 are affirmed as serious violations and a total penalty of $5,500.00 is assessed.

Jurisdiction

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Review Commission pursuant to § 10(c) of the Act (Exh. J-1 ¶¶2 and 3). Florida Gas also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Exh. J-1 ¶1).

Background and Facts

Florida Gas is a Florida company engaged in the business of installing gas lines (Tr. 342). It contracts such services with various suppliers of gas. It employs approximately 125 individuals (Tr. 373). The majority of those employees are engaged in the installation of gas lines which requires excavation work.

On April 23, 2014, Florida Gas had a worksite on Sheldon Road in Tampa, Florida, at which its employees were working to tie a gas line from a Burger King under renovation to the main supply line at Sheldon Road (Tr. 155). Florida Gas had a two-man crew performing the work. The foreman for the site was John Horan (Exh. J-1 ¶4). He was being assisted by Isacc Perez. Mr. Horan had been a foreman with Florida Gas for three years at the time (Tr. 133). According to Michael Petralia, a project manager with Florida Gas and Mr. Horan's supervisor, Mr. Horan typically worked in shallow excavations (Tr. 345). Mr. Perez was a new employee, having been hired four months earlier.

At the start of the project, Florida Gas first had to remove a portion of the sidewalk along Sheldon Road in order to access the existing gas line (Tr. 34, 134). Once the sidewalk was removed, Mr. Horan and Mr. Perez began to manually dig at the location they expected to find the gas line, using hand held shovels (Tr. 134; Exh. J-1 ¶12). Mr. Horan testified he expected to

find the gas line at a depth of approximately three to four feet, but did not (Tr. 134, 155-56, 346). When he and Mr. Perez reached a depth of four feet, Mr. Horan installed a shoring system along the north and south walls of the excavation (Tr. 134-35; Exhs. C-2, C-4, C-11). He did not install a shoring system along the west or east wall of the excavation (Tr. 138; Exh. J-1 ¶7). Mr. Horan testified he did not think a shoring system was necessary along the west wall because it appeared to be hard packed and he observed no cracking (Tr. 138). However, the parties stipulated the soil was previously disturbed, type C soil (Exh. J-1 ¶19). *See* Appendix A to Subpart P, 29 CFR §§ 1926.650-652.

The excavation was bisected by a concrete structure that had formed a curb-like wall adjacent to the sidewalk along Sheldon Road (Tr. 34; Exh. J-1 ¶5). Mr. Horan estimated the structure was 28 inches tall, with approximately half the structure above the original ground level and half below (Tr. 165; Exh. J-1 ¶5). He described it as being wider at the bottom than the top - approximately 18 inches at the bottom and 12 inches at the top (Tr. 165). In their attempt to find the main gas line, Mr. Horan and Mr. Perez dug under this structure (Tr. 140-42; Exh. J-1 ¶10). Although they dug several feet underneath the structure, they placed no support system under it (Tr. 141; Exh. J-1 ¶11).

The parties stipulated Mr. Horan dug the excavation on the west side of the concrete structure and Mr. Perez dug the excavation on the east side (Exh. J-1 ¶12). According to the testimony of both Mr. Horan and Mr. Perez, as they dug, Mr. Horan stood in the west side of the excavation and threw the excavated dirt under the concrete structure to Mr. Perez (Tr. 161). Mr. Perez stood in the back of the east side of the excavation (Tr. 145).[1] As Mr. Horan threw the dirt toward him, Mr. Perez used his shovel to pick up the dirt and throw it onto the spoil pile located on the east and south side of the excavation. The spoil pile created by Mr. Perez was less than two feet from the edge of the excavation (Exhs. J-1 ¶8, C-1). Mr. Horan consistently testified Mr. Perez was standing next to the spoil pile (Tr. 145-46, 205, 219, 227). No support system was in place on the side of the excavation where Mr. Perez stood (Exhs. C-1, C-9, C-10).

[1] According to Mr. Perez, he stood somewhere along the top edge of the east side of the excavation, but was not in the excavation itself (Tr. 241-42). For the reasons discussed in detail herein, I did not find Mr. Perez's testimony on this issue credible.

At some point after the installation of the shoring system, Mr. Horan noticed water entering the excavation (Tr. 135-36). He and Mr. Perez then installed a well point system to remove the water (Tr. 135-37). The men continued to dig until they were more than six feet deep (Tr. 146). Having reached that depth, Mr. Horan testified he decided to abort the job because the main gas line was too deep (Tr. 146). He and Mr. Perez stopped working and left the job site (Tr. 144). Sometime during their absence from the worksite, the pump of the well point system stopped working (Tr. 144).

That same day, CSHO Nicou was returning to the Sheldon Road location to follow-up on an inspection he had begun the day before of other employers working on the Burger King renovation (Tr. 31). It was at that time he observed the excavation created by Florida Gas employees (Tr. 31-32). CSHO Nicou observed water in the excavation as well as cracking on the west wall (Tr. 42, 50-54; Exhs. C-3, C-4, C-7) and separation of the wall along the south side of the excavation (Tr. 37). CSHO Nicou testified he saw spoil piles on both sides of the concrete structure with the spoil pile on the east side at the edge of the excavation (Tr. 58-59; Exhs. C-9, C-10). He also observed two shovels in the excavation – one resting along the east wall and one partially submerged in water and mud on the bottom of the west section of the excavation (Tr. 44; Exhs. C-1, C-4, C-5, C-9). He concluded cave-in of the excavation was imminent (Tr. 42, 54, 60).

Around the same time CSHO Nicou arrived at the excavation, Mr. Horan and Mr. Perez were returning. CSHO Nicou first spoke with Mr. Horan who identified himself as the foreman (Tr. 32). Initially, Mr. Horan told CSHO Nicou he was the only one working in the excavation (Tr. 34, 63, 457). He later admitted to CSHO Nicou both he and Mr. Perez were in it (Tr. 63, 138). Mr. Horan also told CSHO Nicou he had not used shoring along the west wall because he felt the excavation was safe without it. Mr. Perez told CSHO Nicou he believed the excavation was too small to require shoring.

Neither employee reentered the excavation after CSHO Nicou arrived on the worksite. Rather, according to CSHO Nicou, the employees backfilled the trench within 30 minutes of their return to the worksite (Tr. 63).

Prior to that, CSHO Nicou measured the excavation with the assistance of Mr. Horan. Using CSHO Nicou's trench rod, they found the excavation was 6 feet, 4 inches deep (Tr. 453). CSHO Nicou testified the bottom of the excavation was the same depth on both sides of the concrete structure (Tr. 35). Mr. Horan's testimony was essentially the same. He stated under the structure it was "almost level" (Tr. 142). Mr. Horan estimated the entire excavation was 5 feet in width (north to south) and 8 feet in length (east to west) (Tr. 143). CSHO Nicou described the excavation has having all four walls vertical (Tr. 36). He observed both the south and east wall on the side of the excavation dug by Mr. Perez to be "relatively straight." (Tr. 453). CSHO Nicou photographed the excavation from several angles (Tr. 39; Exhs C-1 - C-11).

Based upon his inspection, CSHO Nicou recommended three citations be issued to Florida Gas. CSHO Nicou's recommendations were based on his observation of a lack of support for the concrete structure under which Mr. Horan and Mr. Perez had dug, the spoil pile being "right on the edge" of the excavation, and failure to protect employees in the excavation from cave-in along the west and east side of the excavation.

Legal Analysis

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Each of the three items at issue alleges a violation of Subpart P of the construction standards, which addresses excavations. Item 1 alleges a violation of 29 CFR § 1926.651(i)(3) for failure to support the undermined concrete structure that bisected the excavation, exposing employees to potential collapse of that structure. Item 2 alleges a violation of 29 CFR § 1926.651(j)(2) for placing the spoil pile along the east side of the excavation less than two feet from the edge of that excavation. Item 3 alleges a violation of 29 CFR § 1926.652(a)(1) for failing to provide a protective system on the east and west vertical walls of the excavation.

Florida Gas raises several challenges to the Secretary's prima facie case. With regard to each violation, Florida Gas contends the Secretary cannot establish employer knowledge of the hazard because knowledge cannot be imputed to Florida Gas through Mr. Horan absent a showing its safety program was deficient, which the Secretary has failed to do. With regard to Items 1 and 2, Florida Gas contends the Secretary has failed to meet his burden to establish any employee was exposed to a hazard. With regard to Item 1, Florida Gas contends the standard cited does not apply to the concrete structure at issue. Finally, Florida Gas raised the affirmative defense of unpreventable employee misconduct.

Item 1: Alleged Serious Violation of 29 CFR § 1926.651(i)(3)

Item 1 alleges:

> … employees were exposed to a possible concrete curb wall collapse in that, a trench was dug under the concrete curb wall adjacent to the sidewalk without providing any support to prevent it from collapsing into the trench.

The sited standard at 29 CFR § 1926.651(i)(3) reads:

> Sidewalks, pavements, and appurtenant structures shall not be undermined unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures.

Applicability of the Standard

The standard prohibits any undermining of sidewalks, pavement, and appurtenant structures unless a support system is provided. The Secretary contends the concrete structure, to which he refers in his citation as a curb wall, is an appurtenant structure for which no undermining is permitted without use of a support system. Florida Gas contends, to the contrary, the concrete structure is a like a retaining wall or other structure, and, therefore, covered by the requirements of § 1926.651(i)(1) or (2). On this point I disagree with Florida Gas. Both §§ 1926.651(i)(1) and 1926.651(i)(2) refer to structures adjacent to an excavation and address the hazard posed by the loads imposed on the soil at or near the excavation by the structure or the instability of the structure created by the adjacent excavation. 54 Fed. Reg. 45894-01, 45923 (1989). Neither address the hazard addressed by § 1926.651(i)(3) of the collapse of the structure due to having been undermined. I also disagree with Florida Gas that the structure referenced in

the citation is not covered by the standard. As noted in the 1989 Preamble to the standard, the term "appurtenant structures" refers to "structures attached to sidewalks and pavements." 54 Fed. Reg. 45894-01, 45924 (1989). It is undisputed the concrete structure referenced in the citation was attached to the sidewalk before the sidewalk was removed. Therefore, it is the type of structure addressed by the standard and the standard applies.

Failure to Comply with the Terms of the Standard

The hazard addressed by § 1926.651(i)(3) is collapse of the sidewalk, pavement, or appurtenant structure. The standard is intended to address both the hazard associated with being struck by the collapsing structure while working in the excavation, and the hazard associated with walking on the unsupported structure. *Id*. Generally, a standard presumes a hazard and the Secretary need only show the employer violated the terms of the standard. *Kasper Electroplating Corp.*, 16 BNA OSHC 1517, 1523 (No. 90-2866, 1993). However, a hazard is not presumed when the standard incorporates the hazard as a violative element. *Bunge Corp v. Secretary of Labor*, 638 F.2d 831 (5th Cir. 1981).

It is my determination § 1926.651(i)(3) incorporates the hazard as a violative element the Secretary must establish in order to show the employer in violation.[2] Although the standard reads as a prohibition of undermining without the use of a support system, it limits that prohibition to circumstances in which there is the "possible collapse of such structures." It is well recognized that statutes must be read as a whole, "making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." *Lake Cumberland Trust, Inc. v. E.P.A.*, 954 F.2d 1218, 1222 (6th Cir 1992), *quoting, Boise Cascade Corp. v. U.S. E.P.A.*, 942 F2d 1427, 1431-32 (9th Cir. 1991)). The last

[2] Florida Gas did not challenge the Secretary's position the cited standard presumes a hazard, relying rather on its argument the Secretary cited the wrong standard. Nevertheless, I have addressed the question of interpretation of the standard. It has long been recognized courts are not bound to accept stipulations as to questions of law. *Estate of Sanford v. Comm'r of IRS*, 308 U.S. 39, 51 (1939). Rather, when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, (1991); and *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77, (1990).

phrase of the cited standard incorporates an additional element to the Secretary's prima facie case, i.e. establishing the possibility of collapse of the structure. To interpret the regulation otherwise would render the final phrase - "to protect employees from possible collapse of the structure" – superfluous.

In so holding, I am aware at least one other administrative law judge (ALJ) has ruled to the contrary.[3] In *Rawson Contractors, Inc*., 20 BNA OSHC 1273 (No. 02-1921, 2003), Judge Barkley held the standard

> presumes that undermined pavement is no longer capable of supporting the loads such pavement could sustain before being undermined, and so presents a hazard to employees working within the zone of danger.

I note Judge Barkley's decision is an unreviewed ALJ decision and, therefore, not binding precedent. *Leone Construction Co.*, 3 BNA OHSC 1979 (No. 4090, 1976). Moreover, I do not find his analysis persuasive. If the regulation simply read "sidewalks, pavements, and appurtenant structure shall not be undermined unless a support system or another method of protection is provided," I would be inclined to agree the regulation presumes a hazard, but the regulation does not stop there. Rather, it requires such support system "to protect employees from the possible collapse of such structures." Judge Barkley's analysis simply ignores this qualifying statement. For this reason, I disagree with Judge Barkley's decision and find the standard does not presume a hazard of collapse.

The only other decision of which I am aware specifically discussing the standard at issue is Judge Baumerich's decision in *Penney's Construction Company, LLC*, 24 BNA OSHC 1819 (No. 12-0596, 2013). In finding the employer had violated the standard, Judge Baumerich never reached the issue presented here of whether the standard presumes a hazard. Moreover, the facts of the case were distinctly different in that the undermined structures had fallen into the excavation prior to the initiation of the inspection, rendering the issue of the possibility of collapse undisputed.

[3] The Secretary relied on Judge Phillips's decision in *Teichert Construction*, 24 BNA OSHC 1020 (No. 10-0220, 2012). However, Judge Phillips never specifically reached this issue.

Having found the Secretary has the burden to establish the possibility of collapse of the undermined structure, I turn to whether the Secretary has met that burden. I find he has not. The only evidence of the possibility of collapse of the concrete structure was the testimony of CSHO Nicou. He admitted he had not inspected the structure for signs of structural compromise (Tr. 107, 458). Nor did he observe any (Tr. 107). Rather, CSHO Nicou testified any number of things could have happened to diminish the structure's strength (Tr. 459-60). However, given the lack of evidence of any such events, it is equally likely, on this record, that nothing was done to the structure to compromise its integrity. The Secretary presented no evidence of the make-up of the structure, or any explanation of how, or under what circumstances it might collapse. Finally, the record contains no documentary or photographic evidence of any compromise in the integrity of the structure.[4] I find the Secretary's evidence speculative and, consequently, of little probative value. Therefore, I find the Secretary has failed to meet his burden to establish a violation of the standard and vacate Item 1 of Citation 1.

Item 2: Alleged Serious Violation of 29 CFR § 1926.651(j)(2)

Item 2 alleges, on the "[w]est side of the construction site, employees were exposed to struck by hazard, in that, the spoil was placed right at the edge of the east side trench wall."

The sited standard at 29 CFR § 1926.651(j)(2) reads:

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

Applicability of the Standard

[4] In support of its position there was no possibility of the structure's collapse, Florida Gas presented the testimony of Jason Burby whom it offered as an expert in engineering. I declined to accept Mr. Burby as an expert on the grounds Florida Gas had not provided sufficient notice of its intent to call an expert to either the court or the Secretary. However, I did admit his lay opinion testimony over the Secretary's objection. In finding the Secretary has failed to meet his burden to establish a hazard, I did not rely on the testimony of Mr. Burby, as the Secretary failed to present probative evidence sufficient to meet his burden. Therefore, I find no prejudice to the Secretary in having admitted the testimony of Mr. Burby.

The standard requires the protection of employees from excavated materials falling into an excavation. The standard applies, therefore, to circumstances in which material has been excavated and remains on the worksite. Because there was excavated material at the worksite, I find the standard applies.

Failure to Comply with the Terms of the Standard

The hazard addressed by § 1926.651(j)(2) is material or equipment falling or rolling into an excavation and striking employees working there. The Secretary contends the standard presumes a hazard and that all he need show is the existence of excavated material less than two feet from the edge of the excavation with no retaining device in use. Florida Gas contends, to the contrary, the standard does not presume a hazard. Rather, to show a violation of the standard, the Secretary must show the excavated material "could pose a hazard by falling or rolling" into the excavation. Further, Florida Gas contends because no material was observed to be falling into the excavation, the Secretary has failed to meet his burden. Although I agree with Florida Gas that the standard does not presume a hazard, and thus, the Secretary has the burden to establish the excavated material could pose a hazard by falling or rolling into the excavation, I disagree the burden can only be met with proof of material actually having fallen, or in the process of falling, into the excavation. Based upon the totality of the evidence, I find the Secretary has established Florida Gas violated the terms of § 1926.651(j)(2).

First, I find § 1926.651(j)(2) incorporates the hazard as a violative element the Secretary must prove. In so holding, I am again bound by the standard of statutory interpretation requiring a statute be read as a whole such that all provisions have meaning. The first sentence of the regulation requires protection of employees from "excavated material or equipment that could pose a hazard by falling or rolling into excavations." The inclusion of this sentence requires the Secretary to prove material or equipment could pose a hazard of falling or rolling into the excavation and the material or equipment was less than two feet from the edge of the excavation. To hold otherwise would render the first sentence without purpose.

Although the Commission has yet to address this issue, the majority of ALJs who have addressed the issue have ruled the Secretary must establish the hazard in order to prove the employer violated the standard. *Columbia Gas of Ohio*, 17 BNA OSHC 1510 (No. 93-3232,

1995); *Honey Creek Contracting, Inc*., 1998 WL 1386877 (No. 97-0353, 1998); *Performance Site Management*, 21 BNA OSHC 2115 (No. 06-1457, 2007); and *Schaer Development of Central Florida, Inc.*, 23 BNA OSHC 1842 (No. 11-0371, 2011), *but see North Texas Contracting, Inc*., 21 BNA OSHC 1419 (No. 05-0330, 2006). Although these decisions are unreviewed ALJ decisions and are not, therefore, binding precedent, I do find the reasoning persuasive. A careful reading of the standard indicates to me that unless the excavated or other material "could pose a hazard by falling or rolling" into the excavation, there is no violation of the standard even if the materials are less than two feet from the excavation's edge.

I do not agree, however, with Florida Gas's urging that the Secretary's burden can only be met by establishing material had fallen, or was in the process of falling, into the excavation. As Judge Welsch noted in *Performance Site Management*, the Secretary's burden is not to show "significant risk of the hazard coming to fruition;" rather, the Secretary need only show that "if the hazardous event occurs, it would create a significant risk to employees." *Performance Site Management*, 21 BNA OSHC at 2119, *citing Waldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993). Again, I find Judge Welsch's holding persuasive as it is based on long standing Review Commission precedent and is well-reasoned.

I find the preponderance of the evidence supports a finding not only of the possibility of the spoil pile materials falling into the excavation, but that if the event were to occur, it would create a significant risk to employees. The parties stipulated the spoil pile along the south wall of the east side of the excavation was within 2 feet of the excavation's edge (Exhs. J-1 ¶8, C-1, C-9, C-10).[5] The parties also stipulated the material comprising the spoil pile was previously disturbed, type C soil (Exh. J-1 ¶19). CSHO Nicou observed the soil on the spoil pile material to be loose (Tr. 119-20). CSHO Nicou testified soil of this type would fall back into the excavation as it is thrown, given the angle of repose of the spoil pile (Tr. 43, 119). Moreover, the walls on this portion of the excavation were vertical or straight (Tr. 119, 453-55). The spoil pile was 2 to

[5] Florida Gas argues Mr. Perez testified the spoil pile was two feet from the edge prior to he and Mr. Horan leaving the worksite. For the reasons discussed herein, I do not find Mr. Perez a credible witness. Mr. Horan testified the sides of the excavation changed, but could not recall which sides changed or how much the conditions changed (Tr. 158-59). I find Florida Gas's argument, based on the less than credible testimony of Mr. Perez unpersuasive.

3 feet high (Tr. 67, 217). A careful review of the photographs taken by CSHO Nicou shows a large spoil pile well within 2 feet of the excavation's edge (Exhs. C-1, C-9, C-10).[6] Because there was little sloping on the east wall on which the spoil pile sat, if the loose material were to fall, a large volume of material, weighing as much as 100 to 200 pounds per cubic foot, would have fallen unimpeded on Mr. Perez (Tr. 67). Thus, given the size of the spoil pile, the type of soil, and the vertical walls of the excavation, I find the Secretary has established a violation of the terms of the standard.

Employee Exposure to the Hazard

The Secretary has also established employee exposure to the hazard. Mr. Horan testified Mr. Perez was in the east side of the excavation next to the spoil pile (Tr. 145-46, 205, 226). Mr. Horan stated he was passing the dirt from his side, under the concrete structure, to Mr. Perez who, in turn, threw the dirt over his shoulder onto the spoil pile (Tr. 145-46). Florida Gas stipulated Mr. Perez dug the east side of the excavation and was in the east side of the excavation for at least 2 hours (Exh. J-1 ¶¶12 and 15). The Secretary has established Mr. Perez was exposed to the hazard addressed in the standard.

Relying on the testimony of Mr. Perez, Florida Gas contends the Secretary cannot show Mr. Perez was exposed to the hazard. Mr. Perez testified he stood on the top edge of the excavation and reached 4 to 5 feet down into the excavation as Mr. Horan threw dirt under the concrete structure to him. Therefore, Florida Gas argues, he was never exposed to material potentially falling into the excavation because he was not in the excavation. On this I find Mr. Perez less than credible and reject Florida Gas's argument. First, contrary to Mr. Perez's testimony, Mr. Horan's testimony was that Mr. Perez was on a ledge approximately 2 feet into the excavation, next to the spoil pile and digging under the concrete structure (Tr. 145-46, 205, 219, 227). I found Mr. Horan to be a more credible witness than Mr. Perez. Mr. Perez's various statements regarding where he stood while assisting Mr. Horan were not consistent (Tr. 241, 258, 267-68). Nor was his testimony consistent with facts to which Florida Gas previously stipulated

[6] I note the citation references only the spoil pile on the east excavation wall and not the south wall. The photographic evidence shows a spoil pile along the edge of both the south and east excavation walls.

(Exh. J-1 ¶¶12 and 15). Mr. Perez was often confused and equivocal while testifying, changing his testimony when prompted by counsel (Tr. 267-68).[7] Mr. Horan, on the other hand, did not waver on this point. Mr. Perez's statement that he stood on the top of the excavation wall, bent over, and extended his shovel at times more than 5 feet down to the bottom of the excavation, under the concrete structure simply does not have the ring of truth (Tr. 258).

Nothing in the standard requires the Secretary to establish the employee was at the bottom of an excavation more than 5 feet deep. The Secretary need only show the employee was within the zone of danger. Because the preponderance of the credible evidence establishes Mr. Perez was in the east side of the excavation next to the spoil pile, the Secretary has established he was exposed to the hazard of the spoil pile material falling into the excavation and onto him.

Employer knowledge

The Secretary must establish Florida Gas had knowledge of the violative condition. In order to establish employer knowledge of a violative condition, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engd Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is required to make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their scheduled work. *Automatic Sprinkler Corporation of America*, 8 BNA OSHC 1384, 1387 (No 76-5089, 1980). The Secretary contends Mr. Horan's knowledge of Mr. Perez's location and the condition of the spoil pile should be imputed to Florida Gas. Florida Gas, to the contrary, contends Mr. Horan's knowledge of the condition cannot be imputed to it under the 11th Circuit's holding in *ComTran Group, Inc., v. U.S. Dept. of Labor,* 722 F.3d 1304 (11th Cir. 2013), absent a showing of the inadequacy of its safety program. I disagree with Florida Gas and find the Secretary has established employer knowledge.

The Court of Appeals for the 11th Circuit recently discussed the Secretary's knowledge element in the *ComTran* decision:

[7] Although I am cognizant of the fact Mr. Perez had limited English language skills, his inability to consistently state his location was not the result of a language barrier.

> As for the knowledge element [ ], the Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer (citations omitted). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See e.g., Secretary of Labor v. Kansas Power & Light Co*., 5 O.S.H. Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct but he was in close enough proximity that he should have. *See, e.g., Secretary of Labor v. Hamilton Fixture*, 16 O.S.H. Cas. (BNA) 1073 *17-19 (1993) (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, see *New York State Elec. & Gas Corp.*, 88 F.3d 103, 105-06 (2d Cir. 1996) (citations omitted), with the rationale being that ---in the absence of such a program ---the misconduct was reasonably foreseeable.

ComTran, 722 F.3d at 1307-1308.

Further, in *ComTran* the court held "if the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the conduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct." *Id. at* 1318. The 11th Circuit held, however, its decision in *ComTran* did not apply to the ordinary case in which constructive knowledge is established because the supervisory employee should have known through reasonable diligence of the exposure of his subordinates to the hazardous conditions. *ComTran*, 722 F.3d at 1308, n. 2. Such is the case here. Mr. Horan was in proximity to Mr. Perez during the entire day. He was aware of what Mr. Perez was doing (Tr. 205). Although he did not admit to knowing the location of the spoil pile, Mr. Horan admitted he knew Mr. Perez was next to it (Tr. 145-46; 205; Exh. C-12). The Secretary has established employer knowledge.

Florida Gas's reliance on *ComTran* ignores its inapplicability to the facts of the instant case. At issue in *ComTran* were two violations of specific safety standards addressing trench safety. The supervisory employee in *ComTran* not only created the hazard addressed by the standard (dug the trench), he was also the exposed employee. *Id*. at 1309. The Secretary

attempted to impute knowledge to the employer through the actual knowledge of the supervisor of his own misconduct. In the instant case, it was Mr. Perez who created and who was exposed to the hazard. I find Florida Gas had knowledge of the hazard because Mr. Horan should have known through reasonable diligence of the conditions created by, and exposure of his subordinate. Thus, the case falls outside of the standard set out in *ComTran* as the 11th Circuit explicitly stated. *ComTran*, 722 F.3d at 1308 n. 2.

Classification

The Secretary alleged the violation § 1926.651(j)(2) was properly classified as a serious violation because, should the spoil pile fall onto the employee working in proximity to it, that employee would be exposed to soil hitting or falling on him (Tr. 67-68). Given the weight of soil, this could result in broken bones or other serious injuries. Florida Gas did not dispute this. Therefore, I find Mr. Perez was exposed to a hazard likely to result in serious injury and find Item 2 properly classified as a serious violation.

For the foregoing reasons, the Secretary has established a serious violation of 29 CFR § 1926.651(j)(2).

Item 3: Alleged Serious Violation of 29 CFR § 1926.652(a)(1)

Item 3 alleges, on the

> [w]est side of the construction site, employees were exposed to possible cave-ins, in that, while in progress of locating a gas pipe, a trench 7 feet by 5 feet and 6 feet 5 inches deep was not provided with a shoring system at the east and west trench walls.

The cited standard at 29 CFR § 1926.652(a)(1) reads:

> 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…

Designs for proper sloping and benching systems are set out in § 1926.652(b); and for support systems in § 1926.652(c).

Applicability of the Standard

The standard requires the protection of employees working in excavations from cave-ins. The standard applies to circumstances in which employees are working in excavations that are over 5 feet deep and not dug in stable rock. 29 CFR §§ 1926.652(a)(1)(i) and (ii). The standard defines excavation as any "man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." Florida Gas concedes employees were working in an excavation (Exh. J-1 ¶15). Moreover, the excavation was over 6 feet deep and dug in type C soil (Exh. J-1 ¶19). I find the entire excavation (both sides of the concrete structure) was over 5 feet deep. As CSHO Nicou and Mr. Horan testified, the excavation was 6 feet, 4 inches at its lowest point (Tr. 453). Based upon Mr. Horan's testimony, this would have created a 5 foot gap underneath the concrete structure. This gap can be seen in the photographs taken by CSHO Nicou (Exhs. C-1, C-5, C-7, C-9, C-10, C-11). According to Mr. Horan, the excavation was level at that point and then sloped upward on the east side (Tr. 142). Given this large gap and the manner in which Mr. Horan and Mr. Perez were working, I find the worksite constituted a single excavation and the standard applies to the operations of both Mr. Horan and Mr. Perez.

Failure to Comply with the Terms of the Standard

The parties stipulated the west side of the excavation did not comply with 29 CFR § 1926.652(a)(1). The parties also stipulated there was no shoring on the east excavation wall (Exh. J-1 ¶16). CSHO testified the east excavation wall was vertical (Tr. 36, 48; Exh. C-6). This would not comply with the benching requirements for type C soil found in § 1926.652(b). Mr. Horan conceded as much in his testimony (Tr. 224). CSHO Nicou further testified walls of this configuration in type C soil could collapse (Tr. 50). Moreover, there were signs of instability of the walls (Tr. 47, 51-54; Exh. C-7). Therefore, the terms of the standard were violated.

Employee Exposure to the Hazard

The Secretary has also established employee exposure to the hazard. There is no dispute Mr. Horan was in the excavation at a point at which it was over five feet deep without any protective system on the west wall of the excavation. Moreover, as previously discussed, I have found the preponderance of the credible evidence establishes Mr. Perez was in the east side of the excavation with no protective system in place on the east wall of the excavation.

Florida Gas contends Mr. Perez was not exposed to the hazard of the excavation cave-in because he was standing on the edge of the excavation. As I have previously discussed, I have found Mr. Perez was working in the excavation, not on the top edge. Moreover, Mr. Perez was exposed to the hazard of a cave-in as is evidenced by the fact that some of the walls of the excavation had begun to cave in while he and Mr. Horan were away from the worksite (Tr. 217-22). The Review Commission has recognized the cited standard is implicated by the depth of a particular trench, without regard to an individual worker's precise location in it. *Ford Development Corp.*, 15 BNA OSHC 2003 (No. 90-1505, 1992) (rejecting the employer's argument that workers standing on a pipe while in a trench were effectively only exposed to a depth of 3 ½ feet and therefore, not in violation of the standard); *see also P. Gioioso & Sons v. OSHRC*, 115 F.3d 100, 108-09 (1st Cir. 1997). Thus, even if Mr. Perez was not standing at a point below 5 feet, he was exposed to the hazard addressed by the cited standard. The Secretary has met his burden to establish both Mr. Perez and Mr. Horan were exposed to the hazard addressed in the standard.

Employer Knowledge

The Secretary must establish Florida Gas was aware or, with the exercise of reasonable diligence should have been aware, of the violative condition. The Secretary contends Mr. Horan's knowledge of his own location and that of Mr. Perez and the condition of the excavation should be imputed to Florida Gas. As with Item 2, Florida Gas contends Mr. Horan's knowledge of the condition cannot be imputed to it under the 11th Circuit's holding in *ComTran*, absent a showing of the inadequacy of its safety program. For the reasons discussed with regard to Item 2, I disagree with Florida Gas and find the Secretary has established employer knowledge.

I find Florida Gas had knowledge of the hazard because Mr. Horan knew of the exposure of both himself and his subordinate to the hazardous condition (Tr. 226-27). Mr. Horan testified, "I kind of knew that I needed a four-side—like I would need a four-sided trench box, but I just kind of did it anyways." (Tr. 199). Thus, the case falls outside of the standard set out in *ComTran* as the 11th Circuit explicitly stated. *ComTran*, 722 F.3d at 1308 n. 2.

Classification

The Secretary alleged the violation of § 1926.652(a)(1) was properly classified as a serious violation because cave-in of an excavation could result in employees being engulfed or buried by soil (Tr. 69). This, in turn, could result in serious injury such as broken bones or death (Tr. 69). Florida Gas did not dispute this. Therefore, I find Mr. Horan and Mr. Perez were exposed to a hazard likely to result in serious injury and find Item 3 properly classified as a serious violation.

For the foregoing reasons, the Secretary has established a serious violation of 29 CFR § 1926.652(a)(1).

Unpreventable Employee Misconduct

Florida Gas has asserted a defense of unpreventable employee misconduct with regard to each of the alleged violations. To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., Stark Excavating, Inc.*, 2014 WL 5825310 (Nos. 09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). Where the asserted misconduct is that of a supervisory employee, the Commission has made the employer's burden of proof "more rigorous" and the defense "more difficult to establish" because it has recognized the supervisor has the duty to protect the safety of employees under his supervision and a supervisor's misconduct is "strong evidence that the employer's safety program is lax." *CBI Services, Inc., 19 BNA OSHC 1591 (No. 95-0489, 2001).* Florida Gas contends, if the Secretary has established any of the violations, each was the result of the unpreventable misconduct of Mr. Horan and Mr. Perez.

I find Florida Gas has met the first three elements of the affirmative defense. Florida Gas presented evidence of its work rules designed to prevent the violation of the specific standards at issue and that it trained its employees on those rules. Lisa Judge, operations safety and compliance manager of Florida Gas, testified the company has an employee safety guide provided to all employees upon starting work (Tr. 383; Exh. R-4). This document contains rules that address safety issues with regard to excavations generally, and the violations at issue in this

matter specifically (Exh. R-4 pp. 73, 74, and 75). Florida Gas's employee handbook also contains safety standards (Tr. 383; Exh. R-3 p. 44). Each of these rules was communicated to employees during their orientation (Tr. 178, 275, 374). Part of Florida Gas's orientation also includes an interactive computer training developed by National Utilities Contractors Association (NUCA) (Tr. 373; Exh. R-1). Employees must complete the course prior to beginning work and do so on computers at Florida Gas's training facility (Tr. 172-73, 375-77). Both Mr. Horan and Mr. Perez completed this training and acknowledged receipt of the each of these documents (Tr.168-69, 275; Exhs. R-2, R-5, R-9). In addition to orientation training, Florida Gas provides its employees with competent person training (Tr. 378; Exhs. R-6, R-7). Both Mr. Horan and Mr. Perez completed this training as well (Tr. 174-75, 278-80; Exhs. R6, R-9). Florida Gas requires its foremen to conduct biweekly tool box talks (Tr. 379-80; Exhs. R-10, R-11). The company has a safety committee, comprised of employees, designed to allow employees to air their concerns and have them addressed by management (Tr. 379; Exhs. R-14, R-15). The NUCA DVD, tool box talks, and Employee Safety Guide were all available in Spanish for Spanish speaking employees (Tr. 379-80).

I also find Florida Gas took reasonable steps to discover violations of their work rules. Mr. Petralia testified he has oversight of 12 crews. He stated he tries to visit all 12 of his crews each day (Tr. 343). His crews do not know his route for the day and he may observe the worksite from a distance before letting employees know he has arrived (Tr. 349-50). Thus, Mr. Petralia ensures he sees employees in the normal course of their work. Mr. Petralia testified this is consistent with his understanding of how other project managers conduct oversight of their jobs. Steve Furry, Florida Gas's director of operations, also testified he performs unannounced site visits (Tr. 361). Mr. Horan corroborated his supervisors have come to his worksites "many times." (Tr. 195-96). Ms. Judge testified the company uses a service provided by its insurance company to perform inspections and write reports for the company on its findings (Tr. 411; Exh. R-16).

Despite finding adequate most aspects of Florida Gas's safety program, I find Florida Gas failed to meet its burden to establish it effectively enforced it rules once it discovered violations. The Commission most recently addressed the employee misconduct defense in *Stark Excavating*,

Inc., 2014 WL 5825310 at *5-7. In *Stark*, the Commission held the employer had failed to meet its burden with regard to the last element of the affirmative defense. The Commission found the employer had a disciplinary program that "required the issuance of a written safety ticket for any safety violation and progressive disciplinary consequences for subsequent violations." *Id*. at *5. However, the evidence established the safety director had issued the majority of the written discipline. In 22 months, no other supervisor had issued written discipline, preferring to use verbal warnings. Although the Commission recognized verbal warnings may be adequate in certain cases, it found because the employer's policy expressly required written warnings, "giving only oral warnings undermined the policy's progressive nature." *Id*. at *6 *citing GEM Industrial, Inc.*, 17 BNA OSHC 1891 (No. 93-1122, 1996). Moreover, the Commission found the employer's evidence lacking for failure to provide documentation of any verbal warnings. In so holding, the Commission relied on its prior holdings in *Precast Services, Inc.* 17 BNA OSHC 1454 (No. 93-2971, 1995) and *Rawson Contractors, Inc*., 20 BNA OSHC 1078 (No. 99-0018, 2003), in which it found, although verbal warnings may suffice, it is the rare case and generally requires a showing of a long history of safe work practices despite frequent opportunities for violations and evidence of actually having administered the discipline.

Florida Gas's employee handbook contains the company policy for progressive discipline (Exh. R-3 p. 14). Under that policy, an employee is first issued a verbal warning (Exh. R-3, p. 14). According to Mr. Furry, if the condition is not corrected, a written warning or harsher penalty is issued (Tr. 364). According to Ms. Judge, verbal warnings are to be reduced to writing (Tr. 382). The form used by Florida Gas for all discipline since at least 2006, with the exception of that issued to Mr. Horan and Mr. Perez,[8] is designed to allow for such documentation, as well as keep track of subsequent discipline for the same offense (see Exh. R-17). Mr. Petralia testified he gives verbal warnings for violations such as failure to wear a safety vest or hard hat, but was unable to state whether he had issued a written warning in 2014 (Tr. 356). Mr. Furry testified to two instances of suspensions issued to a crew leader for a safety violation (Tr. 366-67). However, he did not provide any details.

[8] When asked why there were no other similar documents, Ms. Judge responded "because we just changed the forms" (Tr. 428). She could not state when this change occurred. Nor did Florida Gas provide any explanation for this difference in format.

Based upon a careful review of Florida Gas's disciplinary records, I find Florida Gas has failed to establish effective enforcement of its safety program. These records corroborate only one of the disciplinary actions to which Mr. Furry testified and none referenced by Mr. Petralia. The record of the discipline referenced by Mr. Furry show it occurred in 2011 (Exh. R-17C). Moreover, only five of the 30 disciplinary records submitted by Florida Gas address safety violations occurring before this inspection (Exhs. R-17C, 17-D, 17M, 17O, 17P).[9] The overwhelming majority of these records, which date back to 2006, show discipline for attendance violations. When asked whether the documents contained in Exhibit R-17 constituted all the discipline issued for the time period covered, Ms. Judge responded "it's just a sampling…we could not bring everything; it's too voluminous." (Tr. 430). Florida Gas has the burden to produce evidence of enforcement of its safety rules. That voluminous evidence of such exists, but Florida Gas chose not to present it and presented in its place evidence of discipline for non-safety related infractions, strains credulity. Even if I found this assertion credible, I can only consider those records before me. Based on the record before me, I find Florida Gas has failed to establish it followed its own progressive disciplinary policy when enforcing its safety rules.

The evidence shows serious safety concerns had been brought to Florida Gas's attention, yet it did not address those issues with its employees. I am unpersuaded by Florida Gas's assertion, via Mr. Judge's testimony, it did not discipline anyone for safety violations depicted in the CNA reports because the photographs do not show exposed employees. First, this is simply inaccurate, as the photos at Exhibit R-16B (employee riding in the open bed of a pick-up truck), R-16B.2 (an employee without a safety vest), and R-16B.4 (an employee without proper foot protection) establish. Florida Gas presented no evidence, other than the one set of safety committee minutes that occurred after the OSHA inspection, establishing it took measures to address any of the safety concerns raised by the insurance carrier in these meetings. In failing to respond, in light of the language used by the insurance carrier in one letter in which the inspector

[9] Florida Gas refers to nine safety-related disciplinary records. Because Florida Gas did not specify to which records it refers, I assume the discrepancy is due, in part, to my exclusion of the discipline issued to Mr. Horan and Mr. Perez. Florida Gas may also have included discipline for such infractions as carelessness and spitting, as well. Even accepting Florida Gas's number, the overwhelming majority of the disciplinary records do not reference safety-related discipline.

states "uncontrolled exposures…should have been controlled as a normal operational procedure," (Exh. R-16B), Florida Gas undermined the effectiveness of its written program.

Although Mr. Horan and Mr. Perez were disciplined following the OSHA inspection, the records indicate they were disciplined for not following company policy with regard to conduct during such an OSHA inspection, with reference to only one of the safety concerns raised in the OSHA inspection (Exh. R-17A, 17B). Mr. Horan testified, in additional to the verbal discipline, he was required to give a presentation to his peers (Tr. 163-64). I was impressed by Mr. Horan's sincere expression of embarrassment at having to so do. However, I found the evidence as to what this presentation involved lacking (Tr. 201). The minutes of that meeting indicate his focus was on failure to follow company procedures with regard to conduct during an OSHA inspection, such as directing the CSHO to wait for a manager to arrive and to take the same photos as the CSHO (Exh. R-15N). Therefore, I do not find this discipline of Mr. Horan to be persuasive evidence of Florida Gas's enforcement of its safety policies.

To the extent Florida Gas's safety committee could be construed as a mechanism to address rule violations, a careful review of the minutes of those meetings establishes employee safety was raised infrequently (Exhs. R-15A, 15E, 15F, 15I, 15K). Rather, the majority of the minutes reference discussion of property damage or loss (*see, e.g.*, Exhs. R-15B, 15-D, 15H, 15I, 15J, 15K, 15L).

I find the evidence establishes Florida Gas did not adhere to its own progressive disciplinary policy with regard to safety violations. Florida Gas failed to submit evidence showing it addressed its insurance carrier's concerns with employees through an enforcement mechanism. As the Commission recognized in *Stark*, giving only verbal reprimands where an employer's policy explicitly required it to use progressive discipline and issue written warnings, "undermined the policy's progressive nature." 2014 WL 5825310 at *6. For the foregoing reasons, I find Florida Gas has failed to establish the affirmative defense of unpreventable employee misconduct.

Penalty Determination

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). Section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

The Secretary proposed a penalty of $4,900.00 each for Item 2 and Item 3 (Tr. 71). CSHO Nicou testified he considered the violations to have a high probability of causing injury; therefore, the gravity based penalty proposed for each was $7,000.00. A reduction factor of 30% was given for the company's small size. No other reductions were given.

With regard to Item 2, I do not agree the gravity of the violation was high. Given the type of soil, size of the spoil pile, and Mr. Perez's location, the likelihood of injury is low. Mr. Perez was the only employee exposed and for a short period of time.

With regard to Item 3, I find the gravity of the violation was high. Either Mr. Horan or Mr. Perez, or both, could have been severely injured if the excavation caved in. The likelihood of that occurring was heightened due to the water in the excavation, evidenced by Mr. Horan's testimony the walls had collapsed as a result of the pump having stopped (Tr. 144, 158). The record establishes Mr. Horan and Mr. Perez were exposed to the hazard for approximately 30 minutes. Therefore, a high gravity based penalty for this violation is appropriate.

I also find a reduction in the gravity based penalty is warranted. Florida Gas is a small employer. Although I found its safety program lacking, the evidence of its efforts to train employees and its response to the conditions found during the OSHA inspection evince good faith. The Secretary presented no evidence of Florida Gas having a history of violations. Therefore, I find a significant reduction in the gravity based penalty is warranted.

Considering all of the statutory factors, it is determined that a penalty of $2,000.00 for Item 2 and $3,500.00 for Item 3, for a total penalty of $5,500.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, Citation 1, alleging a violation of 29 CFR § 1926.651(i)(3) is vacated;
2. Item 2, Citation 1, alleging a violation of 29 CFR § 1926.651(j)(2) is affirmed as serious, and a penalty of $2,000.00 is assessed; and
3. Item 3, Citation 1, alleging a violation of 29 CFR § 1926.652(a)(1) is affirmed as serious, and a penalty of $3,500.00 is assessed.

/s/
HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia

DATE: December 12, 2014

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