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

Some personal identifiers have been redacted for privacy purposes

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Bardav, Inc. d/b/a Martha's Vineyard Mobile Home Park, Respondent.	DOCKET NO. 10-1055

Appearances:

Michael Schoen, Esq., Matthew Sallusti, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Frederick McCutchon, Esq., Bonnie Kirkland, Esq., Wood, Boykin & Wolter, P.C., Corpus Christi, Texas
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 the Martha's Vineyard Mobile Home Park, owned by Bardav, Inc. (Respondent), in Corpus Christi, Texas between March 25 and April 21, 2010. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging willful, serious, and other-than-serious violations of the Act with total proposed penalties of $50,250.00. Respondent timely contested the Citation. At the beginning of the trial, Complainant withdrew Citation 1 Item 1. (Tr. 28). Therefore, only Citation 1, Items 2 through 11; Citation 2, Items 1 and 2; and Citation 3, Item 1 remained in dispute during the five-day trial conducted in

Corpus Christi, Texas over the course of April 5, 6, 7, 28, and 29, 2011.

Before addressing the substantive issues in this case, the court notes that it reviewed and considered the following post-trial submissions: *Respondent's Motion for Sanctions, Complainant's Response to Respondent's Motion for Sanctions, Respondent's Supplemental Motion for Sanctions,* and *Complainant's Response to Respondent's Supplemental Motion for Sanctions.* Respondent argued that the court should exercise its discretion to sanction Complainant because the original of a largely irrelevant document, rather than a photocopy, could not be located; because the third page of a largely irrelevant document could not be located; because a witness[1] claimed he saw Complainant's investigator take more investigative photographs than were produced in discovery; because Complainant's investigator did not record, *verbatim*, conversations which were memorialized through signed witness statements; and because Complainant's post-trial brief contains factual assertions and argument with which Respondent disagrees.

As Respondent correctly stated in its motion, the imposition of sanctions falls within the sound discretion of this court, which the court declines to exercise based on the arguments in Respondent's motions and Complainant's responses. *Commission Rules* 52(f) and 101; *Architectural Glass & Metal Company,* 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001); *Jersey Steel Erectors,* 16 BNA OSHC 1162 (No. 90-1307, 1993); *Philadelphia Const. Equipment*, 16 BNA OSHC 1128, 1993 CCH OSHD ¶30,051 (No. 92-899, 1993); *Sealtite Corp.*, 15 BNA OSHC 1130, 1991 CCH OSHD ¶29,398 (No. 88-1431, 1991); *NL Industries, Inc.*, 11 BNA OSHC 2156, 1984-85 CCH OSHD ¶26,997 (No. 78-5204, 1984). Respondent failed to convince the court that Complainant, or its counsel, engaged in any contumacious, improper, or otherwise sanctionable conduct. Furthermore, none of the allegations contained in Respondent's motions established any prejudice to Respondent in defending itself against the substantive allegations in this case. The Respondent had the opportunity to cross exam the Complainant's witnesses over the two largely

[1] The court addresses the credibility of witness [redacted], who made that allegation, later in this decision.

irrelevant documents, the inability to locate the originals and regarding the witness statements given the CSHO. In addition, as previously stated, the court gave no weight to the testimony of [redacted] that the CSHO took more pictures than were tendered to the Respondent. The Respondent also had the opportunity to question the CSHO on this matter. Finally, the assertion that Complainant's post-trial brief contains factual assertions and arguments in which the Respondent disagrees does not constitute grounds for the issuance of sanctions. Post trial briefs contain the arguments of the parties. Because one party disagrees with the arguments raised in a post trial brief, does not make the arguments false or misleading as it is the court that ultimately makes the findings of facts and concludes the law. Accordingly, *Respondent's Motion for Sanctions* and *Respondent's Supplemental Motion for Sanctions* are DENIED.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, that Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (Tr. 11); *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

A violation was "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. §666(k). Complainant need not

show that there was a substantial probability that an accident would 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. *Mosser Construction*, 23 BNA OSHC 1044, 2010 CCH OSHD ¶33,049 (No. 08-0631, 2010); *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).

A violation was "willful" if it was "committed 'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.'" *Kaspar Wireworks, Inc.*, 18 BNA OSHC 2178, 2000 CCH OSHD ¶32,134 (No. 90-2775, 2000); *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. *AJP Construction, Inc*., 357 F.3d 70 (D.C. Cir. 2004). Complainant must show that Respondent had a "heightened awareness" of the illegality of its conduct. *Id*. Heightened awareness is more than simple knowledge of the conditions constituting the alleged violation; such evidence is already necessary to establish the basic violation. *Id.* Instead, Complainant must show that Respondent was actually aware of the unlawfulness of its action or that it "possessed a state of mind such that if it were informed of the standards, it would not care." *Id.*

Stipulations

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Occupational Safety and Health Act ("Act"). (Tr. 10-11).

2. Respondent is engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. Section 652(5). (Tr. 11).

3. Inspection No. 314296740 occurred at Respondent's workplace or jobsite. (Tr. 11-12).

4. Respondent was not subject to the Appropriations Rider set forth in Exhibit C-23 and

was not otherwise exempt or subject to any limited scope inspection, specifically from December 18, 2009 through the issuance of the Citation on May 13, 2010. (Tr. 303-306, 707-709).

5. Donald Halterman, of the OSHA Salt Lake Technical Center, was qualified to testify as an expert concerning soil classification under the regulations. (Tr. 415).

Discussion

Thirteen witnesses testified at trial: (1) Michel Caballero, OSHA Compliance Safety and Health Officer ("CSHO"); (2) Donald Halterman, OSHA's expert witness on soil analysis; (3) Jacob Morgan, Corpus Christi area plumber; (4) [redacted], former maintenance employee for Respondent; (5) Abel Pulido, Corpus Christi Fire Department Battalion Chief; (6) Steve McDanel, OSHA Assistant Area Director; (7) Javier Cantu, former maintenance employee for Respondent, (8) Cheryl Rice, Respondent's bookkeeper; (9) Liz Medrano, Respondent's Property Manager; (10) [redacted], current maintenance employee for Respondent; (11) [redacted]; (12) David May, Respondent's owner; and (13) Melissa Stokes, Respondent's General Manager. (Tr. 38, 416, 485, 655, 812, 870, 924, 954, 997, 1033, 1238, 1330, 1401). Based on their testimony and discussion of evidentiary exhibits, the court makes the following additional findings.

Respondent owns and operates a mobile home park in Corpus Christi, Texas. (Tr. 32, 932). On December 30, 2009, Respondent's owner, David May, observed that a section of ground between the mobile home park swimming pool and a perimeter fence was very wet and spongy. (Tr. 660, 1036, 1332). He directed the two mobile home park maintenance employees, [redacted] and [redacted], to determine the cause. (Tr. 660-661, 1334). The following day, December 31, 2009, [redacted] and [redacted] dug in the area with shovels and buckets for approximately four hours, but were unable to find the exact source of the leak. (Tr. 661-662, 1145, 1151). The ground was saturated and soil was falling back into their excavation almost as fast as they could dig. (Tr. 1154, 1159). Ultimately, [redacted] and [redacted] learned that a four-inch water pipe buried approximately 31 inches beneath the ground was leaking. (Tr. 294, 377, 553, 1099).

Over the course of two days, December 31, 2009 and January 1, 2010, Respondent's two maintenance employees, a third-party plumber, and the park owner's son worked to expose and repair the leak. (Tr. 169-171, 176, 488, 668-669, 1050). Work stopped suddenly on January 1, 2010 when portions of the excavation walls collapsed, temporarily trapping Respondent's maintenance employees inside the excavation. (Tr. 512, 684). Both employees were eventually rescued and taken to a local hospital for treatment of minor injuries. (Tr. 703, 1016). Approximately three months later, as a result of an employee complaint, OSHA CSHO Michele Caballero was assigned to investigate the incident. (Tr. 45-46). Her investigation revealed events and worksite conditions, some unrelated to the excavation collapse, which prompted the issuance of the citation items in dispute in this case.

Citation 2 Item 1

Complainant alleged a willful violation of the Act in Citation 2, Item 1 as follows:

> *29 C.F.R. §1926.651(k)(2): Where the competent person found evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees were not removed from the hazardous area until the necessary precautions had been taken to ensure their safety: At this location, on or about January 1, 2010, maintenance employees were involved in the repair of a water main located between the facility swimming pool and brick fence adjacent to Stone Street. The employer disregarded the warnings and recommendations of the competent person and did not remove employees from an excavation, greater than 4 feet deep, when hazardous conditions were observed, such as, but not limited to the following: (a) fluidity of the saturated sand flowing back into the hole during digging efforts, (b) lack of a protective*

system in the excavation, (c) accumulated water in the excavation, and (d) lack of safe egress.

The cited standard provides:

29 C.F.R. §1926.651(k)(2): Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

On December 31, 2009, after the maintenance employees' unsuccessful initial attempt to locate the leak, Respondent's owner, David May (who also lived in the mobile home park at the time), telephoned Larson Plumbing and asked them to send a plumber out to help fix their leaking pipe. (Tr. 169, 487, 569, 658, 664, 1250). Mr. May also called [redacted], and asked him to come to the mobile home park to help with the pipe repair work. (Tr. 664, 975-976, 1241-1243, 1251, 1294).[2]

Jacob Morgan, a supervisory plumber, arrived later that day with a "mini excavator." (Tr. 1042). Mr. Morgan had been working in the plumbing industry for seventeen years and had personally been involved in over one hundred excavations during his plumbing career. (Tr. 486-487). Mr. Morgan's excavator had the potential to dig as far as eight feet underground, although in this instance, a nearby fence limited the excavator's reach. (Tr. 488-489; Ex. C-60). Soon after Mr. Morgan began digging in the area of the leaking pipe, he observed that the majority of the wet, sandy soil in the area would fall back into the hole with every scoop of the excavator. (Tr. 169-170, 489-490, 493, 500-501, 512, 673-674, 676, 683, 760).

Based on the behavior of the soil, Mr. Morgan decided that an excavation protective system

[2] [redacted] was later paid by Respondent for the hours he worked on the pipe repair project. (Tr. 975-976).

was necessary. (Tr. 491, 504); See also 29 C.F.R. §1926, Subpart P. He testified that sloping was not possible because the sand was too wet, so he decided to install a shoring system on the sides of the excavation using 2x4's and some plywood found on Respondent's property. (Tr. 169-170, 491-492, 566, 667, 1047, 1179, 1383, 1387).

When [redacted] returned to the site after purchasing replacement parts for the pipe, he argued with Mr. Morgan about whether or not the shoring system was actually necessary. (Tr. 169-171, 176-178, 493, 668-669, 682-683, 758). Mr. Morgan insisted that it was, but [redacted] ordered the two maintenance employees to remove the shoring system from the excavation. (Tr. 493, 682, 757-759). Mr. Morgan then told [redacted] that he did not believe it was safe to work in the excavation without the shoring, and that the shoring would also help them dig down to the necessary depth to perform the repairs. (Tr. 495, 616, 757-762). [redacted], in the presence of David May, maintained his refusal to allow Mr. Morgan to shore the excavation and stated that Respondent would not pay him for the time it would take to install and use it. (Tr. 169-171, 176-178, 618, 668-669, 673, 758). Mr. Morgan later memorialized his interactions with [redacted] over the shoring system on an invoice. (Tr. 232, 534; Ex. C-53, C-59). Throughout the excavation work the rest of the day, and through the following day, January 1, 2010, no shoring system or other kind of protective system was used in the excavation. (Tr. 675, 1190). [redacted] described the walls of the excavation as like "the sides of a bowl." (Tr. 1056).

By the end of the day on December 31, 2009, Mr. Morgan was able to dig approximately 31 inches to the underground level of the leaking pipe. (Tr. 490, 1053). [redacted] then entered the excavation and located the leak by feeling along the pipe, which was submerged beneath about 1½ feet of accumulated water. (Tr. 530, 682-683). David May then asked Mr. Morgan, [redacted], [redacted], and [redacted] to come back the next day to help complete the repair. (Tr. 1047, 1049).

After observing the difficulty Mr. Morgan experienced while trying to excavate the wet sand on December 31, 2009, David May decided to call another company to send out a larger excavator

the following morning that could more easily expose the leaking pipe. (Tr. 674, 1308, 1338-1339). On January 1, 2010, a larger backhoe, provided and operated by another company, dug for about thirty minutes, fully exposing the pipe so it could be repaired. (Tr. 770-771).

While the larger excavator was digging, [redacted] told [redacted] and Mr. Morgan to pre-assemble the four-foot-long replacement part so that it would be ready to install once the leaking parts were removed. (Tr. 772, 1064). Then [redacted] helped [redacted], [redacted], and Mr. Morgan install the replacement part from inside the excavation. (Tr. 1196, 1259, 1340).

Just seconds after the new part was installed, when the water was turned back on to test the repair, a second leak began which flooded water into the excavation and caused the walls of the excavation to collapse onto [redacted] and [redacted]. (Tr. 380, 516, 684, 688, 774, 1073, 1197, 1200). Mr. Morgan immediately shut the water supply off again. (Tr. 775). At that point, [redacted] and [redacted] were partially stuck in the excavation and could not get out. (Tr. 686-687).

It was quickly determined that they could not be pulled free by the others. So the excavator began digging around [redacted] and [redacted] in an attempt to free them. (Tr. 517). [redacted] was removed quickly, although his leg was struck by the excavator in the removal process. (Tr. 517, 690-691, 1075, 1079-1080). [redacted] could not be removed as easily, and therefore, Respondent's Park Manager, Liz Medrano, called 911. (Tr. 518-520, 693-696, 815-816, 1015, 1075). After multiple unsuccessful attempts to remove [redacted] by the Corpus Christi Fire Department, he was ultimately freed from the excavation approximately two hours later with the help of a City of Corpus Christi vacuum truck, which suctioned out the wet sand around his lower body. (Tr. 543, 690-698, 702-703, 1273; Ex. C-60).

No one involved in the pipe repair ever measured the depth of the excavation, and since OSHA did not begin its investigation until three months after the incident, the precise measurements of the trench at the time of the accident are unknown. (Tr. 253). The court notes,

however, that the regulation cited in this instance does not contain any minimum depth in order to be applicable. (Tr. 172, 868). The cited regulation applies when a competent person at an excavation site finds "evidence of a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions." (Tr. 221). The record established that Mr. Morgan was the only competent person for the purposes of excavation safety at this jobsite. (Tr. 177, 221-222, 486-487). Based on his extensive experience in this type of work, he specifically identified cave-in hazards, indications that sloping would not work as a protective method, and the need for a shoring system in the excavation. In addition, Mr. Morgan started to implement a shoring system, with the help of [redacted] and [redacted], which was later ordered to be removed by [redacted]. Even after the hazardous conditions of the excavation were identified by Mr. Morgan, the two maintenance employees continued to work inside the excavation without an adequate protective system. Therefore, the court finds that the cited standard applied and was violated.

To establish employee exposure to a violative condition, Complainant must prove that it was reasonably predictable that employees "will be, are, or have been in the zone of danger" created by a violative condition. *Fabricated Metal Products*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶20,448 (No. 504, 1976). [redacted] and [redacted] were exposed to the violative condition each time they worked inside the unprotected excavation on December 31, 2009 and January 1, 2010. (Tr. 169, 177, 217, 495, 496, 661-662, 669, 768, 1050, 1187, 1374).

The violation was serious in that an excavation collapse could have, and unfortunately did, occur in this instance. [redacted] was taken to a hospital by ambulance and treated for loss of blood flow, hypothermia, dehydration, and lacerations. (Tr. 218, 703, 1016; Ex. C-44). [redacted] was taken to a hospital by ambulance and treated for his leg injury. (Tr. 216, 690, 1016; Ex. C-44). The potential injuries could have been much more serious, and possibly even fatal. (Tr. 284).

Complainant has determined that "excavation work is one of the most hazardous types of work done in the construction industry [and] [t]he primary type of accident of concern in excavation-related work is [the] cave-in." *Mosser Construction, Inc.,* supra.

David May and [redacted] participated directly in the excavation and repair work, while Liz Medrano, Respondent's Property Manager, and Melissa Stokes, Respondent's General Manager, periodically visited the excavation to observe the progress of the repair. (Tr. 217, 1012-1014, 1178, 1184, 1337, 1344, 1402-1405). In addition, during the course of the excavation project, David May and [redacted] specifically provided the maintenance employees with directions and instructions. (Tr. 658, 671, 678, 754, 792, 929-930, 998, 1018, 1019, 1034, 1141, 1332, 1368, 1390, 1402). Although [redacted] was not a full-time employee of the mobile home park, and only assisted with various projects when requested to do so by his father, an employee who is delegated with authority over other employees, even temporarily, is considered to be a supervisor for the purposes of imputing knowledge to the employer. *Tampa Shipyards, Inc*., 15 BNA OSHC 1533, 1992 CCH OSHD ¶29,617 (No. 86-360, 1992).

The periodic presence of all four supervisors, combined with Mr. Morgan's specific demand for, and attempt to install, a protective system in front of both David May and [redacted], established Respondent's knowledge of the violative condition. *Shaw Construction, Inc*., 6 BNA OSHC 1341, 1978 CCH OSHD ¶22,524 (No. 3324, 1978); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991).

Complainant characterized the violation as willful because Respondent's managers knew of the hazardous conditions in the excavation from their own observations and from the warnings and attempted shoring by Mr. Morgan, yet Respondent continued to allow the mobile home park's two maintenance employees to work inside the excavation without proper protection. (Tr. 219). Complainant asserted that these actions constituted plain indifference to those employees' safety and health. (Tr. 220). The court agrees. Mr. Morgan was hired by David May for his expertise in

the field of repairing underground plumbing leaks. Mr. Morgan quickly identified the hazardous condition of the wet sand in the excavation, and the need for a protective system. Mr. Morgan even attempted to install a shoring system, which [redacted] ordered the maintenance employees to remove. Despite Mr. Morgan's continued argument with [redacted] over the issue, in the presence of David May at certain points, Respondent refused to allow for the use of a protective system and sent its maintenance employees into the excavation to perform work. Unfortunately, Mr. Morgan's safety concerns were realized when the excavation collapsed trapping the two maintenance employees inside. These facts constitute plain indifference to the requirements of the regulations and to employee safety. *Lakeland Enterprises of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 748 (7th Cir. 2005).

It is also worth noting that this was not the first time that Respondent's maintenance employees had experienced an excavation collapse at this mobile home park. Approximately four years earlier, [redacted][3] was working alone, repairing an underground pipe in a four-foot-deep excavation when it collapsed, dumping soil onto his back and knocking him down inside the excavation. (Tr. 180, 345, 1220). [redacted] told Liz Medrano and [redacted] about the incident after it occurred, but prior to the January 1, 2010 accident. (Tr. 180, 348, 1220). This instance provided heightened knowledge to the Respondent about the condition of the soil on its property, the need to evaluate the work environment and provide adequate safeguards and protections in the future when employees were working in excavations.

In conclusion, the court finds that Complainant established all of the elements necessary to

[3] The court notes at this point that it found the majority of [redacted] testimony to be unreliable. In addition to his demeanor, his testimony was repeatedly inconsistent. For example: (1) he testified that Liz Medrano never entered the maintenance workshops, even though Ms. Medrano personally acknowledged that she did enter them (Tr. 1029-1030, 1116-1117); (2) he testified that when Mr. Morgan first arrived, the shovel-dug excavation was only two feet deep, and then later testified that it was three to four feet deep (Tr. 1151, 1162, 1168, 1176); (3) he then later testified that after additional digging by two different excavators on two different days, the excavation was then only three feet deep; (Tr. 1169-1170, 1173); (4) he also testified that the second, larger excavator brought in on January 1, 2010, only deepened the excavation by six inches (Tr. 1190). Given the potential importance of the depth of the excavation to Citation 2 Item 2, it appeared to the court that [redacted] was intentionally understating its depth. To the extent [redacted] testimony was inconsistent with the testimony of Mr. Morgan and [redacted], the court credits Mr. Morgan's and [redacted] testimony over [redacted]. *American Wrecking Corp.*, 19 BNA OSHC 1703, 2001 CCH OSHD ¶32,504 (No. 96-1330, 2001).

prove the willful violation alleged in Citation 2, Item 1. Citation 2, Item 1 will be AFFIRMED.

Citation 2 Item 2

Complainant alleged a willful violation of the Act in Citation 2, Item 2 as follows:

> *29 C.F.R. §1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c), nor had the employer complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than the maximum one and a half horizontal to one vertical (or 34 degrees measured from the horizontal): At this location, on or about January 1, 2010, maintenance employees in an excavation greater than 4 feet deep were involved in the repair of a water main between the facility swimming pool and brick fence adjacent to Stone Street. No cave in protection was used during the repair of the broken 4-inch water main, exposing employees in the excavation to the hazards associated with cave-in.*

The cited standard provides:

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

Citation 2, Item 1 and Citation 2, Item 2, were both based on Respondent's employees being exposed to cave-ins. Respondent could have eliminated the hazards identified in both proposed

violations by either prohibiting employees from working inside the excavation (which is what action the regulation which is subject to Citation 2, Item 1 requires), or by properly implementing one of the excavation protection systems in 29 C.F.R. §1926, Subpart P (which is what action the regulation which is subject to Citation 2, Item 2 requires). Either choice would have abated the hazardous conditions alleged in both Citation 2, Item 1 and Citation 2, Item 2. In this instance, if the Respondent would have prohibited its employees from working in the excavation as required by 29 C.F.R. §1926.651(k)(2) the hazard would have been eliminated and it would have been duplicative to require the implementation of excavation protection systems. The Commission has long held that citation items are impermissibly duplicative if the same abatement action would correct the violative conditions alleged in both items. *Capform, Inc*., 13 BNA OSHC 2219, 1989 CCH OSHD ¶28,503 (No. 84-556, 1989). Accordingly, Citation 2 Item 2 will be VACATED.

Citation 1 Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> *29 C.F.R. §1910.132(d)(2): The employer did not verify that the required workplace hazard assessment had been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date of the assessment and a statement which identifies the document as a certification of hazard assessment: At this location, on or about March 25, 2010, and at times prior thereto, the employer did not ensure a written hazard assessment, which addressed the work activities and identified the associated Personal Protective Equipment for the maintenance employees, had been developed.*

The cited standard provides:

> *29 C.F.R. §1910.132(d)(2): The employer shall verify that the required*

> *workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.*

Respondent did not conduct a workplace hazard assessment despite the fact that its two maintenance employees worked in excavations, used various power tools, performed minor electrical repairs, and handled hazardous chemicals to maintain the swimming pool. (Tr. 65, 87, 124, 743, 1027-1028, 1130, 1221; Ex. C-5, C-6). A properly conducted hazard assessment would have alerted [redacted] and [redacted] to the dangers associated with their varied tasks and ensured that they used appropriate personal protective equipment. (Tr. 66). The court finds that the cited standard applied and was violated.

[redacted] and [redacted] were exposed to the violative condition daily, as they performed maintenance and repair work at Respondent's mobile home park. (Tr. 66-68). Respondent was certainly aware of its failure to conduct and certify the completion of a hazard assessment. Melissa Stokes was even specifically aware that certain jobsite activities exposed Respondent's maintenance employees to certain hazards, as she bought them safety glasses on one occasion and required them to wear steel-toed boots. (Tr. 66-67). Employee exposure and the employer's knowledge of the violative condition were established.

Complainant characterized Citation 1 Item 2 as a serious violation. However, the court notes that Complainant elected to charge Respondent with a violation of 29 C.F.R. §1910.132(d)(2), which requires employers to *certify* that a hazard assessment was performed. The actual requirement to *conduct* a hazard assessment is contained in 29 C.F.R. §1910.132(d), which was not cited here. The court notes that there could be no certification of a hazard assessment since no assessment was performed. Where no hazard assessment was conducted it logically flows that

there could be no certification completed. The specific subparagraph cited in this instance is essentially a record-keeping violation. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 2, after MODIFICATION to an other-than-serious violation. Citation 1, Item 2 will be AFFIRMED as an OTHER-THAN-SERIOUS violation.

Citation 1 Item 3

Complainant alleged a serious violation of the Act in Citation 1 Item 3 as follows:

> *29 C.F.R. §1910.151(c): Where employees were exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body were not provided within the work area for immediate emergency use: At this location, on or about March 25, 2010, and at times prior thereto, in the pool pump house, employees were using corrosive chemical swimming pool and spa additives without an approved emergency eye wash available onsite, or in the immediate area, in the event of a mishap.*

The cited standard provides:

> *29 C.F.R. §1910.151(c): Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.*

During her inspection of the mobile home park, CSHO Caballero observed conditions in and around the maintenance workshop, the paint workshop, and the pumphouse, which were unrelated to the excavation work, and served as the basis for most of the following violations addressed in this Decision. (Tr. 264, 786). For example, in relation to Citation 1 Item 3, she observed containers of swimming pool chemicals and learned that [redacted] and [redacted] maintained the swimming

pool at Respondent's mobile home park. (Tr. 70, 1027-1028; Ex. C-6). At least weekly, one or both employees treated the pool water with Burnout 35, Algae Stop, Soda Ash and/or Jumbo Chlorine Tabs, chemicals which were identified by their manufacturers as hazardous and dangerous. (Tr. 64, 70-75, 710-713, 1130; Ex. C-6). Complainant charged Respondent with not having suitable eyewash facilities "within the work area for immediate emergency use" while handling these substances.

The burden is on the Complainant, based on the nature of hazardous chemicals in the area and quantities, to provide evidence as to why a garden hose at the swimming pool, as well as a sink in the swimming pool restroom approximately ten yards away, would be insufficient under the circumstances.

Under Commission precedent, whether an employer has provided suitable facilities depends on the totality of the relevant circumstances, including the nature, strength, and amounts of corrosive material to which employees are exposed, the configuration of the work area, and the distance between the area where any corrosive chemicals are used and the eyewash facilities. *Atlantic Battery Company, Inc.,* 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994). The Commission has held that the Secretary cannot bear her burden of proving that the facilities provided are unsuitable merely by showing that the drenching or flushing facilities are not an eyewash fountain. *Id.*; *see also, E.I. duPont de Nemours & Co.,* 10 BNA OSHC 1320, 1982 CCH OSHD ¶25,883 (No. 76-2400, 1982). In *Atlantic Battery*, the Commission found that the Secretary had not proved that an aerated hose was an unsuitable means of flushing the eyes where the record failed to describe the strength and amount of sulfuric acid used by affected employees, or the nature of the acid mixing operation to which employees were exposed. The Commission in *Gibson Discount Center, Store #15*, 6 BNA OSHC 1526, 1978 CCH OSHD ¶22,669 (No. 14656, 1978), held the availability of running water within a reasonable distance was found "suitable." Also, in *Con Agra Flour Milling Co*, 16 BNA OSHC 1137, CCH OSHD ¶39,045 (No. 88-1250,

1993), the Commission affirmed a decision vacating a § 1910.151(c) citation as the Secretary failed to demonstrate that Con Agra's employees were more than "potentially" exposed to corrosive chemicals in the course of their duties.

The Complainant, in regards to the present citation, failed to carry her burden. While there is evidence in the record as to the strength of the corrosive chemicals to which employees were actually exposed, she failed to establish: (i) the amount of chemicals actually used by the employees; (ii) the nature or the process of the application of the chemicals to which the employees were exposed; (iii) the configuration of the work area; and (iv) the circumstances under which employees were more than potentially exposed to such chemicals. Without the above facts being presented the suitability of the available flushing facilities cannot be properly evaluated. Given the totality of the circumstances, it cannot be found that the garden hose available at the swimming pool, as well as a sink in the swimming pool restroom approximately ten yards away, were unavailable for immediate use. The record established that there was a garden hose available at the swimming pool, as well as a sink in the swimming pool restroom approximately ten yards away. (Tr. 728, 1133-1134). Either could have been quickly accessed and used to irrigate the maintenance employees' eyes in case of an emergency. The totality of the circumstances in this instance, factoring in the type of chemicals involved and the location and type of available washing facilities, convince the court that Respondent did have suitable eyewash facilities available within the work area for immediate emergency use. *Atlantic Battery Co*., 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994); *Gibson Discount Centers*, 6 BNA OSHC 1526, 1978 CCH OSHD ¶22,669 (No. 14657, 1978). Citation 1, Item 3 will be VACATED.

Citation 1 Item 4a

Complainant alleged a serious violation of the Act in Citation 1, Item 4a as follows:

> *29 C.F.R. §1910.303(b)(2): Listed or labeled electrical equipment was not used or installed in accordance with instructions included in the*

> *listing or labeling: At this location, on or about March 25, 2010, and at times prior thereto, in the workshop, electrical equipment was not being used or installed properly, such as, but not limited to: (a) One plastic receptacle outlet box and one plastic bracket with outlets were not mounted within the wall but attached to the top shelf of the work bench and hung down over the bench top; the conductor wires exited the back; (b) Two re-locatable power strips were series connected (daisy chained) to provide more power outlets for battery chargers and portable tool charging stations; (c) Romex cable exited the outdoor light conduit and ran through a fence hole, strung in mid-air approximately 2-feet in length where it had been spliced and wrapped with black plastic tape, then entered through the wall of the adjacent water well pump house where it was connected to the electrical wiring of the pump.*

The cited standard provides:

> *29 C.F.R. §1910.303(b)(2): Installation and use. Listed or labeled equipment shall be installed and used in accordance with any instructions included in the listing or labeling*

While examining the large maintenance work shop and pumphouse, CSHO Caballero observed electrical power strips which were improperly connected, one to another in a series, so that they would reach charging stations for various power tools; an electrical outlet improperly suspended over a workbench, rather than installed in the wall; and Romex electrical wiring which was improperly run through a hole in an exterior wooden fence, then strung mid-air for a couple of feet, and then entered the pumphouse through a hole in its wall. (Tr. 89-91, 97, 106, 131-133, 718-719, 1221, 1393; Ex. C-7). CSHO Caballero testified, without contradiction, that the identified electrical equipment was not supposed to be installed or used under those conditions pursuant to

manufacturer instructions. (Tr. 134). Therefore, the court finds that the cited standard applied and was violated.

The maintenance employees visited and worked inside the maintenance shops every day. In addition, their time cards and a time clock were located in the larger workshop, so they were required to enter that area at least twice a day to clock-in and clock-out. (Tr. 717-719, 1221; Ex. C-7). They also periodically entered the pumphouse to check pressure gauges, to ensure that the pumps were working properly, and during the winter months, to turn lights on to help keep water pipes from freezing. (Tr. 97, 106, 720, 1119-1120). Therefore, the two maintenance employees were exposed to these violative electrical conditions.

David May, Liz Medrano, and Melissa Stokes, all of which supervised the maintenance employees, acknowledged that they periodically visited the maintenance workshops and pumphouse as well. (Tr. (Tr. 658, 671, 678, 739, 754, 792, 929-930, 998, 1018, 1019, 1034, 1141, 1332, 1368, 1390, 1402, 1029-1030, 1357, 1390-1391, 1398, 1442). All of the violative conditions were in plain view to anyone who accessed those areas. (Tr. 104, 134, 715). In addition, constructive knowledge under the Act includes an obligation for supervisors to inspect the work place. *North Landing*, 19 BNA OSHC 1465, 2001 CCH OSHD ¶32,391 (No. 96-721, 2001). Employer knowledge was established in that Respondent’s managers knew, or with the exercise of reasonable diligence, could have known of these obvious electrical violations.

Lastly, failure to follow the manufacturer’s installation guidelines for electrical wiring and electrical equipment could have resulted in electrical shock or fire, posing a threat of serious physical harm or death to the employees. (Tr. 93). The violation was properly characterized as a serious violation. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1 Item 4a. Citation 1, Item 4a will be AFFIRMED.

Citation 1 Item 4b

Complainant alleged a serious violation of the Act in Citation 1, Item 4b as follows:

> *29 C.F.R. §1910.305(b)(2)(i): In completed installations, each outlet box did not have a cover, faceplate, or fixture canopy: At this location, on or about March 25, 2010, and at times prior thereto, the energized junction box in the water well pump house was not provided with a faceplate.*

The cited standard provides:

> *29 C.F.R. §1910.305(b)(2)(i): Covers and canopies. (i) All pull boxes, junction boxes, and fittings shall be provided with covers identified for the purpose. If metal covers are used, they shall be grounded. In completed installations, each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.*

There was a missing face plate on an electrical junction box inside the pumphouse at Respondent's mobile home park, which exposed live wiring. (Tr. 97-99; Ex. C-8). The cited standard applied and was violated. As stated earlier, maintenance employees entered the pumphouse periodically and were exposed to the condition. (Tr. 97, 106, 720, 1119-1120). David May also acknowledged that he occasionally visited the pumphouse, and the record establishes that the missing face plate was in plain view. (Tr. 721; Ex. C-8). Therefore, employee exposure and employer knowledge were also established. Lastly, accidental contact with the live wiring could have resulted in serious injuries or death. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 4b. Citation 1, Item 4b will be AFFIRMED.

Citation 1 Item 4c

Complainant alleged a serious violation of the Act in Citation 1, Item 4c as follows:

> *29 C.F.R. §1910.305(j)(1)(i): Fixtures, lampholders, lamps, rosettes, and receptacles had live parts normally exposed to employee contact. However, rosettes and cleat-type lampholders and receptacles located at least 2.44 m (8.0 ft) above the floor may have exposed terminals. At this location, on or about March 25, 2010, and at times prior thereto, energized outlets were not provided with faceplates, such as, but not limited to the following: (a) the shop work bench where the employee time card was connected; (b) the one receptacle outlet on the north end of the work bench where a portable tool charger was connected; and (c) the four-plex receptacle outlet in the paint work shop on the east wall adjacent to the door where power cords to equipment such as the spray paint machine were connected.*

The cited standard provides:

> *29 C.F.R. §1910.305(j)(1)(i): Equipment for general use – (1) Lighting fixtures, lampholders, lamps, and receptacles. (i) Fixtures, lampholders, lamps, rosettes, and receptacles may have no live parts normally exposed to employee contact. However, rosettes and cleat-type lampholders and receptacles located at least 2.44 m (8.0 ft) above the floor may have exposed terminals.*

The missing faceplates listed in Item 4c, located inside the pumphouse at the Respondent's mobile home park, were in plain view to anyone who looked inside or entered the maintenance workshops. (Tr. 104, 725-726; Ex. C-9). The cited standard applied and was violated. The maintenance employees and Respondent's managers regularly visited the maintenance workshops and were exposed to the condition. (Tr. 106, 718-719, 722-726, 1221-1222). Therefore, employee

exposure and employer knowledge were also established. Accidental contact with the live wiring could have resulted in serious injuries or death. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1 Item 4c. Citation 1, Item 4c will be AFFIRMED.

Citation 1 Item 5

Complainant alleged a serious violation of the Act in Citation 1, Item 5 as follows:

> *29 C.F.R. §1910.303(b)(7): Electrical equipment was not installed in a neat and workmanlike manner: At this location, on or about March 25, 2010, and at times prior thereto, in both workshops and the large water well pump house, the electrical wiring to outlets and equipment was not installed in a neat and orderly fashion.*

The cited standard provides:

> *29 C.F.R. §1910.303(b)(7): Mechanical execution of work. Electric equipment shall be installed in a neat and workmanlike manner.*

The improperly installed electrical equipment, wiring, and outlets which serve as the factual basis for Citation 1, Item 5, were also listed as the basis for Citation 1, Item 3 and Citation 1, Item 4. Correction of the hazards identified in Citation 1, Item 3, and Citation 1, Item 4 would have also corrected the violative conditions identified in Citation 1, Item 5. Therefore, the court finds that Citation 1, Item 5 is impermissibly duplicative of those previously discussed citation items. *Capform, Inc.*, supra. Accordingly, Citation 1 Item 5 will be VACATED.

Citation 1 Item 6a

Complainant alleged a serious violation of the Act in Citation 1, Item 6a as follows:

> *29 C.F.R. §1910.303(f)(2): Each service, feeder, and branch circuit, at its disconnecting means of overcurrent device, was not legibly marked to indicate its purpose, unless located and arranged to [sic] the purpose is*

evident: At this location, on or about March 25, 2010, and at times prior thereto, on the outside wall of the office, three circuit breakers in the electrical panel were not labeled as to their function and/or purpose.

The cited standard provides:

29 C.F.R. §1910.303(f)(2): Services, feeders, and branch circuits. Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident.

In the circuit breaker box behind the mobile home park office, several of the circuit breaker switches were not labeled. (Tr. 111, 732, 1222; Ex. C-11). Maintenance employees accessed this circuit breaker box whenever they performed minor electrical work, by disconnecting power to an area themselves, and by performing electrical work in areas controlled by one or more of the unlabeled circuit breakers. (Tr. 111, 114). [redacted] testified that he accessed the circuit breaker box a couple of times a week. (Tr. 731, 788). Respondent's managers also regularly accessed the circuit breaker box, often to assist the maintenance personnel by shutting off power to a particular area. (Tr. 732, 737). Respondent's managers' use of the circuit breaker box established knowledge of the violative condition. An employer does not have to possess knowledge that a particular condition violated the Act or its regulations, just knowledge that the condition existed. *Shaw Construction, Inc.*, supra. The court finds that the standard applied, was violated, that Respondent's maintenance employees were exposed to the condition, and that Respondent knew, or with the exercise of reasonable diligence, could have known of the condition.

Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 6a. Citation 1, Item 6a will be AFFIRMED.

Citation 1 Item 6b

Complainant alleged a serious violation of the Act in Citation 1, Item 6b as follows:

29 C.F.R. §1910.305(b)(1)(i): Conductors entering boxes, cabinets, or fittings were not protected from abrasions, and openings through which conductors were entering were not effectively closed. At this location, on or about March 25, 2010, and at times prior thereto, the electrical box located on the back, outside wall of the office had a conductor opening on the bottom left side of the box which was not completely closed.

The cited standard provides:

29 C.F.R. §1910.305(b)(1)(i): Conductors entering cutout boxes, cabinets, or fittings shall be protected from abrasion, and openings through which conductors enter shall be effectively closed.

One of the conductors which entered the bottom of the circuit breaker box behind the main office did not completely fill the knockout hole on the box, leaving a small opening of approximately one inch or less. (C-12). [redacted] and [redacted] were exposed to the condition because, as indicated above, they regularly accessed the circuit breaker box. (Tr. 118, 737). The condition was in plain view and managers accessed the circuit breaker box to shut off power to various areas for the maintenance employees. (Tr. 119; Ex. C-12). The court finds that the cited standard applied, was violated, that Respondent's employees were exposed, and that Respondent knew, or with the exercise of reasonable diligence, could have known of the condition.

Complainant argued that the violation was serious because dust, weather, or vermin, could enter the circuit breaker box through the small opening, which could lead to arcing and fire. (Tr. 116; Ex. C-12). Based on the totality of the circumstances, the court does not agree that such a chain of events was reasonably likely to occur and therefore the severity and gravity as assessed to this citation by the CSHO was in error. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 6b, after MODIFICATION to an other-than-serious violation. Citation 1, Item 6b will be AFFIRMED as an

OTHER-THAN-SERIOUS violation.

Citation 1 Item 6c

Complainant alleged a serious violation of the Act in Citation 1, Item 6c as follows:

> *29 C.F.R. §1910.305(b)(1)(ii): Unused openings in boxes, cabinets, or fittings were not effectively closed: At this location, on or about March 25, 2010, and at times prior thereto, the electrical panel in the electrical box on the back, outside wall of the office, had openings for circuit breakers which were not closed.*

The cited standard provides:

> *29 C.F.R. §1910.305(b)(1)(ii): Unused openings in cabinets, boxes, and fittings shall be effectively closed.*

The circuit breaker box behind the office also had slots for circuit breakers which were unused and left open. (Tr. 120-121; Ex. C-13). The cited standard applied and was violated. For the reasons stated above, [redacted] and [redacted] were exposed to the condition, and Respondent's managers had knowledge of the condition due to their periodic use of the circuit breaker box. (Tr. 121-122, 737). The openings allowed anyone who accessed the circuit breaker box to easily place their fingers inside and behind the circuit breaker panel, potentially contacting live wiring. The violation was properly characterized as a serious violation. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1 Item 6c. Citation 1, Item 6c will be AFFIRMED.

Citation 1 Item 7

Complainant alleged a serious violation of the Act in Citation 1, Item 7 as follows:

> *29 C.F.R. §1910.304(a)(2): Grounded conductors were attached to terminals or leads so as to reverse designated polarity: At this location,*

on or about March 25, 2010, and at times prior thereto, in the paint workshop, maintenance employees were connecting electrical cords to a four-plex receptacle outlet which, when tested, had reverse polarity, exposing them to the hazards of electric shock.

The cited standard provides:

29 C.F.R. §1910.304(a)(2): Polarity of connections. No grounded conductor may be attached to any terminal or lead so as to reverse designated polarity.

CSHO Caballero discovered a single four-plex electric receptacle in the paint workshop which indicated reverse polarization when she tested it with her meter. (Tr. 125). She explained that plugging electric tools into an outlet with reverse polarization could have resulted in shock or the inability to turn off a tool. (Tr. 125, 129). Since the condition was not open and obvious, and could only be determined through plugging in electrical testing equipment into the outlet, Complainant failed to introduce sufficient evidence to establish that Respondent knew, or with the exercise of reasonable diligence could have known, of the condition. There is also no evidence in the record to indicate there were prior incidents or events of the receptacle malfunctioning to impute knowledge to the Respondent. Since employer knowledge is a required element for a *prima facie* violation of the Act, Citation 1 Item 7 will be VACATED.

Citation 1 Item 8

Complainant alleged a serious violation of the Act in Citation 1, Item 8 as follows:

29 C.F.R. §1910.305(g)(2)(iii): Flexible cords were not connected to devices and fittings so that tension would not be transmitted to joints or terminal screws: At this location, on or about March 25, 2010, and at times prior thereto, in the paint/workshop, the female end of an orange

extension cord used by maintenance employees was not provided with strain relief.

The cited standard provides:

29 C.F.R. §1910.305(g)(2)(iii): Flexible cords and cables shall be connected to devices and fittings so that strain relief is provided that will prevent pull from being directly transmitted to joints or terminal screws.

CSHO Caballero observed and photographed an extension cord on which the outer sheathing had pulled away from the female end of the cord, exposing the internal conductor wires, due to a lack of strain relief during its use. (Tr. 136; Ex. C-15). The male end of the cord was plugged into an electrical outlet, but the female end was not connected to any tools at the time. (Tr. 136; Ex. C-15). [redacted] and [redacted] regularly handled and used the extension cord with electric power tools. (Tr. 136, 740, 1129). The cord was hanging on the wall in the paint workshop in plain view to any of Respondent's supervisors who, as indicated above, regularly visit both maintenance workshops. (Tr. 137). Complainant established that the cited standard applied and was violated, that Respondent's employees were exposed to the condition, and that Respondent knew, or with the exercise of reasonable diligence could have known, of the condition. Lastly, the violation was properly characterized as a serious violation in that employees could have been seriously injured, or killed, if they had come into contact with the internal conductor wiring during its use. (Tr. 138). Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1 Item 8. Citation 1, Item 8 will be AFFIRMED.

Citation 1 Item 9

Complainant alleged a serious violation of the Act in Citation 1, Item 9 as follows:

29 C.F.R. §1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards

or other exposure to illness or injury: At this location, on or about January 1, 2010, maintenance employees were involved in the repair of a leaking water main. The employer did not ensure employees were trained in the recognition of unsafe conditions in trenching and excavation work, to include hazards, such as, but not limited to, the following: (a) hazards of working in trenches without an adequate employee protective system; (b) hazards of working in trenches where the soil is saturated and there is an accumulation of water; (c) safe means of egress.

The cited standard provides:

29 C.F.R. §1926.21(b)(2): The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Two maintenance employees were directed to enter an unprotected excavation area and perform pipe repairs on December 31, 2009 and January 1, 2010. (Tr. 143-145). In addition, both David May and [redacted] observed the wet and unstable soil conditions in the excavation, and were specifically told by plumber Jacob Morgan that the excavation was unsafe and needed a protective system. (Tr. 145). In the past seven years, [redacted] testified that he has helped repair ten excavation-related plumbing leaks at the mobile home park. (Tr. 1035). Despite these facts, neither of Respondent's maintenance employees had ever been instructed by Respondent on the potential hazards and injuries associated with excavation work. (Tr. 143-144, 809). The court also notes that Complainant requested employee training records before trial, but no such records were produced. (Tr. 148-149; Ex. C-52, C-54). The cited standard applied, was violated, and Respondent's two maintenance employees were exposed to the condition.

Respondent is also deemed to have knowledge of the training and instruction it provides, or in this case did not provide, to its employees. Failure to instruct employees on how to recognize and avoid unsafe conditions in the work they are assigned can, and unfortunately did in this case, result in serious injuries. (Tr. 146). Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 9. Citation 1, Item 9 will be AFFIRMED.

Citation 1 Item 10

Complainant alleged a serious violation of the Act in Citation 1 Item 10 as follows:

> *29 C.F.R. §1926.651(c)(2): 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: At this location, on or about January 1, 2010, between the facility swimming pool and the brick fence adjacent to Stone Street, maintenance employees were working in a trench at [a] depth greater than 4 feet and a ladder had not been provided for egress.*

The cited standard provides:

> *29 C.F.R. §1926.651(c)(2): Means of egress from trench excavations.*[4] *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.*

The precise dimensions of the excavation before the accident are not known. (Tr. 345). None of the witnesses ever measured the excavation, although numerous witnesses gave widely varying, and largely unreliable, estimates on its depth, ranging from as shallow as two feet seven

---

[4] The regulation makes specific reference to "trench excavation." There is a specific definition which applies to a "trench excavation." 29 C.F.R. §1926.650(b). Since the Secretary is the author of her own regulations, it is clear from its face that in order for this requirement to apply, the excavation must be a "trench excavation" as opposed to an excavation.

inches, to as deep as ten feet. (Tr. 510, 666, 683, 686, 761, 818, 820, 866-867, 1066, 1159-1162, 1268-1270, 1341, 1378, 1405). The preponderance of the evidence established that at the time of the collapse, the excavation was between four and five feet deep. This conclusion credits the undisputed testimony from several witnesses indicating that the leaking pipe was 31 inches underground, that the plumber reached the depth of the pipe on December 31, 2009 and that a larger excavator was used the following day to dig past the depth of the pipe creating several inches of space beneath the pipe and the bottom of the excavation. Despite initial claims of a greater depth, even CSHO Caballero ultimately conceded at trial that the excavation was "approximately four feet or greater." (Tr. 274). The width of the excavation, which ranged from five to fifteen feet, was greater than the depth of the excavation. (Tr. 1056).

The cited standard in Item 10 requires ladders or other safe means of egress for a "trench excavation" which is defined as "a narrow excavation (in relation to its length) made below the surface of the ground. In general, the *depth is greater than the width*, but the width of a trench (measured at the bottom) is not greater than 15 feet." 29 C.F.R. §1926.650(b)(emphasis added). Accordingly, the cited standard did not apply since the Complainant has not established by a preponderance of the evidence that the depth of the trench excavation was deeper than it was wide. The width of the excavation, which ranged from five to fifteen feet, was greater than the depth. (Tr. 1056). Since application of the standard is a required element, Citation 1 Item 10 will be VACATED.

Citation 1 Item 11

Complainant alleged a serious violation of the Act in Citation 1, Item 11 as follows:

> *29 C.F.R. §1926.651(h)(1): The employer did not ensure that adequate precautions were taken to protect employees against the hazards posed by water accumulation. At this location, on or about January 1, 2010, between the facility swimming pool and the brick fence adjacent to Stone*

Street, the employer directed maintenance employees to continue working in an excavation, greater than 4 feet in depth, with an accumulation of water.

The cited standard provides:

29 C.F.R. §1926.651(h)(1): Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

The cited standard applied because Respondent's employees were working in an excavation for two days, with varying levels of accumulated water, attempting to repair a pipe leak. (Tr. 164). Initially, water pumps were used to remove water from the excavation, but they kept clogging and became ineffective. (Tr. 164-166). The record clearly established that [redacted] and [redacted] worked inside the excavation at various times between December 31, 2009 and January 1, 2010 while it contained standing water ranging from just a few inches to as much as 1 ½ feet. (Tr. 164-165, 522, 682, 1044, 1051, 1342, 1406). In fact, the maintenance employees wore waders while working in the excavation. (Tr. 767-768).

The accumulated water was in plain view to every supervisor who visited the excavation, and despite Mr. Morgan's conversations with [redacted] and David May about the hazardous condition of the excavation, no protective systems or other precautions were ever taken. The terms of the cited standard were violated and employer knowledge of the condition was established. The violation was serious because the accumulation of water inside an excavation creates hazardous

conditions beyond those typically found in a dry excavation, such as drowning and increased instability of the surrounding excavation walls. (Tr. 167). Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 11. Citation 1, Item 11 will be AFFIRMED.

Citation 3 Item 1

Complainant alleged an other-than-serious violation of the Act in Citation 3, Item 1 as follows:

> *29 C.F.R. §1910.1200(e)(1): The employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met: At this location, employees engaged in swimming pool and spa maintenance, as well as small equipment operations and repairs, were exposed to hazardous chemicals such as, but not limited to, Leslie's Swimming Pool Supplies 3-inch Jumbo Chlorine Tabs, BioGuard Strip Kwik, BioGuard Burnout 35, Leslie's Ultra Bright, [and] Soda Ash. The employer had not developed a program which would address labeling and other forms of warning on chemical containers, Material Safety Data Sheets, and employee information and training on the hazards associated with chemicals used at this site. The written program must also contain the following: (a) a list of all hazardous chemicals on site, (b) the methods the employer will use to inform employees of the hazards associated with non-routine tasks involving chemicals, such as a spill, (c) the hazards of chemicals contained in piping that is not labeled, and (d) the method the employer will use to inform other employers (contractors) of the chemicals their*

employees might be exposed to while performing duties at this site.

The cited standard provides:

> *29 C.F.R. §1910.1200(e)(1): Written hazard communication program. (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also include the following: [list of hazardous chemicals and methods of informing employees of hazards when performing non-routine tasks]*

Employees regularly used the hazardous chemicals and substances listed in the citation during the course of weekly swimming pool maintenance. (Tr. 140-141, 706-707, 710-713, 1027-1028, 1130; Ex. C-7, C-21). The manufacturers' labeling on those chemicals identified the hazardous nature of the substances. (Ex. C-6). Despite this fact, neither the maintenance employees nor managers of the mobile home park could produce a written hazard communication program or Material Safety Data Sheets for the chemicals. (Tr. 140-141, 1441). The cited standard applied, was violated, and Respondent's two maintenance employees were exposed.

Respondent is deemed to have knowledge of written programs which it failed to develop, implement, and maintain. This knowledge is strengthened by the fact that Respondent purchased the pool chemicals for the maintenance employees to use, and required them to complete a log confirming their weekly maintenance of the pool. (Tr. 141-142, 713). Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 3, Item 1. Citation3, Item 1 will be AFFIRMED.

Affirmative Defenses

Respondent failed to argue any of its originally pled affirmative defenses in its *Post Hearing*

Brief. Typically, this results in a waiver of any affirmative defenses listed in the *Answer*. See *Georgia-Pacific Corp*., 15 BNA OSHC 1127, 1991 CCH OSHD ¶29,395 (No. 89-2713, 1991). However, Respondent alluded to certain defenses during the trial. Therefore, the court will briefly address them.

Fourth Amendment

Respondent attempted to argue that Complainant's walkaround inspection of the mobile home park violated its Fourth Amendment protection against unreasonable searches. *Marshall v. Barlows,* 436 U.S. 307 (1978). The court ruled during trial that this defense was untimely as it had never been previously raised in Respondent's *Answer*. The court maintains its ruling on that issue and, in addition, briefly notes that the record clearly established that CSHO Caballero obtained permission from Park Manager Liz Medrano to enter the park property to conduct her inspection. (Tr. 49-50, 260-261, 1004-1005, 1438). The court also notes that no one, including Park Manager Medrano, ever attempted to withdraw that consent or otherwise protest CSHO Caballero's presence on Respondent's property. (Tr. 55-56). Respondent unequivocally waived any Fourth Amendment defense through its consent to the inspection. *Cody-Zeigler, Inc*., 19 BNA OSHC 1777, 2002 CCH OSHD ¶32,559 (No. 01-1236, 2002). Accordingly, Respondent's assertion of a Fourth Amendment affirmative defense to the inspection is REJECTED.

Unpreventable Employee Misconduct

Some of Respondent's questioning related to an unpreventable employee misconduct defense. To establish that affirmative defense, Respondent must prove that: (1) it established work rules designed to prevent the violation, (2) it adequately communicated those rules to its employees, (3) it took steps to discover violations, and (4) it effectively enforced the rules when violations were discovered. *American Sterilizer Co.,* 18 BNA OSHC 1082, 1995-97 CCH OSHD ¶31,451 (No. 91-2494, 1997). The court notes that Complainant requested records of employee discipline for any purported violation of work rules, but none were ever produced (Tr. 144; Ex. C-58) and there is no

evidence in the record to establish the existence of established work rules and the enforcement of those rules. The court also notes that [redacted], to whom many of the questions implying employee misconduct were posed, was never disciplined by Respondent in any way for the excavation incident. (Tr. 809). A review of the record confirms that Respondent failed to prove any of the elements necessary to establish an unpreventable employee misconduct defense for any of the affirmed violations. Accordingly, Respondent's assertion of unpreventable employee misconduct as an affirmative defense is REJECTED.

Borrowed Servant Doctrine

Respondent argued during trial that because Mr. Morgan instructed [redacted] and [redacted] at various times during the excavation work, the borrowed servant doctrine shielded Respondent from liability for any OSHA violations proven in this case. (Tr. 582-583). However, the Commission has clearly stated that the borrowed servant doctrine is not a defense in OSHA proceedings as multiple entities may be deemed employers for the purposes of the Act. *Frohlick Crane Service*, 521 F.2d 628 (10th Cir. 1975); *Froedtert Memorial Lutheran Hospital*, 20 BNA OSHC 1500 (No. 97-1839, 2004); *Baroid Division, NL Industries*, 1977 CCH OSHD ¶22,280 (No. 16096, 1976). Additionally, even if the doctrine did apply, the record established that [redacted] and [redacted] were employed by Respondent the entire time; took direction from several of Respondent's managers before, during, and after the excavation work; were paid by Respondent; and used Respondent's tools and materials; all of which occurred on Respondent's property. (Tr. 496-497, 580, 1370-1371). Accordingly, Respondent's assertion of a borrowed servant doctrine as an affirmative defense is REJECTED.

Infeasibility

Respondent argued in its Answer that the infeasibility defense shielded the Respondent from liability. The defense of infeasibility requires an employer to prove that: (1) the means of

compliance prescribed by the standard are technologically or economically infeasible, or necessary work operations are technologically infeasible after implementation; and (2) there are no feasible alternative means of protection or an alternative method of protection was used. *V.I.P. Structures, Inc.,* 16 BNA OSHC 1873, 1993-95 CCH OSHD ¶30,485 (No. 91-1167, 1994). *See also A. J. McNulty & Co*., 19 BNA OSHC 1121, 1129 (No. 94-1758, 2000). Employer has the burden of proving infeasibility of compliance. *State Sheet Metal*, 16 BNA OSHC 1155, 1161 (No. 90-2894, 1993). The Respondent failed to establish infeasibility as an affirmative defense. The Respondent provided no proof that compliance with the Act and its regulations were infeasible. The Respondent abated the deficiencies noted in the citations after the inspection. This action itself establishes that it was feasible to comply with the Act and its regulations prior to the inspection. Accordingly, Respondent's assertion of infeasibility as an affirmative defense is REJECTED.

Vindictive Prosecution and Bias

Respondent attempted to argue the entire inspection, the resulting issuance of the Citation and the prosecution of this case is based either upon a theory of vindictive prosecution or bias. The court ruled during trial that this defense was untimely as it had never been previously raised as an affirmative defense in the Answer. The court maintains its ruling on that issue.

Although there is no uniform test for proving vindictive prosecution, a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right. *Nat'l Eng'g & Contracting Co*., 18 BNA OSHC 1075, 1077 (No. 94-2787, 1997) (consolidated), *aff'd*, 181 F.3d 715 (6th Cir. 1999). There is no evidence that a protected right was at issue here. The Respondent's assertion of an affirmative defense or bias is REJECTED.

Penalty

In calculating the appropriate penalty for affirmed 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).

It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975); *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995). In calculating the proposed penalties, CSHO Caballero generally credited Respondent with a sixty percent reduction due to its status as a small employer, and a ten percent reduction for its lack of OSHA violation history. (Tr. 69, 85, 110, 123, 138, 147, 182, 223).

With regard to Citation 2 Item 1, the court considered the totality of the circumstances, including the fact that Respondent is a very small business; that two of its employees were exposed to serious excavation hazards for two days; that a third-party plumber specifically warned Respondent’s managers of the hazardous nature of the excavation; that Respondent ordered its employees to remove the plumber’s initial attempts at a shoring system;, that the plumber’s safety concerns were realized when the excavation actually collapsed;, and that Respondent’s employees were actually injured. As a result, the court will assess the penalty for Citation 2 Item 1 at $15,000.00.

With regard to Citation 1, Item 9, the court considered the totality of the circumstances. It considered the same factors that it considered in assessing the penalty for Citation 2, Item 1 in determining the penalty for Citation 1, Item 9. Other factors the court considered as to Citation 1, Item 9 were the established facts that two maintenance employees were not provided with the training required under the Act and there were past events clearly indicating training was lacking

and needed. In the past seven years, [redacted] testified that he has helped repair ten excavation-related plumbing leaks at the mobile home park. (Tr. 1035). The Respondent produced no training records. (Tr. 148-149; Ex. C-52, C-54). And finally, there was a prior incident in which [redacted] was involved in the collapse of an excavation. For seven years and after having knowledge of past incidences, the Respondent provided no training. As a result, the court will assess the penalty for Citation 1, Item 9 at $2,500.00.

Based on the totality of the circumstances discussed above with regard to each of the other affirmed violations, the court assesses the penalties as set out below.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1 Item 1 was withdrawn by Complainant (Tr. 28);
2. Citation 1 Item 2 is MODIFIED to an other-than-serious violation, AFFIRMED as modified, and a penalty of $225.00 is ASSESSED;
3. Citation 1 Item 3 is VACATED;
4. Citation 1 Item 4a is AFFIRMED and a penalty of $750.00 is ASSESSED;
5. Citation 1 Item 4b is AFFIRMED, which for penalty purposes was grouped with Item 4a;
6. Citation 1 Item 4c is AFFIRMED, which for penalty purposes was grouped with Item 4a;
7. Citation 1 Item 5 is VACATED;
8. Citation 1 Item 6a is AFFIRMED and a penalty of $750.00 is ASSESSED;
9. Citation 1 Item 6b is MODIFIED to an other-than serious violation, AFFIRMED as modified, which for penalty purposes was grouped with Item 6a;
10. Citation 1 Item 6c is AFFIRMED, which for penalty purposes was grouped with Item 6a;
11. Citation 1 Item 7 is VACATED;
12. Citation 1 Item 8 is AFFIRMED and a penalty of $450.00 is ASSESSED;
13. Citation 1 Item 9 is AFFIRMED and a penalty of $2,500.00 is ASSESSED;

14. Citation 1 Item 10 is VACATED;

15. Citation 1 Item 11 is AFFIRMED and a penalty of $1,000.00 is ASSESSED;

16. Citation 2 Item 1 is AFFIRMED and a penalty of $15,000.00 is ASSESSED;

17. Citation 2 Item 2 is VACATED; and

18. Citation 3 Item 1 is AFFIRMED and a penalty of $0.00 is ASSESSED.

/s/

Date: January 27, 2012
Denver, Colorado

PATRICK B. AUGUSTINE
Judge, OSHRC