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
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 10-0610
	:	
E. R. ZEILER EXCAVATING, INC.	:	
	:	
Respondent.	:	

APPEARANCES:

Mary Bradley, Esquire
Office of the Solicitor
U.S. Department of Labor
881 Federal Building
1240 East Ninth St.
Cleveland, Ohio 44199
For the Complainant.

Ms. Lisa M. Zeiler, President (Pro Se)
E.R. Zeiler Excavating, Inc.
125 West Substation Road
Temperance, Michigan 48182
For the Respondent

BEFORE: Stephen J. Simko, Jr.
Administrative Law Judge

DECISION AND ORDER

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").

On November 9, 2009 E.R. Zeiler Excavating, Inc. ("respondent" or "ERZ") began a project at the Southwest Pumping Station for the Lucas County, Ohio Sanitary Engineer in

Maumee, Ohio on the grounds of the Springfield Township Fire Department. It was contracted to install a 24-inch water main and connect ("tap") it into the existing 36-inch main. Lt. Daniel Ball of the Springfield Fire Department observed employees in the excavation and was concerned about their safety. He expressed his concerns to one of respondent‟s employees and then made a call to the Occupational Safety and Health Administration ("OSHA"). An OSHA compliance officer ("CO"), Darin VonLehmden, arrived at the site and began an inspection (Tr. 19). As a result of that inspection, ERZ was issued a citation alleging two willful violations of the Act on the grounds that the employer failed to (1) provide a safe means of egress from a trench and (2) adequately shore, slope, or otherwise protect the excavation from a cave-in. The Secretary proposed a penalty of $28,000 for each violation, for a total proposed penalty of $56,000. ERZ filed a timely notice of contest and a hearing was held in Toledo, Ohio on October 14, 2010. Both parties have filed post-hearing briefs and this matter is now ready for disposition.

DISCUSSION

1. Compliance Officer's Credibility

A. *Respondent's Arguments*

As an initial matter, ERZ challenges the credibility of the CO. In this challenge, ERZ makes several assertions:

1. The CO‟s report (Ex. R-1) contains statements allegedly made by its foreman, Jim Ridner (Tr. 74-76). However, the CO‟s testimony casts doubt on whether Ridner actually made the statements or whether they only represented the CO‟s interpretation of what he was told (Tr. 98-110, 126-127). Indeed, Ridner denied that he made the statements. (Tr. 160-162) For example, the CO recalled that Ridner said that ERZ needed to get its work done "today" because the tapper was on the site. Ridner explicitly denied having made that statement (Tr. 161). Also, the CO‟s notes indicate that Ridner told him that "[w]e should have a ladder in the hole. We just jumped in there." (Tr. 75). Again, Ridner explicitly denied ever having made such a statement (Tr. 162).

2. The CO knew there were only four employees, yet tried to indicate his belief that there were, in fact, five employees. (Tr. 21) The fifth person in the trench was, in fact, an employee of a different employer. Later, when ERZ representative Lisa Zeiler pointed out that the inspection report stated that there were only four employees "the CO smiled at me and stated, „I believe there

were four employees if I'm correct' (Tr. 57) and then winked at me." (ERZ Brief at 6).[1] Respondent asserts that this is just an example of the "audacity" she had to deal with from the CO.

3. Respondent also argues that the CO's testimony should be discounted because he allegedly lied about his employment history. For example, the CO testified that he once worked for H&M Excavating and Ziacam (Tr. 70). In its brief, ERZ includes an affidavit from H&M stating that the CO never worked for the company. Respondent also contacted Ziacam. Mr. Ziacam allegedly told ERZ that he did not personally know the CO, but that his former partner did. Mr. Ziacam refused to contact his ex-partner because he did not want to get involved.

B. *Discussion*

That the CO's notes and recollections of his interviews do not agree with the recollections of the employees interviewed is a fairly standard occurrence. It is the experience of this Judge that these discrepancies are often the results of differences in perception rather than prevarication. That is why we hold hearings.

Respondent next suggests that the CO deliberately attempted to get this Judge to believe that ERZ had five rather than four employees exposed to the hazard. However, at the hearing, the CO admitted that he "misstated" the status of the fifth person in the excavation (Tr. 94). This fifth person was the tapper who was not an ERZ employee and who was the only employee who worked between the pipe and the north wall. This is seen as important to respondent because it is ERZ's contention that this tapper was the only person actually exposed to a hazard. As discussed, *infra,* this is an erroneous assumption. Moreover, ERZ dug the excavation and was responsible for ensuring that it complied with OSHA regulations. As the contractor that created and controlled the hazardous conditions, it was responsible for the exposure of all workers exposed to the hazard, not just its own employees. *Summit Contractors, Inc.* 23 BNA OSHC 1196 (No. 05-0839, 2010). Thus, there was nothing for the CO to gain by lying about the employment status of the tapper.

Finally, I cannot grant any weight to the affidavit by H&M Excavating's owner, John Morris, regarding the employment history of the CO. The affidavit states that there is no record of the CO ever having been employed by H&M. However, there may be many explanations for H&M's inability to find any record of the CO's employment. For one, the CO said he "worked for"

1. Regarding the allegation that the CO "winked" at Ms. Zeiler, suffice it to say that I did not observe this behavior and nothing of this matter was brought up at the hearing. Certainly, the CO has not had any opportunity to defend himself from this allegation. Therefore, I cannot draw any conclusions about the propriety of Ms. Zeiler's impressions

H&M (Tr. 70). It is possible that he worked as a contractor rather than as an employee. Also, we don"t know how far back H&M"s records go. Without the CO having an opportunity to respond, or the Secretary to cross-examine Mr. Morris, these questions must go unanswered.

I find no reason to reopen the record to allow the matter of the CO"s employment history to be pursued. There is no basis to assume that the CO made any intentional misrepresentation of his employment history. Clearly, Mr. VonLehmden"s background was sufficient to persuade the Secretary to hire him as an OSHA compliance officer. Furthermore, there really is no dispute that the OSHA excavation standards were violated. As discussed, *infra,* undisputed facts and OSHA precedent establish that respondent failed to comply with the cited standards and that all employees were exposed to a serious hazard. The only dispute is the degree to which these violations exposed employees to a hazard and whether the violations were willful. My findings regarding the allegation that the violations were willful are based on clear evidence adduced at the hearing and Commission precedent. None of these issues turn on the credibility of the CO or the veracity of employee statements recorded in his notes. Therefore, there would be nothing to be gained to reopen the record solely to determine his employment history.

2. The violations

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer could have known of the existence of the hazard with the exercise of reasonable diligence. *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1 alleges a willful violation of 29 C.F.R.§ 1926.651(c)(2)2 on the grounds that:

> A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

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2 The standard provides:
Sec. 1926.651 Specific excavation requirements.
* * *
(c) Access and egress
* * *
(2) Means of egress from trench excavations. A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

a. E.R. Zeiler Excavating, Inc. worksite located near the intersection of Garden Rd. & Holloway Rd., Maumee, Ohio: On or about November 9, 2009, the employer did not ensure safe access/egress was provided while employees performed work in a trench approximately 10.00" deep. No ladder or other safe means was provided.

The excavation was approximately 10 feet deep[3] (Tr. 25, 31, 51, 54). Four of respondent"s employees and an employer of another company were working inside (Tr. 21, 57, 165, 190, Ex. C-3). ERZ contends that the standard was not applicable because the ramp was above a 36-inch pipe and there was eight inches below the pipe for a total of 44 inches (Tr. 174). This was four inches below the four foot (48 inches) depth requirement that is required for the standard to apply (ERZ Brief at 5). The argument has no merit. At the outset, it is not clear what ERZ is arguing. Apparently, it equates the top of the pipe with the top of the trench. Respondent"s argument would require us to ignore the nearly six feet of trench that existed above the pipe. If those six feet of trench collapsed, employees would have to somehow climb over the pipe to make a safe egress. Accordingly, the argument is rejected and I find that the standard applies.

The evidence establishes that there was no ladder in the trench (Tr. 57, 141, 160) and that egress was affected by climbing up the 36-inch pipe to a ramp which led out of the trench (Tr. 160, 162, Exs. C-3, C-7). Moreover, there was a ladder in the truck, but the foreman decided not to use it (Tr. 181).

ERZ argues that the trench had a ramp that provided safe egress. It points out that the 36-inch pipe was used to assist employees in reaching a landing where the ramp began (ERZ Brief at p.5). Foreman Ridner testified that exiting the trench via the ramp was not difficult (Tr. 160). However, Joseph M Szajna, respondent"s site superintendent, testified that, while he was not sure that he told the CO that there should have been a ladder in the trench, he now was of that opinion (Tr. 141).

Exhibit C-3 is a video of the worksite when the CO first arrived. Five people are inside the trench. In response to the CO"s request, employees exit the trench. The video clearly shows the first person slightly stumbling as he jumps from the trench floor to the top of the pipe. The second

3 Respondent argues that the west wall was only 8.75 feet in depth, that the north wall was only 9.25 feet deep and that there was no full measurement of the east wall. Only the south wall, it contends, where nobody was working measured at 10 feet deep (ERZ Brief at 5). Despite respondent"s cites to the transcript and exhibits, I find nothing in the record to support these contentions. The CO clearly stated that the *average* depth was 10 feet. In any event, these measurements do not alter the results of this case since there is no dispute that the depth of trench was more than sufficient to trigger the requirements of both cited standards.

person to exit has to rise from all fours as he pulls himself to the top of the pipe[4]. The CO also testified, and exhibit C-8 depicts, that a third employee exited the trench with difficulty (Tr. 36). Therefore, I find that the preponderance of the evidence establishes that the pipe and ramp combination did not provide a safe method of access or egress in the event of an accident or emergency as required by the cited standard (Tr. 57).

The evidence also establishes that respondent"s employees were exposed to the hazard. The exhibits and the testimony support the CO"s testimony that employees had to exert substantial effort to exit the trench and that they were exposed to hazard of slipping, tripping, and falling (Tr. 57). As noted, *supra*, the exhibits and testimony clearly demonstrate that four of respondent"s employees were working in the excavation. In the event of a cave-in or other emergency, these employees were exposed to the hazard of death or serious physical harm due to ERZ"s failure to provide a safe method of egress.

The record also establishes that ERZ knew, or with the exercise of reasonable diligence should have known of the violation. Foreman Ridner testified that there was a ladder at the site but that he chose not to place it in the trench (Tr. 160-162). Ridner also agreed that appropriate egress was not provided (Tr. 179). A foreman or supervisor is the employer"s representative at the site and, as such his knowledge is imputed to the employer. *E.g.*, *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993); *Tampa Shipyards Inc.*, 15 BNA OSHC 1533,1537 (Nos. 86-360 and 86-469, 1992)(citing *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, (No. 85-369, 1991)) Therefore, ERZ had constructive knowledge of the violative condition.

Finally, a violation is serious if, in the event of an accident, the result would be death or serious physical harm. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000)(Consolidated). The CO testified that, in the event of an accident, employees attempting to exit the trench could trip, fall or slip resulting in broken bones, contusions and even death (Tr. 57-58). Accordingly, I find that the Secretary established that the violation was serious.

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4 I note that, after jumping on top of the pipe neither employee continued up the ramp. Rather, because the CO was standing away from the ramp, they walked up the side near the CO without the ramp (Tr. 186). There is no dispute, however, that to access the ramp employees had to first climb on the pipe (Tr. 186-187). Therefore, in assessing this item, I consider Exhibits C-3 and C-8 only insofar as they depict the employees jumping onto the pipe and the difficulty they encountered as they rose to their feet.

Item 2 alleges a willful violation of 29 C.F.R.§ 1926.652(a)(1)[5] on the grounds that:

> Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 C.F.R.§ 1926.652(b) or (c):
>
> a. E.R. Zeiler Excavating, Inc. worksite located near the intersection of Garden Rd. & Holloway Rd., Maumee, Ohio: On or about November 9, 2009, the employer did not ensure employees were protected from cave-ins/collapse while working in an unprotected excavation approximately 10.00" deep. The north wall of the excavation was near vertical and composed of "B" soil.

The CO testified that, when he arrived at the site, he saw a large trench that was inadequately protected against cave-in. The trench was approximately ten feet deep (Tr. 25, 31, 51, 54). The west side of the excavation was 16-feet wide (Tr. 50) and the width of the east side was 22-feet (Tr. 50, Ex. C-16). The length of the exposed pipe was 12-feet wide on the north wall (Tr. 49-50, Ex. C-17) and the width of the north face was also 12 feet (Tr. 49). The width of the south end of the trench was approximately 16-feet (Tr. 49, Ex. C-18). There was a large spoil pile on one side of the trench. The north wall of the trench was nearly vertical (Tr. 33, 38, Exs. C-4, C-6, C-12). However, at the very top of the north side, there was a small amount of sloping (Tr. 85, Ex. C-5). Also, on the north side, was a heavily traveled two-lane road that subjected the trench to vibration (Tr. 20-21, 42). The excavator was sitting close to the south wall, which was near vertical (Tr. 31, 37, Ex. C-10). There was also sloughing on the south side (Tr. 31, 37, Exs. C-3, C-10). The CO did not observe a trench box or any shoring at the site (Tr. 55). The trench was dug in previously disturbed Type B soil (Tr. 24, 45, 47, 139, 148, 176). The CO testified that, to comply with OSHA requirements, the trench was required to be sloped at a 45 degree angle (Tr. 56). Respondent made an attempt to bench[6] the east and west sides of the excavation, but the CO found that the attempt was inadequate and failed to comply with OSHA requirements (Tr. 55). He

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5 The standard provides:
Sec. 1926.652 Requirements for protective systems.
(a) 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 the ground by a competent person provides no indication of a potential cave-in.

6 Benching is a method of protecting employees from cave-ins by excavating the sides of an excavation to form one, or a series of, horizontal levels or steps, usually with vertical or near vertical surfaces between levels. 29 CFR § 1926.650(b).

testified that there was only one bench on each side (Tr. 91) and that the depth of the benches on both the east side west side of the trench was 3.6 feet (Tr. 52-53).

Although he denied that he ever said so to the CO, Superintendent Szajna did not dispute that the trench was not in compliance (Tr. 156). The CO testified that during the inspection, Foreman Ridner was aware that the trench was not properly sloped (Tr. 24). The CO also recalled that Ridner told him that he was unable to adequately bench the trench because it would have required removal of a large portion of the road (Tr. 88-89). This was denied by Ridner, who testified that, in his opinion, the trench was safe (Tr. 162, 184, Ex. C-28, ¶ 15). Ridner testified that, to protect the trench they benched the east and west side and sloped it back on the north side (Tr. 162-163, 165). Ridner further testified that he did not measure the depth of the trench and was not sure of the dimensions. However, he did not dispute the CO"s measurements (Tr. 175, 177). While he was not sure how far back the trench should have been sloped, he agreed it should have been sloped at a 45 degree angle (Tr. 177). Ridner explained that he did not bench or slope all but the top of the north end of the trench because he believed that the existing 36-inch water main provided stable protection. In his view the ground was not going to move the pipe. He noted that the crew was working on the south side of the pipe which would be a safe spot (Tr. 183). Ridner also testified that he was not aware of the sloping requirements at the time of the inspection (Tr. 178, 189).

I find it unnecessary to resolve the conflict over what Ridner told the CO during the inspection. The preponderance of the evidence plainly establishes that the trench was not sloped or otherwise protected in accordance with OSHA regulations. It is undisputed that a trench dug in Type B soil must be sloped at a 45 degree angle (meaning it is sloped back one foot for each foot rise) The north face of the trench was nearly vertical, except for a slight sloping at the very top. This slight slope was wholly inadequate to comply with OSHA requirements. Alternatively, an employer could bench or shore the trench, or use a trench box. It is undisputed that no trench box or shoring was used. Although there was an attempt to bench the trench, the preponderance of the evidence establishes that the degree of benching was wholly inadequate. Appendix B to Subpart B requires that a trench dug in Type B soil, 20 feet or less in depth may have multiple benches four feet deep or a single bench at the bottom, with everything above the bench sloped at a 1:1 slope (or 45 degree angle). Both the east and west side of the trench had a single bench, 3.6 feet deep, with the remainder of those walls unsloped and unsupported.

Although respondent does not dispute that the trench was technically in noncompliance with OSHA requirements, it argues that (1) employees were not exposed to any hazard and (2) it did not know of the violation.

ERZ contends that employees were not exposed to any hazard because they were not required to work between the vertical north wall and the 36-inch pipe. It argues that the pipe provided protection to employees working on the side opposite the trench north wall. Moreover, it contends that the tapper, who was working between the pipe and the north wall, was not an ERZ employee and was not under its control. It also argues that employees were protected by the size of the trench and asserts that this was a planned precaution by Ridner. According to ERZ, in the event of collapse, the size of the excavation made it possible for them to get out of the way of danger (ERZ Brief at 4). I find no merit in any of these arguments and find that the preponderance of the evidence establishes that employees were exposed to the hazard of a potential trench collapse.

The person seen working between the pipe and the north wall is the tapper (Ex. C-3). Respondent asserts that it did not direct the work of the tapper, who was at the site on his own (Tr. 190). He was in the trench without permission and decided on his own to stand between the pipe and the trench wall (Tr. 164-165). However, as noted, s*upra*, as the contractor that created and controlled the hazard, it was responsible for the safety of the tapper. In any event, respondent erroneously assumes that the pipe provided adequate protection against the hazard of a cave-in. The pipe did not eliminate the fact that the trench was nearly 10 feet deep. Neither did the pipe lessen the effects of vibration from the nearby heavily travelled road. Although the pipe might have blocked some of the cave-in from the north wall, it could neither have stopped the collapse nor contained most of the debris from falling onto employees. Moreover, the pipe was only 36-inches wide and stood approximately eight inches off the ground for a total of 44 inches. By respondent"s own figures, the north wall was 9.25 feet or 111 inches high. Subtracting the 44 inches from the 111 inch height of the trench leaves 67 inches, or five feet-seven inches of trench above the pipe. The standard requires protection for excavations over five feet deep[7]. Therefore, even assuming that there is any validity to respondent"s argument that the pipe provided cave-in

7 I note that the presence of vibration from the nearby roadway and the weight of machinery sitting near the edge of the excavation heightened the possibility of a collapse. *See e.g. Appendix A to Subpart P of Part 1926* at ¶(d)(1)(vii) and *Appendix B to Subpart P of Part 1926 a*t ¶(c)(3)(iii).

protection, the excavation was still in violation of the standard for that part of the trench above the pipe.

Furthermore, I find that, despite the large size of the excavation, employees were exposed to the hazard of a cave-in from all four walls. To establish that an employee is exposed to a hazard, the Secretary must demonstrate that it was reasonably predictable that employees had access to the "zone of danger" created by the cited hazard. *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1073 (No. 93-1853, 1997). The Secretary can establish "reasonable predictability by demonstrating that, either while in the course of their assigned duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, employees will be, are, or have been in the zone of danger." *Gilles & Cotting, Inc.,* 3 BNA OSHC 2002, 2003 (No. 504, 1976); s*ee also Fabricated Metal Prods.*, 18 BNA OSHC at 1073; *Kokosing Constr. Co.,* 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996).

There is no evidence that employees were instructed not to stray from the north wall or otherwise prevented from walking near any of the other trench walls. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2075-76 (No. 87-1359, 1991). Therefore, it was reasonably predictable that, while in the course of their assigned duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces the employees would approach any of the four faces of the excavation. In any event, the evidence demonstrates that had any of the four trench walls collapsed, employees working inside would have been exposed, at a minimum, to the hazard of being injured by falling debris (Tr. 63). That the large size of the excavation made it *possible* that employees might be able to escape debris falling from a collapsed wall may go to the gravity of the violation, but does not change the fact that employees were exposed to the hazard. Based on the preponderance of the evidence, I find that it was reasonably predicable that employees would come within the zone of danger of all four walls of the trench and, therefore, that they were exposed to the violative condition[8].

Finally, respondent contends that it did not know of the violation. Respondent asserts that when Superintendent Szajna left the job site, he had no reason to believe that Foreman Ridner would not properly bench or slope the excavation. It is not disputed that when Szajna left the site,

8 That the size of the excavation made it possible for employees to escape the debris falling from a cave-in does not vitiate the fact that they were exposed to the hazard. At most, it goes to the likelihood of injury and, therefore, the gravity of the violation.

respondent considered Ridner to be a "competent person"[9] and left him in charge of the site. Clearly, it was Ridner who decided not to properly slope, shore or otherwise protect the excavation. As discussed in item 1, as the foreman with supervisory responsibility, his knowledge is imputed to ERZ. *Danis Shook Joint Venture*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001), *aff'd* 319 F.3d 805 (6th Cir. 2003).

Accordingly, I find that the Secretary established by a preponderance of the evidence that ERZ failed to comply with 29 C.F.R.§ 1926.652(a)(1). Also, for the reasons set forth in item 1, the Secretary established that the violation was serious. Had an employee been caught in a cave-in, the results would likely have been contusions, broken bones, and even death (Tr. 63).

3. Willfulness

a. Arguments of the Parties

1. Secretary

The Secretary notes out that ERZ has been cited multiple times for trenching violations, dating back to 1981 (Exs. C-22, C-23). She contends that respondent had a heightened awareness of the excavation standards based on two recent citations, issued within the past three years, alleging violations of the same standards (Exs. C-24, C-25). In May 2007, ERZ was cited for a serious violation of 29 CFR §1926.651(c)(2) for failing to ensure safe egress from an excavation more than four feet deep (Tr. 60-64, Exs. C-24 & C-25). The May 2007 citation became a final order on June 12, 2007. A citation for a repeated violation of that same standard was issued on October 22, 2009 (Tr. 60-64, Exs. C-24 & C-25). Furthermore, on that date ERZ was also cited for violating 29 CFR §1926.652(a)(1) for failing to provide adequate cave-in protection (Tr. 60-64, Exs. C-24 & C-25). Finally, the Secretary points out that the instant violations were cited only two days before ERZ signed a settlement agreement making the October 22, 2009 citations a final order.

The Secretary also points out that ERZ considered its foreman to be a "competent" person although he only attended competent person training in 2007 (Tr. 162). At the hearing, he still

9 A competent person is defined at 29 CFR §1926.650(b) as "one who is capable of identifying existing and predicable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." Under 29 CFR §1926.651(k) the "competent person" is charged with making daily inspections of the excavation and protective systems for evidence of a situation that could result in a possible cave-in, failure of protective systems, hazardous atmosphere, or other hazardous conditions.

could not articulate how to provide adequate protection to employees in an excavation, even though he attended a 30-hour OSHA class on excavation after the citation was issued (Tr. 169, 178). For example, the foreman asserted that the 36-inch pipe was a stable protector of the north wall, even though the north face was subject to vibrations from the cars traveling on the road above (Tr. 183). According to the Secretary, at the hearing the foreman had trouble differentiating between sloping and benching and continued to believe that he properly sloped the excavation (Secretary Brief at 17). Moreover, even though there was a ladder on the truck, the foreman failed to use it. The foreman also contended that the ramp was adequate, even though employees had to scramble up a 36-inch pipe "and then use their hands to claw and crawl up the walls of the excavation to safety." (Secretary Brief at 17)(Tr. 184). It is the Secretary's contention that Respondent's placing a foreman in charge who did not know how to comply with the standards constituted "reckless disregard" of employee safety (Secretary Brief at 18). Given his experience and training, the Secretary characterizes the foreman's failure to protect employees as "unreasonable, ludicrous and not indicative of good faith." (Secretary Brief at 20).

The Secretary also points out that respondent failed to take any action even after Lt. Ball of the Springfield Township Fire Department expressed his concerns about the safety of the trench to one of ERZ's employees. Finally, the Secretary contends that respondent's failure to provide adequate cave-in protection was not an isolated event, but was part of a pattern of intentional disregard for the requirements for the standard or, at the very least, plain indifference to employee safety. In light of its long history of trenching violations, respondent was on notice that attention was required at the job site to prevent future violations (Secretary Brief at 20).

2. ERZ

ERZ argues that, even though the excavation was not in compliance with OSHA standards, it was sloped and benched and, therefore, provided some cave-in protection. Moreover, the CO did not take measurements of the slope of the north wall. Therefore, it cannot be determined how far it was out of compliance. Respondent asserts that Foreman Ridner has been employed by ERZ for 22 years and is a "competent person." He did not place anybody in a dangerous work environment. He was confident in his decisions and did not disregard safety standards. Indeed, he purposely made the excavation much larger than necessary to enable employees to get out of the way in the event of a collapse. Ridner also considered that the 36-inch water main provided additional protection from collapse and did not make additional cuts in the roadway because he determined

that the roadway enabled the excavation to be more stable by not disturbing it. These decisions were made based on his evaluation of conditions, and did not constitute an intentional, knowing, or voluntary disregard of the requirements of the Act. Moreover, when Superintendent Szajna left the site, he had no reason to believe that Ridner would not properly bench or slope the excavation (ERZ Brief 4-5).

ERZ also argues that its citations issued prior to 2007 have no bearing on the current citation. It notes that the Secretary generally only considers citations issued within the prior three years (ERZ Brief at 5). It especially notes that the citation issued in 1981 should not be considered. It points out that, in 1981, Ridner was only 14 years old and Szajna was not yet even born (ERZ Brief at 5).

3. Discussion

A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Valdak Corp.,* 17 BNA OSHC 1135, 1136 (No. 93-239, 1995), 73 F.3d 1466 (8th Cir. 1996). The Secretary must differentiate a willful from a serious violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Valdak Corp.,* 17 BNA OSHC at 1136. The Secretary must show that, at the time of the violative act, the employer was actually aware that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care. *Propellex Corp.,*18 BNA OSHC 1677, 1684 (No. 96-0265, 1999). The Commission has found heightened awareness "where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that the violative conditions exist." *J.A. Jones Constr.,* 15 BNA OSHC 2201, 2209 (No. 87-2059, 1993); *See also, E.L. Davis Contrac.,*16 BNA OSHC 2046, 2051-52 (No. 92-35, 1994)(employer allowed three employees to work in an unprotected excavation despite prior citations and a city inspector"s warning).

I find that the preponderance of the evidence does not establish that the violations were willful. Before Superintendent Szajna left the site on the morning of November 9, 2009, he gave Foreman Ridner instructions to properly protect the excavation (Tr. 42). As he testified, he had no reason to believe that Ridner would not properly slope or bench the excavation. They operated that way before and Szajna considered Ridner to be a "competent person" (Tr. 138, 147). Although

Ridner failed to properly protect the excavation, he made an attempt, albeit insufficient, to slope the north wall and to bench the east and west sides.

A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer"s efforts were not entirely effective or complete. *L.R. Willson and Sons, Inc.,* 17 BNA OSHC 2059, 2063 (No. 94-1546, 1997), *rev'd on other grounds,* 134 F.3d 1235 (4th Cir. 1998); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). The test of good faith for these purposes is whether the employer"s efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *General Motors Corp., Electro-Motive Div.* 14 BNA OSHC 2064, 2068 (No. 82-630, 1991)(consolidated).

Having observed Ridner"s demeanor, I am persuaded that he had a good faith belief that he was protecting his employees. Ridner appeared to be testifying truthfully when he insisted that he was creating a safe excavation. Indeed, his insistence that he created a safe excavation, despite the clear evidence that it was not in compliance with OSHA standards, served only to undermine his status as a competent person and, therefore worked to his own detriment. I therefore conclude that he erroneously, but honestly, believed that the pipe provided a level of protection to employees, that he was providing protection by enlarging the excavation larger than necessary to perform the work, and that the ramp, accessed by climbing over the 36-inch water main, constituted a safe method of egress.

Moreover, while Ridner was clearly wrong in his assessment, it was not objectively unreasonable. The incomplete benching of the east and west walls did reduce the load on the walls and, therefore, reduced the likelihood of a cave-in. Similarly, the minor sloping of the north face, together with the presence of the water main did provide limited protection; and in the event of a collapse the large size of the excavation did provide the employees with some chance of avoiding being buried if they were able to escape to the middle of the excavation. Finally, the ramp, though inadequate, did provide some method of egress from the 10-foot deep trench.

Respondent"s long history of OSHA violations, including recent violations of the excavation standards, though not rising to the level of willfulness, does demonstrate a sloppy attitude toward its OSHA obligations. That attitude is best evidenced by ERZ"s decision to consider Foreman Ridner a competent person and by Superintendent Szajna"s decision to rely on Ridner to bring the excavation into compliance. As demonstrated at the hearing, despite his years

of experience and prior "competent person" training, Ridner demonstrated confusion and lack of knowledge of the requirements for bringing an excavation into compliance with OSHA regulations. However, there is nothing in the record to suggest that ERZ was aware that Ridner lacked the fundamental knowledge necessary to make him a "competent person." The record demonstrates that, despite his weaknesses, Ridner received "competent person" training in 2007, was an experienced foreman and, after 22 years of employment, has never been disciplined for a safety violation by ERZ (Tr. 162, 182). Furthermore, at the hearing, Ridner continued to maintain that he was a "competent" person, even after his lack of knowledge about OSHA excavation requirements was exposed (Tr. 170). Given his background, relying on Ridner to act as ERZ's "competent person" at the site was a mistake, but did not rise to the level of a conscious disregard of or plain indifference to employee safety.

That Lt. Ball brought his concerns regarding the safety of the excavation to the attention of an employee does not require a different result. Lt. Ball's concerns were not expressed to Foreman Ridner, but to an employee, and there is nothing in the record to show that the employee conveyed those concerns to Ridner. Thus, there is nothing in the record to suggest that Ridner was aware of Lt. Ball's concerns.

Based on this record, I find that the preponderance of the evidence fails to establish that the violations were the result of an intentional, knowing or voluntary disregard for the requirements of the Act or that ERZ acted with plain indifference to employee safety.

4. Penalty

The Secretary proposed a $28,000 penalty for each of the two violations. Those penalties, however, were based on the Secretary's conclusion that the violations were willful. Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that, in assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *S & G Packaging Co., 19* BNA OSHC 1503, 1509 (No. 98-1107, 2001). The OSHA Form 1-B indicates that the Secretary considered the violations to be of high severity, with a "greater" probability that an accident could occur. Moreover, the Secretary granted ERZ the maximum deduction for its small size allowed by the Field Inspectors Reference Manual (FIRM, Section 8, Chapter IV(c)(2)(i)(5)(a)(1)). No credit was given for ERZ's history or good-faith (Tr. 65-68, Exs. C-26, C-27).

Considering these factors, I conclude that a penalty of $3000 is appropriate for item 1, for failure to provide an appropriate means of egress. I also find that a penalty of $5000 is appropriate for item 2, for failure to adequately slope, shore, or otherwise protect the sides of the excavation from a cave-in. I consider item 2 to represent a violation of higher gravity than item 1, since the failure to provide an adequate means of egress becomes most relevant in the event of a cave-in. Moreover, should the sides cave-in, an adequate ramp would be of help to employees only if they could reach it before they are buried by the collapse. As noted, supra, both violations were serious and would likely result in death or serious physical harm.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1. Citation 1, Item 1 for a willful violation of Section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R.§ 1926.651(c)(2) is AFFIRMED as a serious violation, and a penalty of $3000 is ASSESSED.

2. Citation1, Item 2 for a willful violation of Section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R.§ 1926.652(a)(1) is AFFIRMED as a serious violation, and a penalty of $5000 is ASSESSED.

SO ORDERED.

/s/
Stephen J. Simko, Jr.
Judge, OSHRC

Dated: March 25, 2011