THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Stark Excavating, Inc., Respondent.	OSHRC DOCKETS NO. 09-0004 09-0005 (Consolidated)

Appearances:

Leonard A. Grossman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Julie O'Keefe, Esq., Armstrong Teasdale, LLP, St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Stark Excavating, Inc. ("Respondent") worksite in Peoria, Illinois on June 5, 2008, and a second inspection of a worksite in Champaign, Illinois on July 22, 2008. As a result of those inspections, OSHA issued *Citations and Notifications of Penalty* to Respondent charging violations of the Act at each location.[1] Respondent timely contested the citations in both cases, which were subsequently consolidated

1 OSHRC Docket No. 09-0004 (OSHA Inspection No. 310801246) consists of an alleged serious violation of 29 C.F.R. §1926.102(a)(2) with a proposed penalty of $2,000.00; an alleged willful violation of 29 C.F.R. §1926.652(a)(1) with a

for hearing, and a trial was conducted between November 3 and November 6, 2009, in Peoria, Illinois.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. At all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Complaints* and *Answers; Slinghuff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a prima facie violation of the Act, the Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

A violation is "serious" if there is a substantial probability that death or serious physical harm could result from the violative condition. *29 U.S.C. 666(k)*. Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm would result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp.* v. OSHRC, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 1993 CCH OSHD ¶29,942 (No. 88-0523, 1993).

When Complainant alleges a "repeat" violation, she has the burden of establishing that the present and past violations are substantially similar. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Complainant makes a prima facie showing of "substantial similarity" by establishing the past and present violations are for failure to comply with the same standard. The burden then shifts to Respondent

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proposed penalty of $70,000.00; and an alleged repeat violation of 29 C.F.R. §1926.651(j)(2) with a proposed penalty of $35,000.00. Complainant withdrew an alleged violation of 29 C.F.R. §1926.21(b)(2) [Citation 1 Item 1(a)] before trial. OSHRC Docket No. 09-0005 (OSHA Inspection No. 310802095) consists of an alleged willful violation of 29 C.F.R.

to rebut that showing. *Monitor Construction Co*., 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

A violation is "willful" if it is "committed 'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.'" *Diamond Installations, Inc*., 21 BNA OSHC 1688, 2005 CCH OSHD ¶32,848 (No. 02-2080, 2006) (cited references omitted). This test describes misconduct that is more than negligent but less than malicious, or committed with specific intent to violate the Act or standard. *Georgia Electric Co.,* 595 F.2d 309, 318-19 (5th Cir. 1979*); Ensign-Bickford Co. v. OSHRC,* 717 F.2d 1419, 1422-23 (D.C.Cir. 1983). The employer's state of mind is the key issue. *Diamond Installations*, supra. Complainant must show that Respondent had a "heightened awareness" of the illegality of the conduct. *Id*. Heightened awareness is more than simple awareness of the conditions constituting the alleged violation; such evidence is already necessary to establish the violation. *Id.* Instead, Complainant must show that Respondent was actually aware of the unlawfulness of the action or that it "possessed a state of mind such that if it were informed of the standards, it would not care." *Id.*

Numerous cases "make clear that willfulness will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible." *Froedtert Lutheran Hosp., Inc.,* 20 BNA OSHC 1500, 1510 (No. 97-1839, 2004). Thus a company cannot be found to have willfully violated a standard if it exhibited a good faith, reasonable belief that its conduct conformed to law, or if it made a good faith effort to comply with a standard or eliminate a hazard. *American Wrecking Corporation v. Secretary of Labor,* 351 F.3d 1254, 1262-63 (D.C. Cir. 2003); *General Motors Corp. Electro-Motive Division*, 14 BNA OSHC 2064, 1991 CCH OSHD ¶29,240 (No. 82-630 *et al*., 1991). To negate willfulness, the employer's good faith efforts or belief must be objectively reasonable under the circumstances. *Caterpillar Inc.,* 17 BNA OSHC 1731, 1733 (No. 93-373, 1996), *aff'd* 122 F.3d 437 (7th Cir. 1997).

Respondent asserted "unpreventable employee misconduct" as an affirmative defense in each case. To establish this defense, Respondent must show that: (1) it had established work rules designed to

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§1926.651(j)(2) with a proposed penalty of $70,000.00; and an alleged willful violation of 29 C.F.R. §1926.652(a)(1) with a

prevent the violations, (2) it adequately communicated those rules to its employees, (3) it took steps to discover violations of its rules, and (4) it effectively enforced the rules when violations were discovered. *Diamond Installations* supra. When the alleged misconduct is that of a supervisor, the required proof is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *Archer-Western Contractors Ltd*., 15 BNA OSHC 1013, 1991 CCH OSHD ¶29,317 (No. 87-1067, 1991). The actions and knowledge of supervisory personnel are generally imputed to their employers. *Revoli Const. Co.,* 19 BNA OSHC 1682 (No. 00-0315, 2001). It is well settled that an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Access Equipment Systems, Inc*., 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). In such an instance, the Respondent must establish that it took all feasible steps to prevent the incident, including adequate instruction and supervision of its supervisory employee. *Archer-Western Contractors Ltd.,* supra.

Factual Stipulations

The following undisputed facts were identified in the parties' pre-trial submissions:

- Respondent has an office and place of business at 895 W. Washington St., Bloomington, Illinois.
- Respondent is engaged in the business of excavation and related activities as well as construction.
- On June 5, 2008, Respondent had a worksite located at 3708 N. Prospect Road, Peoria, Illinois (Starbucks Coffee) which was the site of Inspection 310801246 (Docket 09-0004).
- On July 22, 2008, Respondent had a worksite at Springfield and Third, Champaign, Illinois which was the site of Inspection 310802095 (Docket 09-0005).
- Stark Excavating was cited for a violation of Occupational Safety and Health Standard 29 C.F.R. §1926.652(a)(1) or its equivalent which was contained in OSHA inspection 308573252, Citation 1,

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proposed penalty of $70,000.00.

Item 2b issued on August 30, 2006, with regard to a workplace located at Euclid Street, Bloomington, Illinois. Respondent did not contest this citation. An Informal Settlement Agreement re: Inspection 308573021, including this citation, was signed by Wayne E. Clayton on behalf of Respondent, and was entered on September 21, 2006.

- Stark Excavating was cited for a violation of Occupational Safety and Health Standard 29 C.F.R. §1926.652(a)(1) or its equivalent which was contained in OSHA Inspection 308573021, Citation 1, Item 2, issued on August 30, 2006, with regard to a workplace located at the corner of North Orange Prairie Road and West Landens Way, Peoria, Illinois. Respondent did not contest this citation. An Informal Settlement Agreement re Inspection 308573021, including this citation, was signed by Wayne E. Clayton on behalf of Respondent, and was entered on September 21, 2006.
- Stark Excavating was cited for a violation of Occupational Safety and Health Standard 1926.651(j)(2) or its equivalent which was contained in OSHA Inspection 308573252, Citation 1, Item 1 issued on August 30, 2006, with regard to a workplace located at Euclid Street, Bloomington, Illinois. Respondent did not contest this citation. An Informal Settlement Agreement re Inspection 380573021, including this citation, was signed by Wayne E. Clayton on behalf of Respondent, and was entered on September 21, 2006. (See also Tr. 89-90, 92-94, 866; Ex. C- 40, C-41, C-42).
- (OSHRC Docket No. 09-0004/OSHA Inspection No. 310801246) Prior to Matt Bohm's entry into the excavation, Foreman Jason Schupp had classified the soil at the excavation as Type B and had recorded that on his daily report. Prior to Matt Bohm's entry into the excavation, Jason Schupp did not take measurements to determine the slope of the walls of the excavation. A measurement taken by CSHO Karl Armstrong at the site indicated the excavation had not been properly sloped. During the inspection, CSHO Armstrong did not determine the distance of the spoil pile from the excavation. During the time he was in the excavation, Matt Bohm wore (i) prescription glasses

that did not have side shields; and (ii) a hard hat. CSHO Armstrong used a soil pocket penetrometer during his inspection, and obtained results of 1.8 tons per square foot and 2.1 tons per square foot.

- (OSHRC Docket No. 09-0005/OSHA Inspection No. 310802095) The area of the excavation from where CSHO Strain took his measurements for the purpose of determining soil type and slope had been dug during the day of the OSHA inspection. During the inspection, CSHO Strain did not measure the distance of the spoil pile from the excavation.

Additional Findings of Fact and Discussion

OSHRC Docket No. 09-0004 (OSHA Inspection No. 310801246) (Starbucks site)

On June 5, 2008, OSHA Compliance Safety and Health Officer ("CSHO") Karl Armstrong, with the Peoria, Illinois Area OSHA Office, conducted an inspection of Respondent's jobsite at Prospect Road in Peoria, Illinois. (Tr. 25-26). Respondent is a large excavation and paving company that typically handles about 250 jobs per year throughout central and southern Illinois. (Tr. 937). At this location, Respondent's crew was replacing a leaking underground fire hydrant water-line in an excavation in front of a Starbucks coffee house. (Tr. 36, 550-551). The excavation was originally created two weeks earlier, but the crew had not been back to the site until the day of the OSHA inspection at issue here. (Tr. 551). Before entering the jobsite, CSHO Armstrong observed and photographed four of Respondent's employees working in and around the excavation from across the street: Foreman Jason Schupp, Backhoe operator Mark Schweigert, Superintendent Greg Gilmore, and Laborer Matthew Bohm. (Tr. 26-28; Ex. C-5).

Foreman Schupp was the crew supervisor and designated competent person. (Tr. 77-78, 127-128). Foreman Schupp and Superintendent Gilmore were standing at the edge of the excavation, watching Mr. Bohm working inside the excavation, when OSHA arrived at the jobsite. (Tr. 31, 89, 577-578). Mr. Bohm was cutting off a piece of pipe with a hand-held, 16-inch, cut-saw. (Tr. 70-71, 566). He worked in the

bottom of the 8-foot deep excavation for approximately ten minutes. (Tr. 36, 574; Ex. C-17). Foreman Schupp admitted that, prior to OSHA arriving, he had not checked the angle of the excavation walls to determine whether they were compliant. However, he did analyze a soil sample and fill out his competent person/excavation report. (Tr. 574, 590).

Significant evidence, including expert testimony, was introduced on soil samples and soil-typing at this excavation. (Tr. 211-249). That testimony ultimately became irrelevant as the parties eventually stipulated during trial that the soil in this excavation was "Type B" as defined in 29 C.F.R. §652. (Tr. 146, 228-230, 232).

Using an engineering rod and universal protractor, CSHO Armstrong determined that three of the walls in the excavation were angled vertically at 76 degrees, 80 degrees, and 75 degrees. (Tr. 50-52; Ex. C-9, C-10, C-11, C-18, C-20, C-22). Safety Director Clayton confirmed that he also observed excavation walls exceeding 63 degrees during OSHA's inspection. (Tr. 892). Ultimately, Respondent stipulated during trial that at least one side of this excavation was not in compliance with the excavation protection regulations. (Tr. 20, 59-60).

In addition, Foreman Schupp conceded that Mr. Bohm was not wearing approved safety glasses while cutting the pipe. (Tr. 583-585). Mr. Bohm was wearing only his personal prescription glasses. (Tr. 68, 584). Foreman Schupp testified that this was the first jobsite he supervised in which an employee wore prescription glasses so he did not recognize it as an issue. (Tr. 582-583). Although Mr. Bohm's eyeglasses did not qualify as OSHA or ANSI compliant safety glasses, CSHO Armstrong testified that they did offer some protection to the eye. (Tr. 175, 200). Therefore, he concluded that the condition presented a "lesser" probability of an actual injury in terms of calculating a proposed penalty. (Tr. 175).

With regard to the alleged spoils pile violation, CSHO Armstrong photographed the condition and location of the piles during his inspection but failed to physically measure their distance from the top edge of the excavation wall. (Tr. 44, 110; Ex. C-15). He did not recognize the location of the spoils piles to be

an issue until later when he was reviewing investigative photographs. (Tr. 107-108). At least one of the spoils piles depicted in investigative photographs was clearly several feet high and located right at the edge of the excavation wall, immediately above the pipe that had been cut by Mr. Bohm. (Ex. C-12; C-15; C-19; C-21). CSHO Armstrong described two hazards resulting from such a situation: (1) material from the spoils pile falling into the trench onto employees, and (2) the weight of the spoils pile at the edge contributing to the possibility of an excavation wall collapse. (Tr. 88). The court also notes that one of OSHA's investigative photographs clearly depicts the base of an outrigger on the backhoe resting right at the top edge of the excavation above the area in which Mr. Bohm was working. (Ex. C-19).

In addition to the stipulations concerning Respondent's history of violations in 2006, Respondent also received three other citations approximately twenty years earlier. However, Complainant failed to produce a copy of the twenty-year-old citations and conceded that they were not significant in determining the classification of the present violations. (Tr. 186, 194, 197-198).

Respondent's primary dispute with regard to the citation items alleged in this case concern: (i) employer knowledge; (ii) employee misconduct; (iii) the willful classification of Citation 2 Item 1; and (iv) the repeat classification of Citation 3 Item 1. (Tr. 74, 230).

Citation 1 Item 1(b)

Complainant alleges that Respondent violated the cited regulation as follows:

> *29 CFR 1926.102(a)(2): Eye and face protective equipment being worn by the employees did not meet the requirements specified in American National Standards Institute, Z 87.1-1968, Practice for Occupational and Educational Eye and Face Protection. An employee was exposed to eye injuries, while cutting 8-inch ductile pipe with a 16-inch cut-off saw and the employee was wearing prescription glasses which did not meet the requirements of ANSI Z 87.1-1968, and did not have side shields to protect the eyes from side exposure to flying debris.*

The cited regulation provides:

> *29 CFR 1926.102(a)(2): Eye and face protection equipment required by this Part shall meet the requirements specified in American National*

Standards Institute, Z87.1-1968, Practice for Occupational and Educational Eye and Face Protection.

Respondent's employee, Matthew Bohm, was cutting a water main pipe with a portable hand-held saw. The cited standard requires ANSI compliant eye protection "when machines or operations present potential eye or face injury from physical, chemical, or radiation agents." *29 C.F.R. §1926.102(a)(1)*. Particles entering the eye as a result of cutting pipe with a hand-held saw could have result in substantial and permanently debilitating injuries. The standard clearly applies to the cited condition. Foreman Schupp acknowledged that in this instance, Mr. Bohm was wearing his personal prescription glasses rather than qualifying safety glasses. The standard was violated. Obviously, Mr. Bohm was the employee exposed to the violative condition. *Fabricated Metal Prods*., 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997). Foreman Schupp was the crew supervisor and designated competent person. (Tr. 77-78, 127-128). Knowledge of Mr. Bohm's failure to wear qualifying eye protection is imputed to Respondent through Foreman Schupp's presence and direct observation of Mr. Bohm while he was cutting the pipe. *Globe Contractors, Inc. v. Herman*, 132 F.3d 367 (7th Cir. 1997). The citation was properly characterized as a serious violation. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). Complainant established the prima facie elements necessary to affirm Citation 1 Item 1(b).

Citation 2 Item 1

Complainant alleges that Respondent willfully violated the cited regulation as follows:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) sloping and benching systems, or paragraph (c) support systems, shield systems, and other protective systems: Each employee in an excavation is not protected from cave-ins by an adequate protective system. The employer does not protect each employee in its trenches by properly sloping the trenches or using appropriate protective systems. This violation was observed at 3708 North Prospect Road, Peoria, Illinois. To abate this violation, the employer must ensure that its trenches are properly sloped or equipped with appropriate

> *protective systems, and that no employees enter trenches until this protection is provided.*
>
> [with additional language regarding abatement verification requirements and reference to previous citations alleging violations of the same standard in 2006 (two), 1989, and 1986]

The cited regulation provides:

> *29 CFR 1926.652(a)(1): Protection of employees in excavations. (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) in depth and examination of that ground by a competent person provides no indication of a potential cave-in.*

The citation alleges a failure to provide adequate excavation protection for Respondent's employees. The cited standard addresses various acceptable methods of excavation protection. The standard clearly applies. The parties agreed that the soil in this eight-foot-deep excavation was "Type B." Therefore, the slope of the excavation walls could not exceed 45 degrees (one horizontal to one vertical). *29 C.F.R. §1926.652, Appendix B, Table B-1.2*. The record establishes that three walls of the excavation exceeded the maximum allowable slope, with no other form of protection having been implemented. The terms of the cited standard were violated. Mr. Bohm's presence in the bottom of the excavation while it was in this condition establishes employee exposure to the violative condition. As with Citation 1 Item 1(b) above, Foreman Schupp's direct knowledge of Mr. Bohm working in this excavation, in this condition, is imputed to Respondent.

The court concludes that Complainant failed to establish the willfulness of this violation. Respondent had developed and implemented, as conceded by Complainant, a well-documented excavation safety program with adequate rules and employee training. (Tr. 520-521). The existence of this program, and the acknowledgement of OSHA as to its comprehensiveness, does not demonstrate the Respondent's state of mind was "such that, if informed of the duty to act, it would not have cared." *Diamond*

Installations, supra. In addition, the record demonstrates a reasonable effort by the Respondent to slope the excavation as opposed to not taking any steps at all to slope the walls. Foreman Schupp admitted that he was in a hurry and neglected to measure the angle of the excavation walls on the morning of the inspection. (Tr. 574, 594-595). He also testified that he did not know whether or not the sloping was in compliance with the requirements. (Tr. 675). His actions are distinguishable from a supervisor who measured the angle of the excavation walls, determined they were non-compliant, and then proceeded with no regard for employee safety. While there is no excusing Foreman Schupp's omission, or the exposure of Mr. Bohm to this unsafe condition, the court is not convinced that the evidence in this case rises to the level of "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." On the contrary, Foreman Schupp testified that he "*usually get[s] into trouble because [he] take[s] too much time making sure that ditches are correct* ." (Tr. 594). Inaction due to negligence is not generally equated to willfulness. See *McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133 (1988). Considering these facts, in combination with the finding (below) that Respondent established three of the four elements necessary to prove an employee misconduct defense, the court concludes that Complainant failed to establish willfulness. Since a wall collapse in this improperly sloped excavation could have resulted in serious injury or death, the court concludes that Complainant established the prima facie elements necessary to affirm Citation 2 Item 1 as a serious violation of the Act.[2]

Citation 3 Item 1

Complainant alleges that Respondent repeatedly violated the cited regulation as follows:

> *29 CFR 1926.651(j)(2): Employees were not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations: Each employee in an excavation is not protected from struck-by hazards and the spoil pile and materials are stored within two*

2 Complainant made a verbal motion at trial for her complaint to be amended to conform to the evidence presented pursuant to F.R.C.P. 15, in that the alleged willful violations could alternatively be deemed repeat violations. (Tr. 981). However, by written notice on November 20, 2009, Complainant withdrew that motion.

> *feet of the excavation. The employer does not protect each employee in its trenches by setting spoil piles and materials at least two feet from trenches. This violation was observed at 3708 North Prospect Road, Peoria, Illinois. To abate this violation, the employer must ensure that spoil and materials are set back from the edge of the excavation at least two feet and that no employees enter trenches until this protection is provided.*
>
> [with additional language regarding abatement verification requirements and reference to a previous citation alleging a violation of the same standard in 2006]

The cited regulation provides:

> *29 CFR 1926.651(j)(2): 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 (.61m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.*

The citation is for improper placement of spoils extracted from an excavation. The cited standard establishes the minimum distance for proximity of spoils piles to an excavation. The standard clearly applies to the cited condition. The standard prohibits placement or storage of "excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations" within two feet of the excavation edge. CSHO Armstrong testified that the spoil pile at the south end of the excavation came down to the edge of the excavation. (Tr. 53). Investigative photographs also establish that the spoils pile nearest to the backhoe bucket, as well as one of the backhoe outrigger bases were within two feet of the excavation edge. (Ex. C-12, C-15, C-19, C-21). The terms of the standard were violated. Mr. Bohm was exposed to this violative condition while he was working inside the excavation. If dirt from the spoils pile collapsed back into the excavation, or the backhoe's outrigger base slipped off the edge, Mr. Bohm could have been seriously injured or killed. Therefore, employee exposure was established. As with the first two alleged violations, Foreman Schupp was present and his knowledge of these jobsite conditions is imputed to Respondent.

It was undisputed that Respondent received a *Citation and Notification of Penalty* in 2006 which included a violation of 29 C.F.R. §1926.651(j)(2). (Ex. C-41, C-42). By presenting evidence of a previous violation of the same cited standard, Complainant has met its burden of establishing the substantial similarity of the hazards. Respondent failed to present evidence to rebut that prima facie showing. Accordingly, Complainant established the prima facie elements necessary to affirm Citation 3 Item 1 as a repeat violation of the Act.

Affirmative Defense

Respondent asserted the defense of unpreventable employee misconduct to these violations. The record establishes that Respondent had written rules concerning excavation protection requirements, spoils pile placement during the excavation process, and effective eye protection. (Ex. R-7). Respondent also established that those rules were adequately communicated to employees and supervisors through training and distribution of written materials. In fact, Complainant stipulated to these elements of the defense. (Tr. 520-521). Respondent also established that it monitored for compliance with these rules, at least through the actions of its Safety Director, Wayne Clayton, by reviewing daily foreman reports and conducting on-site safety audits. (Tr. 799-805). However, the court is not persuaded that Respondent effectively enforced its own rules and policies when violations were discovered.

Foreman Schupp acknowledged that Respondent's policy for safety violations mandates the issuance of "safety tickets" with progressive disciplinary consequences. (Tr. 542-543). According to company policy, the first violation should result in the issuance of a ticket accompanied by a written warning.[3] (Ex. R-2). A second violation should result in a ticket accompanied by a one-day suspension without pay. A third violation should result in a ticket accompanied by a three-day suspension without pay. Respondent's policy mandated that a fourth violation resulted in termination. (Tr. 543; Ex. R-2). The court notes that the Respondent's policy does not allow "verbal" warnings to be issued in lieu of the

3 Respondent had a different disciplinary policy for fall protection deficiencies, none of which are applicable to this case.

written safety tickets. Safety Director Clayton testified that in 2006, after the safety violation policy was implemented, he provided training on the policy to all area managers, superintendents and foremen (collectively referred to as "supervisors"), and provided copies of the policy to each of those individuals along with a "safety ticket" book. (Tr. 798-799, 852-853). Despite this policy, training and Foreman Schupp's observation of safety violations by various employees, he testified that he has never issued any tickets to anyone. (Tr. 543). Foreman Schupp testified that he has verbally corrected employees in the past for improper placement of spoils piles and failure to wear proper safety glasses. (Tr. 523-525). In fact, the only method of correction he has ever used for employee safety violations were both verbal and undocumented. (Tr. 602-603). The deficiency in the practice of verbal warnings lies in the fact that this practice undermines Respondent's safety rule enforcement scheme in that there was no method to determine how many times a particular employee had received verbal corrections for safety violations, especially when working for different foremen.[4]

Foreman Schupp was not the only supervisor who had observed safety violations on Respondent's jobsites yet failed to follow its discipline program. Rod Martin, one of Respondent's Superintendents, testified that he verbally corrects employees for safety deficiencies but has never issued any "safety tickets." (Tr. 633-634). In fact, none of Respondent's supervisors, with the exception of Safety Director Clayton, have issued any "safety tickets" to any employee since August of 2006 - the same year the program was implemented. (Tr. 947-948). For the safety program to truly be effective and properly implemented, supervisors need to follow Respondent's own policy and issue safety citations. In conclusion, the court rejects Safety Director Clayton's theory that supervisors did not issue "safety tickets" to employees in 2007 and 2008 because the company established a better track record of complying with safety regulations. (Tr. 883-887). Superintendent Martin and Foreman Schupp contradicted his theory through testimony that after 2006, they issued only verbal warnings for observed

4 The record establishes that employees work on different crews under different supervisors. The exposed employee in this case, Mr. Bohm, typically works on paving crews rather than excavation crews. (Tr. 559).

safety violations.

In addition to supervisors not following Respondent's program for enforcing its safety rules, the court is also troubled by Superintendent Martin's testimony that supervisors gave each other advance warning when Safety Director Clayton was in their area conducting safety audits. (Tr. 637). Superintendent Martin testified that supervisors on different projects communicated by radio to let each other know when Safety Director Clayton was patrolling the area. (Tr. 637). This apparent cooperation among Respondent's supervisors to undermine the "surprise" element of internal safety audits exposes a flaw in the effectiveness of Respondent's safety enforcement program.

Foreman Schupp's statement that he "gets into trouble" when he "takes too much time making sure that ditches are correct" is also troubling. (Tr. 594). This reveals an unsavory conundrum for Respondent's supervisors - risking trouble for taking the time to properly implement safety measures, or, risking trouble for *not* taking the time to properly implement safety measures. This is a dilemma that would not be present in a workplace in which safety was a priority and failure to follow safety rules was effectively enforced.

Finally, incorporating the findings below concerning OSHRC Docket No. 09-0005, the fact that similar excavation safety deficiencies were observed at two different jobsites, supervised by different individuals, involving different employees, only a few weeks apart, belies the notion that the violative conduct was isolated or unforeseeable. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1193 (Nos. 89-2883 & 3444, 1993); *Brennan v. Butler Lime and Cement Co*., 520 F.2d 1011 (7th Cir. 1975).

These facts convince the court that: (1) Respondent's safety program has deficiencies that need to be addressed, and (2) Respondent's rules were not effectively enforced when violations were discovered. *Rawson Contractors*, Inc., 20 BNA OSHC 1078, 2002 CCH OSHD ¶32,657 (No. 99-0018, 2003). Accordingly, Respondent failed to establish the affirmative defense of unpreventable employee misconduct with regard to the violations alleged in OSHRC Docket No. 09-0004.

OSHRC Docket No. 09-0005 (OSHA Inspection No. 310802095) (Champaign site)

On July 22, 2008, OSHA Compliance Safety and Health Officer ("CSHO") Jeff Strain, with the Peoria, Illinois Area OSHA Office, conducted an inspection of Respondent's jobsite at Springfield and Third, in Champaign, Illinois. (Tr. 261). A general contractor representative walked him over to an excavation CSHO Strain had observed when he entered the jobsite, and introduced him to Respondent's Superintendent, Rod Martin. (Tr. 263). Superintendent Martin was the designated competent person for the excavation. (Tr. 313-314). Respondent's crew, under the supervision of Martin, was installing underground sewer lines near a newly constructed store. (Tr. 642).

Superintendent Martin told CSHO Strain that he had tested the soil with a penetrometer that morning, as well as the day before, both of which indicated a compressive strength of 1.49 tons per square foot ("tsf"). (Tr. 663). A slightly higher result of 1.5 tsf would have been an indication of "Type A" soil.[5] (Tr. 663). Consequently, Superintendent Martin categorized the soil as "Type B." (Tr. 663). Based on CSHO Strain's observations of the soil, a thumb-penetration test, the existence of two previously installed utility lines, and observed fissures, he also concluded that the soil was "Type B." (Tr. 288). To be sure, CSHO Strain took two soil samples and mailed them to OSHA's Salt Lake City Laboratory for analysis. (Tr. 289; Ex. C-38). At trial, Complainant maintained its position that the soil in the excavation was "Type B", while Respondent argued that soil in the area in which employees were working was actually "short-term Type A" which would allow slopes as steep as 63 degrees (1/2 horizontal to 1 vertical). (Tr. 342-343).

5 The court references unconfined compressive strength as *an* indicator of soil type, rather than *the* indicator, because the regulations establish multiple factors which must be considered. See *Appendix A to Subpart P of 29 C.F.R. §1926.*

On the morning of the OSHA inspection, but before CSHO Strain's arrival, Superintendent Martin's crew had been using a trench-box for excavation protection. (Tr. 658). However, Superintendent Martin left the site for a one-hour meeting, and when he returned, his crew was no longer using the trench box because it would not fit into the area between the water main and the frost wall (a type of foundational wall). (Tr. 665-666, 739-740; Ex. C-35, C-36). The protection method at that point was simple sloping - no benching, shielding, or other type of excavation protection was being attempted. (Tr. 389-391). No additional soil testing had been conducted when the crew decided to change from trench-box protection to sloping protection. (Tr. 702). Based only on his previous penetrometer test and what Superintendent Martin described as "much harder" soil, he changed his previous conclusion and determined that the soil in the new working area must have changed to "Type A." (Tr. 667, 674). On that basis, he allowed his crew to continue working without using the trench box.[6] (Tr. 667).

When CSHO Strain arrived "a few minutes later", Superintendent Martin was observed and photographed working with his crew at the excavation. (Tr. 659, 669; Ex. C-36). Superintendent Martin conceded that one of Respondent's employees, A.J. Kerber, had been working in the excavation for about an hour when CSHO Strain arrived at the jobsite. (Tr. 276, 666, 735).

During the OSHA inspection, Superintendent Martin and Safety Director Clayton conducted two additional penetrometer tests which resulted in compressive strength readings of 3.5 tsf and over 4.0 tsf. (Tr. 672, 736, 912). Clint Merrell, a Laboratory Analyst in OSHA's Salt Lake City Technical Laboratory, who has performed more than 2,600 soil analyses during his thirty year tenure with OSHA, testified as an expert witness on soil-typing. (Tr. 217; Ex. C-25). He described in detail how he applied OSHA's method of analyzing the two soil samples he received from CSHO Strain. (Tr. 213, 440-471, 480; Ex. C-27, C-38). His own compressive strength testing resulted in readings similar to those obtained by Superintendent

6 Notably, during Superintendent Martin's pre-trial deposition, he described a very different approach to soil-typing in the area at issue: "I took no sample where A.J. Kerber was working. If you didn't take any samples in the area of the employee's exposure, you should have - - you should treat it as Type C." (Tr. 712).

Martin and Safety Director Clayton during the inspection: 4.0 tsf and 4.1 tsf. (Tr. 441-449). Despite Mr. Merrell's compressive strength test results, which he acknowledged were indicators of "Type A" soil, he ultimately concluded that the samples were "sandy clay cohesive Type B" soil, primarily based on small clumps that had broken off of the samples. (Tr. 444). He testified that this was an indication of fissuring in the soil. (Tr. 441-442, 448-453). Mr. Merrell explained that compressive strength tests were only one indicator of soil-type. "Type B" soil can also have a high compressive strength. (Tr. 454). Respondent did not call an expert witness to address Mr. Merrell's contentions. CSHO Strain's testimony and investigative photographs also revealed that the excavation contained previously disturbed soil, as two existing utility lines were uncovered and continued to cross through the middle of Respondent's excavation. (Tr. 265, 668; Ex. C-32). The soil would have also been previously disturbed during the construction of the frost wall on the south end of the excavation. (Tr. 691-700; Ex. C-33, C-34, C-35).

The excavation was more than six feet deep and the angles of three of the trench walls measured (vertically) 85 degrees , 75 degrees, and 65 degrees. (Tr. 280, 286-287, 384, 958; Ex. C-32, C-35, C-36). Safety Director Clayton confirmed that he also observed walls in the excavation which were greater than 45 degrees, which he agreed would not be compliant for "Type B" soil. (Tr. 909, 954). CSHO Strain testified that none of the three excavation wall angles he measured would be compliant in either "Type B" or "Type A" soil. (Tr. 434).

With regard to the alleged spoils pile violation, CSHO Strain did not actually measure the distance of the spoils pile to the edge of the excavation wall. (Tr. 349). He assumed that any loose material on the top edge of the excavation wall consisted of spoils material. (Tr. 350). However, the white rock gravel prevalent in the photographs and near the edge of the excavation did not come out of the excavation. (Ex. C-33, C-34). A layer of white gravel had been intentionally placed on the surface edge to serve as a buffer between work materials and mud (Tr. 679, 681, 683, 686, 723) and to build a ramp (Tr. 679-680). Thus, the white gravel is not part of the spoil pile. An examination of the photograph taken by CSHO Strain

clearly shows the placement of the white gravel. (Ex. C-36). With the exception of a few clumps of soil, the white gravel is readily visible until the area north of the preexisting utility line. (Ex. C-33). Superintendent Martin testified that he specifically checked the spoils pile above the area where Mr. Kerber had been working and no part of that spoils pile, except for a few small clumps of dirt, were within two feet of the excavation edge. (Tr. 687). Superintendent Martin explained that the only spoils pile material within two feet of the edge was in the portion of the excavation being backfilled - behind the pre-existing water pipe (running perpendicularly through the excavation about halfway up). (Ex. C-30, C-31, C-33 and C-36). He also testified that employees were not working in that area. (Tr. 724, 731-732). Since CSHO Strain did not personally observe employees working in the excavation where the spoil piles actually were within two feet of the excavation wall (i.e., north of the preexisting water pipe), or measure any distances from the spoils pile to the excavation edge, the court accepts Superintendent Martin's description of the employee's location in relation to the spoils piles. The court also gives weight to the photographic evidence which shows the white gravel laid down as a buffer from the mud at grade level. (Ex. C-33 through C-36).

Citation 1 Item 1

Complainant alleges that Respondent willfully violated the cited regulation as follows:

> *29 CFR 1926.651(j)(2): Employees were not protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations: Each employee in an excavation is not protected from struck-by hazards and the spoil pile is stored within two feet of the excavation. The employer does not protect each employee in its trenches by setting spoil piles at least two feet from trenches. This violation was observed at Springfield and Third, Champaign, Illinois. To abate this violation, the employer must ensure that spoil piles are set back from the edge of the excavation at least two feet and that no employees enter trenches until this protection is provided.*
>
> [with additional language regarding abatement verification requirements and reference to a previous citation alleging a violation of the same standard in 2006]

The cited regulation provides:

> *29 CFR 1926.651(j)(2): 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 (.61m) 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.*

Complainant carries the burden of proof on all elements necessary for a prima facie violation of the Act. In this instance, Complainant failed to establish by a preponderance of the evidence that the spoils pile was placed within two feet of the excavation edge above the area in which Mr. Kerber was working. Therefore, there is insufficient evidence to conclude that the cited standard was violated or that Mr. Kerber was exposed to any violative condition. Since violating the terms of the standard and employee exposure are essential elements of a prima facie violation, Citation 1 Item 1 is VACATED.

Citation 1 Item 2

Complainant alleges that Respondent willfully violated the cited regulation as follows:

> *29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) sloping and benching systems, or paragraph (c) support systems, shield systems, and other protective systems: Each employee in an excavation is not protected from cave-ins by an adequate protective system. The employer does not protect each employee in its trenches by properly sloping the trenches or using appropriate protective systems. This violation was observed at Springfield and Third, Champaign, Illinois. To abate this violation, the employer must ensure that its trenches are properly sloped or equipped with appropriate protective systems, and that no employees enter trenches until this protection is provided.*
>
> [with additional language regarding abatement verification requirements and reference to previous citations alleging violations of the same standard in 2006 (two), 1989, and 1986]

The cited regulation provides:

> *29 CFR 1926.652(a)(1): Protection of employees in excavations. (1) Each*

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

The citation alleges a failure to properly protect employees working in an excavation. The cited standard addresses various acceptable methods of excavation protection. The standard clearly applies. The court agrees with the results of the soil analysis conducted by Mr. Merrell, CSHO Strain, and Superintendent Martin (his first analysis, prior to the OSHA inspection), that the soil in this excavation where Mr. Kerber was working was "Type B" soil. CSHO Strain and Mr. Merrell both testified that they observed indications of fissuring in the soil. But even if their testimony about fissuring (which Respondent strongly disputed) is ignored, the excavation contained two previously installed utility lines and a foundational wall that was installed on the south end of the excavation, clearly indicating that the soil in the area had been previously disturbed. The applicable regulations state unequivocally that: "...no soil is Type A if: (i) [t]he soil is fissured; or...(iii) the soil has been previously disturbed..." *Appendix A to Subpart P of Part 1926 - Soil Classification*. The record establishes that three walls of the excavation exceeded the maximum allowable slope of 45 degrees for "Type B" soil, with no other form of protection having been implemented. Therefore, the terms of the cited standard were violated. Mr. Kerber's presence in the bottom of the excavation establishes employee exposure to the violative condition. Finally, Superintendent Martin's direct knowledge of Mr. Kerber working in this excavation, in this condition, is imputed to Respondent.

The court does not agree, however, that Complainant established the willfulness of this violation. As discussed above in the context of OSHRC Docket No. 09-0004, Respondent had developed and implemented, as conceded by Complainant, a well-documented excavation safety program with adequate rules and employee training. (Tr. 520-521). The existence of this program, the acknowledgement of OSHA as to its comprehensiveness, and facts relating to alleged employee misconduct described below do

not demonstrate the Respondent's state of mind was "such that, if informed of the duty to act, it would not have cared." *Diamond Installations,* supra.

Superintendent Martin conducted a soil analysis, prepared an excavation report, and required employees to use a trench box for protection prior to OSHA's arrival. Even after Superintendent Martin returned from a short meeting and discovered the change in excavation protection methods, he re-evaluated the soil and erroneously concluded that it had changed to Type A in the new working area. While there is no excusing Superintendent Martin's failure to ensure the appropriate slope angles of the excavation walls at that point, or the exposure of Mr. Kerber to this unsafe condition, the court is not convinced that the evidence in this case rises to the level of "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." On the contrary, Respondent maintained from the date of the inspection through trial, based on reasonable albeit incorrect evidentiary support, that this was a short-term excavation containing "Type A" soil. Therefore, Respondent argues, pursuant to CSHO Strain's own demonstrative diagram of the excavation, the walls were compliant. (Tr. 408; Ex. C-37). The court finds that although Superintendent Martin's and Safety Director Clayton's conclusions about the soil type were incorrect because of fissuring and previous disturbances to the soil, they were reasonable and appear to have been made in good faith. The Commission has held that willful violations are not appropriate if the employer acted reasonably and in good faith. *General Motors Corp. Electro-Motive Division,* supra.

In analyzing the alleged willfulness of this violation, the court provides no weight to the OSHA investigation which occurred approximately seven weeks prior to this one (OSHA Inspection No. 310801246) because citations resulting from that inspection had not even been issued by the time of the present inspection. The court also notes that after the 2006 excavation citations, Respondent implemented significant and substantial changes to its excavation safety program, including additional training, excavation manuals for supervisors, daily excavation reports, and a discipline program which included the

issuance of safety tickets to employees. (Tr. 793-801).

Considering these facts, in combination with the finding (below) that Respondent established three of the four elements necessary to prove an employee misconduct defense at this location, the court concludes that Complainant failed to establish the willfulness of Citation 1 Item 2. Since a wall collapse in this improperly sloped excavation could have resulted in very serious injuries or death, the court concludes that Complainant established the prima facie elements necessary to affirm Citation 1 Item 2 as a serious violation of the Act.

Affirmative Defense

Respondent also asserted the defense of unpreventable employee misconduct to these violations. (Tr. 6, 23). The same rationale discussed above in the Affirmative Defense section of OSHRC Docket No. 09-0004 applies here. Respondent's safety program is deficient in that supervisors issue only undocumented and untracked verbal warnings, have not followed Respondent's written requirements to issue progressive "safety tickets" since 2006, and have created a system which undermines the "surprise" aspect of internal safety audits by providing each other with advanced warnings when Safety Director Clayton is in their area. Additionally, the occurrence of virtually identical excavation violations on two different jobsites within a seven week period contradicts the notion that the behavior was isolated or unforeseeable. *Falcon Steel Co*., supra. Respondent failed to establish that its excavation rules were effectively enforced and deficiencies in the implementation of their safety program were exposed. Accordingly, Respondent failed to establish the affirmative defense of unpreventable employee misconduct with regard to the violations alleged in OSHRC Docket No. 09-0005.

Penalties

In calculating the appropriate penalty for violations, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of

violations. *29 U.S.C. §666(j)*. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). Neither of the OSHA investigators credited Respondent for size, history, or good faith in formulating proposed penalties in these two cases. (Tr. 206-207, 311-312).

In OSHRC Docket No. 09-0004 (OSHA Inspection No. 310801246), the court considers the totality of the circumstances, including the fact that one employee was exposed to all three violative conditions for approximately ten minutes, that all three violative conditions were open and obvious, and that Respondent was cited for similar excavation safety violations approximately two years earlier.

In OSHRC Docket No. 09-0005 (OSHA Inspection No. 310802095), the court also considers the totality of the circumstances, including the fact that one employee was exposed to the unprotected excavation for approximately one hour, that there were some indications (although ultimately incorrect) of "short-term Type A" soil, and that Respondent was cited for the same violation at two different locations two years earlier. Based on these factors, the court assesses penalties for the affirmed violations as set out below.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law:

OSHRC Docket No. 09-0004 (OSHA Inspection No. 310801246)

1. Citation 1 Item 1(b) is hereby AFFIRMED and a penalty of $2,000.00 is ASSESSED;
2. Citation 2 Item 1 is hereby modified to a serious violation, AFFIRMED as modified, and a penalty of $7,000.00 is ASSESSED;
3. Citation 3 Item 1 is hereby AFFIRMED as a repeat violation and a penalty of $20,000.00 is ASSESSED.

OSHRC Docket No. 09-0005 (OSHA Inspection No. 310802095)

1. Citation 1 Item 1 is hereby VACATED;

2. Citation 1 Item 2 is hereby modified to a serious violation, AFFIRMED as modified, and a penalty of $7,000.00 is ASSESSED.

_/s/_____
PATRICK B. AUGUSTINE
Judge, OSHRC

Date: May 18, 2010
Denver, Colorado