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

SECRETARY OF LABOR, Complainant, v. TRIUMPH CONSTRUCTION CORP., Respondent.	OSHRC Docket No. 15-0634

APPEARANCES:

For the Complainant:

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New York, New York

For the Respondent:

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BEFORE: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

At approximately 2:30 p.m. on August 22, 2014, in lower Manhattan, an employee of the Respondent Triumph Construction Corp. (Triumph) was injured in the cave-in of an excavation.

The excavation was for a construction project for the replacement of a municipal water main for which Triumph was the general contractor. (T. 11, 92; Stip. ¶ 4).

The Occupational Safety and Health Administration (OSHA) conducted an inspection of the worksite that same afternoon, and on February 13, 2015, issued a Citation and Notification of Penalty (Citation) to Triumph alleging one repeat and one serious violation of OSHA's excavations standard at Subpart P, 29 CFR § 1926.650, et seq.

The Citation proposed a penalty of $22,500 for an alleged repeat violation of 29 C.F.R. § 1926.652(a)(1), which requires an employer to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with §§ 1926.652(b) or (c). (Item 1 of citation 2).

The Citation proposed a penalty of $4500 for an alleged serious violation of 29 C.F.R. § 1926.651(j)(1), which requires an employer to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. (Item 1 of citation 1).

Triumph timely contested the Citation and the undersigned conducted an evidentiary hearing on January 5, 6, and 21, 2016. Post-hearing briefing was completed on June 3, 2016.

The primary issues for decision are:

- Does a preponderance of the evidence establish that a cave-in protective system was not required because the excavation met the exception set forth in § 1926.652(a)(1)(ii) [an excavation shallower than five feet where a competent person determines there is no indication of a potential cave-in]? (Alleged violation of § 1926.652(a)(1)).
- Did Triumph repeatedly violate § 1926.652(a)(1)?
- Does a preponderance of the evidence show (1) circumstances likely to give rise to the hazard of "loose rock or soil … falling or rolling" from the face of the excavation, or (2) that Triumph knew or should have known there was a significant risk of such a hazard? (Alleged violation of § 1926.651(j)(1)).

For the reasons described below, the repeated citation alleging a violation of § 1926.652(a)(1) is affirmed, and a penalty of $25,000 is assessed. The serious citation alleging a violation of § 1926.651(j)(1) is not proven and is vacated.

FINDINGS OF FACT

The following facts were established by at least a preponderance of the evidence:

1. Triumph is a New York corporation that at all relevant times was engaged in utilities construction and related activities. Triumph has about 230 employees and is engaged in a business that affects interstate commerce. (Complaint, ¶ II & III; Answer, ¶¶ II & III; Stip. ¶¶ 1 & 3; T. 284).

The Construction Project

2. In August 2014, Triumph was the general contractor for a four-year public construction project to replace certain water mains in lower Manhattan. (T. 92). The project, known as MED 617, began in March 2012 and was expected to conclude in April 2016. (T. 89-90, 437). The New York City Department of Design and Construction (DDC) oversaw the project for the city. (T. 11, 89; Stip. Fact ¶¶ 4-5).

3. Part of the MED 617 project involved replacing the water main under West 10th Street from west to east, beginning at the West Side Highway and ending at Fifth Avenue. (Ex. C-3, pp. 1-2). On August 22, 2014, work had progressed to the 300-foot long segment of West 10th Street between Greenwich Avenue and Avenue of Americas (Sixth Avenue).[1] (Stip. ¶ 4).

[1] No evidence of the length of this segment of West 10th Street was presented at the hearing. Rather, this finding is based on judicial notice of a Google map and satellite image of lower Manhattan, the accuracy of which cannot reasonably be questioned for purposes of this case. *See Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking *sua sponte* judicial notice of a Google map and satellite image as a "'source[ ] whose accuracy cannot reasonably be questioned' for purposes of this case" under Fed. R. Evid. 201(b)(2)); *accord U.S. v. Burroughs*, 810 F.3d 833, 835 n.1 (D.C. Cir. 2016) (taking judicial notice of the same on motion of party).

4. Triumph's site supervisor was Mr. Sal Ansaldi, who had eight years of experience with Triumph in that capacity. (T. 436-37).

5. Triumph's foreman at the site was Mr. Augustine Formoso. Formoso reported to Ansaldi. (T. 235, 438-39).

6. DDC's full-time site inspector at the worksite on August 22, 2014, was Mr. Mohammed Ayoub. Ayoub was responsible for monitoring Triumph's work from the beginning to the end of each workday. (T. 132, 135, 187).

7. On August 22, 2014, Triumph was excavating within the roadway of West 10th Street to remove the existing 20-inch diameter cast iron water main pipe and replacing it with a new 20-inch diameter ductile pipe. (T. 11, 437-38; Stip. Fact ¶ 4). The existing water main was buried between 68 to 74 inches below street grade, so the uppermost part of the buried pipe was at least 48 inches below street grade. (T. 103-04)

8. The new water main pipe was required to be buried to the same depth of the old pipe – so the bottommost part of the newly installed pipe had to be at least 68 inches below street grade (with the uppermost part having to be at least 48 inches below street grade). (T. 103). The minimum depth of the excavation to accommodate installation of the new pipe was therefore 68 inches. (T. 103).

9. At some places, the old 20-inch pipe was buried deeper than 68 inches, and in those locations the excavation could be as much as 74 inches deep. (T. 54, 102-04).

10. On each day of the project, water service to customers in the vicinity of the water main replacement would be shut off midmorning. (T. 129-30, 139, 455). Before work concluded each day, the endpoints of the new and old water main pipes had to be connected so that all water service was restored. (T. 139. 142).

11. Excavation of the street would begin by removal of the surface pavement of asphalt and concrete with a jackhammer. (T. 525). The thickness of the pavement varied, but was as much as 12 to 18 inches thick in places. (T. 343).

12. A backhoe would excavate the next one or two feet of soil, avoiding contact with crossing utilities. (T. 166-67, 218-19, 500-01). Electrical and gas utility mains and service lines typically crossed the excavation at a depth of two to three feet below the street's surface. (T. 502). DDC required that all excavating done within one foot of existing utility lines be by hand (T. 223), so in those areas a worker would enter the excavation and clear the area around an existing utility line with a hand tool. (T. 166-67, 218-19, 501).

13. After the existing utility lines were exposed by hand, a backhoe would excavate around the exposed utilities down to the existing 20-inch cast iron water main pipe. (T. 219). An employee would stand on the old water main pipe to disconnect the customer water service lines and bend them away to prevent damage when the old pipe was removed. (T. 525). The old water main pipe segment was then removed from the excavation using the backhoe's bucket. (T. 441-43).

14. A new 20-inch pipe, in lengths of roughly 18 to 20 feet, would then be installed in the place of the old pipe. (T. 141-42, 441-43, 523). To prepare the excavation for installation of the new pipe, the floor of the excavation was smoothed, either by the backhoe's bucket, or by an employee with a shovel. (T. 204-06). The backhoe would then place the section of new pipe in the excavation and push it into the preceding section of new pipe. (T. 442-43). One end of each section of new ductile pipe had a wider bell-shaped end with gaskets on the interior surface. In installing a section of new pipe, machinery would push the end of the pipe section being installed into the bell-shaped end of the most recently installed section of new pipe. The gaskets on the

inside surface of the bell-shaped end of the pipe would cause the two sections to interlock and seal. (T. 441-43).

The Excavation at 2:30 p.m., August 22, 2014

15. The faces of the excavation were generally vertical. The CO estimated the full length of the excavation to be 80 feet and its width to be four feet, but the CO did not testify to having taken any precise measurements of either the length or width. (Ex. C-3, p. 1). Considering the scale of the 20-inch diameter and approximately 20-foot long segments of new pipe, the photographs of the excavation generally corroborate the CO's estimates of overall length and width. (Exs. C-7, C-8, C-13, C-14).

16. No part of the excavation had a protective system designed in accordance with 29 C.F.R. § 1926.652(b) or (c) to protect employees working in the excavation from cave-ins. (T. 484, 490-99, 541).

17. As of the time of the cave-in, approximately 40 feet of old water main pipe had been removed from the excavation, and one approximately 20-foot long section of new water pipe had been installed in the approximately 40-foot gap that existed between the open ends of the new and old water main pipes. (T. 54-55, 56, 142, 220-21; Exs. C-7, C-13, C-14).

18. For purposes of describing the excavation, it can be neatly divided into three distinct segments –west, center, and east. The condition of those segments immediately prior to cave-in was as follows:

a. *West Segment.* The west segment is defined at its west end by the start point of the excavation and at its east end by the open bell-shaped end of the most recently installed section of new water main pipe. (Ex. C-13). Newly installed 20-inch pipe was present in the entirety of the west segment. Some backfill had been put in the excavation in the western part of the west

segment. In the remaining part of the west segment, the new 20-inch pipe was completely exposed except for one spot on the north side of the pipe where some backfill had been dumped. (Ex. C-13). From the scale of the photographs, the length of this part of the west segment with almost no backfill appears to be about 15 to 20 feet. The depth of the excavation where there was no backfill was at least 68 inches. (T. 53, 102, 533, 538-39; Exs. C-13 & C-14).

b. Center Segment. The cave-in occurred on part of the north face of the center segment. The center segment is defined at its west end by the bell-shaped open end of the last installed section of new pipe, and at its east end by a 6-inch gas main that crossed the excavation. (T. 218; Ex. C-7). All of the old water main pipe had been removed from the center segment. (T. 54-55). The center segment was excavated to its full depth of at least 68 inches and was being prepared for the installation of the next 20-foot section of new pipe. (T. 54-55, 60-61, 82, 216; Ex. C-7, C-8). About one foot east of the open end of the newly installed section of new pipe, a 2-inch gas service line crossed the center segment at a depth of about 30-36 inches below street grade. (T. 448, 345; Exs. C-7, C-8, C-10, C-11). The excavation was 70 inches deep at the point where the 2-inch gas service line crossed it. (T. 266, 270; Exs. C-7, C-9, C-10). Approximately two to three feet east of 2-inch gas service line, a larger concrete-encased electrical duct bank crossed the excavation. (Exs. C-10, C-13, C-7). The excavation was 70 inches deep at the point where the electrical duct bank crosses it. (T. 266, 270, 458; Exs. C-7, C-9, C-10). The photograph at Exhibit C-7 accurately depicts the center segment, with the three crossing utility lines and the absence of any water main pipe, old or new. (The two areas of alleged employee exposure at issue are in the center segment – one near the electrical duct bank and 2-inch gas service line, and the other at the location of the cave-in. The portion of the north face that caved in is between the electrical duct bank and the 6-inch gas main.)

c. *East Segment.* The east segment is defined at its west end by the 6-inch crossing gas main and at its east end by the fully exposed open end of the existing cast iron water main pipe. (Exs. C-7, C-8). All of the old water main pipe to the west of the exposed open end of the old pipe had been removed from the east segment. (T. 54-55). The photograph at Exhibit C-8 accurately depicts the crossing 6-inch gas main and the absence of any water main pipe (except for the open end of the existing pipe) in the east segment. A backhoe excavator was operating in the east segment at the time of the cave-in. (T. 78, 457). A ladder into the excavation is in place on the south face of the east segment. (T. 160, 237-38; Exs. C-1, p. 3, C-3, p. 4). The depth throughout the east segment of the excavation was at least 68 inches.

The Cave-in

19. The foreman (Formoso) instructed LL to enter the excavation to investigate something that the backhoe had contacted near the crossing gas main (which demarcates the center and east segments). (T. 56-57).

20. LL entered the excavation and determined the backhoe had contacted some debris and not anything vital. (T. 56). He continued to use a shovel to move some soil to prepare the excavation floor for the next section of new pipe. (T. 57-58, 70-71, 73, 79; Ex. C-8). The backhoe continued to operate in the east segment, with LL positioned in the center segment about three to five feet west of the crossing gas main. (T. 57, 74, 78, 80). LL believed the excavation was about six feet (72 inches) deep at this point because he is five feet five inches (65 inches) tall and he estimated that the street level was about seven inches over his head. (T. 60, 71, 76-77). While positioned at this location, soil and large sections of pavement from the north edge and face of the excavation caved in on LL, trapping him. (T. 58-59, 74, 158, 236; Stip. ¶¶ 11, 13). Moments before the cave-in, the foreman had cautioned LL to be careful. (T. 58, 73).

21. Three coworkers, including the foreman, immediately entered the excavation to remove the soil and pavement from LL. (T. 59; Ex. C-1, pp. 3-5). One slab of pavement that had caved in was so heavy that the rescuers had to wrap a chain around it so that a backhoe could move it off LL. (T. 59; Ex. C-1, pp. 2-3).

22. LL was extricated from the excavation and taken to the hospital by ambulance. (T. 12, 235; Ex. C-1, p. 1; Stip. ¶ 15). LL was injured in the cave-in and he ultimately required surgery on his arm, back, and abdomen. (T. 49).

The OSHA Inspection

23. OSHA Compliance Safety and Health Officer (CO) Zhao Hong Huang arrived about one hour after the cave-in to investigate, after LL had been taken to the hospital. (T. 234-35; Stip. ¶ 16). When he arrived, the excavation was in the substantially same condition as it had been just before the cave-in, except for the soil and pavement that had collapsed from the north edge and face into the excavation. (T. 262, 313). There was no shoring, sheeting, or other cave-in protection system in the excavation at the time of the cave-in. (T. 238, 493, 541, 547; Exs. C-8, C-13).

24. The CO initially spoke with the foreman about the accident. (T. 235-36). Then Triumph's site superintendent, Ansaldi, arrived, and the CO interviewed him. (T. 236). The CO asked Ansaldi why LL was in the excavation at the time of the cave-in. Ansaldi responded that LL had been instructed to enter the excavation to prepare the floor in the center segment in the vicinity of the crossing 2-inch gas service line and electrical duct bank for the installation of the next section of new pipe; Ansaldi explained that a worker had to clear that area with a hand tool because using a backhoe could damage the crossing utilities. (T. 236-38; 258-59; Ex. C-1, pp. 1-2). Ansaldi told the CO that at the time of the cave-in, LL had moved eastward in the center

segment to wait for the excavator to stop operating in the east segment, so that he could exit the excavation using a ladder that was leaning against the south face of the east segment. (*Id.*).

25. The CO took four measurements based on where Ansaldi had said LL had worked in the excavation. (T. 328-29, 345). Ansaldi and Formoso assisted the CO in taking the measurements by actually handling the tape measure while the CO took photographs of the tape measure extended into the excavation. (T. 238, 329-30, 343; Stip. ¶ 18).

26. The CO recorded two reliable measurements of the excavation depth in the vicinity of LL's location at the time of the cave-in: one measurement was 64 inches (four inches more than five feet) and the other was 53 inches (seven inches less than five feet). (T. 265-67, 300-02, 335-36; Exs. C-7, C-10, C-11).

a. The 64-inch measurement was taken about two to three feet west of the 6-inch gas main. (T. 300-02; Ex. C-7). The 64-inch measurement measured to the floor of the excavation, with the tape measure extending in between two slabs of pavement that had fallen into the excavation. (T. 265, 267, 301-02, 335-36; Exs. C-7, C-8, C-11).

b. The 53-inch measurement was taken about a foot west of the 64-inch measurement. (T. 268-69, 300-02; Exs.C-7, C-8). The 53-inch measurement was to the top of a slab of pavement that had collapsed into the excavation during the cave-in. (T. 336). There is no evidence of the thickness of this slab or the thickness of the soil and/or debris that had collapsed into the excavation underneath it. It is more probable than not that the total thickness of this slab of pavement and the soil/debris from the cave-in underneath it exceeded seven inches, and thus that the depth of the excavation at that location before the cave-in was greater than 60 inches (five feet).

27. The CO took two 70-inch measurements in the center segment, west of the spot of the cave-in. One 70-inch measurement was about one foot east of the open end of the most recently installed new pipe, where the 2-inch gas service line crossed the excavation. (T. 270; Ex. C-10). The other 70-inch measurement was about two to three feet further east, on the east side of the electrical duct bank that crossed the excavation. (*See* Exs. C-7, C-9, C-10, C-13, C-7; CO testimony at T. 266, 343, 345; Exs. C-7, C-10, C-13). The CO did not measure the lateral distance between this easternmost 70-inch measurement and the location of the cave-in, but the scale of the photographs indicates that distance to have been in the range of five to eight feet. (Exs. C-1, p. 4; C-7; C-8; C-9).

28. The CO took a soil sample from the excavation at the area of the cave-in with Ansaldi's assistance. (T. 243-44). OSHA's Salt Lake Technical Center analyzed the soil sample and accurately determined it was Type C, with 95% sand and gravel. (T. 372).

Triumph's Investigation

29. After the accident, Triumph and DDC ascertained that the part of the excavation that had caved-in was the site of a vertical "cold joint" that existed between the soil and some wood sheeting that had been left buried decades earlier for a sewer line than ran parallel to and approximately 10 feet away from the water main. (T. 175-76, 178, 462-63, 526, 528; Ex. R-1L; Resp. Br. 37-39). The soil did not bond with wood sheeting, which weakened the stability of the face of the excavation where the cave-in occurred. (T. 465, 466-468).

30. Prior to the cave-in, Triumph was unaware of the presence of the cold joint. Triumph had not previously encountered a cold joint in the course of the MED 617 project. (T. 545). Current practice requires that wood sheeting be removed from an excavation before it is

backfilled and closed. (T. 178, 185, 188-89). There was no visible indication before the cave-in of the presence of the cold joint. (T. 184, 186-89, 223, 298, 463).

31. The circumstances existing immediately before the cave-in do not reflect circumstances that were likely to give rise to loose rock or soil that could pose a hazard by falling or rolling from the face of the excavation.

Predicate Violations Supporting "Repeat" Classification

32. OSHA previously cited Triumph on January 21, 2009, for having violated § 1926.652(a)(1) on 11/26/2008 in a utility excavation. (Ex. C-20). Triumph timely contested the citation and the matter was docketed by the Occupational Safety and Health Review Commission (Commission) and assigned docket number 09-0301. Triumph then entered into a written Stipulated Settlement wherein it accepted the citation as a serious violation of § 1926.652(a)(1). (Ex. C-21). A Commission judge then approved the Stipulated Settlement by order dated April 22, 2009. The judge's order became a final order of the Commission on May 27, 2009, because no commissioner directed review of the order on or before that date. (Exs. C-20, C-21, C-22).

33. About 18 months later, on November 4, 2011, OSHA again cited Triumph for having violated § 1926.652(a)(1) on 7/26/2011 in a utility excavation, classifying it as a repeat violation, with the violation involved in the 2009 Stipulated Settlement serving as the predicate violation to support that classification. (Ex. C-18). Triumph timely contested the citation by letter dated November 10, 2011, that it caused to be filed with the OSHA Area Office that had issued the citation. (Ex. J-2). Eight days later, on November 18, 2011, Triumph resolved the alleged repeated citation by executing an "Informal Settlement Agreement." In the Informal Settlement Agreement, Triumph accepted the alleged violation of § 1926.652(a)(1) as an "other

than serious" violation, and expressly "waived its rights to contest the above citation(s) and penalties, as amended" by the agreement. (Ex. C-19). The Informal Settlement Agreement also contained the following provision: "By entering into this agreement, [Triumph] does not admit that it violated the cited standards for any litigation or purpose other than a subsequent proceeding under the Occupational Safety and Health Act." (Ex. C-19, ¶4).

34. The parties entered into the Informal Settlement Agreement before the expiration of the fifteen-working-day contest period established by section 10(a) of the Act, 29 U.S.C. § 659(a). (T. 395). Because the citation was fully resolved by the agreement before the contest period expired, the OSHA Area Office determined not to forward Triumph's timely notice of contest to the Commission under the procedures prescribed in 29 C.F.R. § 1903.17(a) and Commission Rule 33, codified at 29 C.F.R. § 2200.33.[2] (T. 395-96). (Ex. C-19).

35. The OSHA Area Director who issued the repeat citation on February 13, 2015 determined that the violation established by the Informal Settlement Agreement had occurred within five years of a prior violation of the same standard. She believed that reliance on that prior violation to support a repeated classification was consistent with OSHA policy that repeat citations generally be supported by a prior violation having been established in the preceding five years. (T. 391-92, 400-01). She believed that the five-year policy on which she relied had been in effect since around August 2010, when the general policy was changed from a three-year period. (T. 400-01).

[2] Section 1903.17(a) provides that upon the receipt of a cited employer's notice of contest, the OSHA "Area Director shall immediately transmit such notice to the Review Commission in accordance with the rules of procedure prescribed by the Commission."

Commission Rule 33, codified at 29 C.F.R. § 2200.33, requires the Secretary to notify the Commission of the receipt of an employer's notice of contest within 15 working days after the Secretary has received the notice of contest.

36. The OSHA Field Operations Manual (FOM) in effect from April 22, 2011 to September 30, 2015 (Directive No. CPL 02-00-150) reflected a three-year, not a five-year, period for a prior violation to support a classification of repeated. (Exs. R-2 & R-3). It provided as follows:

> Although there are no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation, the following policy shall generally be followed.
>
> A citation will be issued as a repeated violation if:
>
> a. The citation is issued within 3 years of the final order date of the previous citation or within 3 years of the final abatement date, whichever is later . . . .

(Ex. R-2, p. 4-34 of OSHA FOM, CPL 02-00-150).

DISCUSSION

The parties have stipulated to the Commission's jurisdiction and to the coverage of the Act, and the record supports those stipulations. 29 U.S.C. §§ 652(3) and (5) and 654(a). (Joint Prehearing Statement, ¶¶ IV.1 thru 4 & V.1 thru 3; Complaint, ¶¶ II, & III; Answer, ¶¶ II & III).

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Protection from Cave-ins – Alleged Violation of § 1926.652(a)(1)

The Secretary alleged that Triumph violated 29 C.F.R. § 1926.652(a)(1), which provides:

> (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.

The Secretary alleged Triumph violated this standard on August 22, 2014, at the "Jobsite trench, east end" on West 10th Street, when "[a]n employee was working in a section of the excavation that is about 5 feet 10 in deep [70 inches] and was not protected from cave-ins by an adequate protective system." (Citation 2, item 1). The citation characterized the violation as a "second repeat" violation, alleging that two final orders of the Commission for violations of the same standard had been entered against Triumph – one in 2009 and the other in 2011.[3]

Applicability of Cited Standard

Section 1926.652(a)(1) requires that employees in an excavation be protected from cave-ins by an adequate protective system. The standard applies "to all open excavations made in the earth's surface." 29 C.F.R. § 1926.650(a). The term "excavation" is defined as follows: "*Excavation* means any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." 29 C.F.R. § 1926.650(b). The cited standard "applies to *any* excavation" and "does not depend on the existence of a hazard." *Bardav, Inc.*, 24 BNA OSHC 2105, 2107 (No. 10-1055, 2014) (emphasis in original). The worksite was an excavation as defined by the standard, so the standard applies.

[3] The Secretary's amended complaint similarly alleged both the 2009 and 2011 prior orders.

Violation of the Standard

There was no protective system designed in accordance with § 1926.652(b) or (c) in the excavation to protect employees from cave-in hazards as the cited standard requires. Triumph asserts, however, that the excavation meets the exception contained in § 1926.652(a)(1)(ii) because the area where LL was working was shallower than five feet and a competent person had determined there was no indication of potential cave-in. (Resp't Br. 13). Triumph has the burden to establish that the excavation meets this exception. *A.E.Y. Enters.*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006).

Triumph asserts that the excavation was shallower than five feet in the areas where LL (or any other employee) was positioned. As discussed below, the preponderance of the evidence establishes that the excavation was five feet or more in depth at two locations in the center segment where LL was working (one being the location of the cave-in, and the other being near the electrical duct bank) so that the exception of § 1926.652(a)(1)(ii) is not proven.

Excavation Depth at Location of Cave-in

Both endpoints of the center segment were at least 68 inches deep -- at the western endpoint at the terminus of the newly installed 20-inch pipe, and at the eastern endpoint where the 6-inch gas main crossed the excavation. Those depths were established by virtue of those being the depths at the corresponding adjacent endpoints of the west and east segments.[4]

[4] In the west segment, the open end of the last section of new water pipe that had been installed was completely exposed, which establishes that the excavation was at least 68 inches deep at that location. (Exs. C-7, C-13).

In the east segment, the open end of the next section of old water pipe that was to be replaced was also completely exposed, so the depth of the excavation at that point was at least 68 inches. (Exs. C-7, C-8). Other photographs show that the depth of the east segment of the excavation (to the east of the crossing gas main) was generally at or below the lowest point of the open end of the old water main, so the depth of the entire east segment was deeper than five feet (60 inches). (*See* Exs. C-1, p. 5; C-12; R-1-A).

The remainder of the center segment was also at least five feet deep. LL testified that at the time of the cave-in, the old pipe had been removed and he was shoveling around the 6-inch gas main to prepare the excavation floor for the next 20-foot section of new water pipe to be installed, which had to be on a grade of at least 68 inches deep. (T. 54-55). LL believed the excavation was about six feet deep where the cave-in occurred because it was about seven inches over his head and his height is 65 inches. (T. 60, 71, 76-77). LL's testimony was reliable and credible – it is consistent with abundant corroborating evidence that at the time of the cave-in the old pipe had been removed in the center segment, and that the depth at the spot of the cave-in exceeded five feet, as it was at both endpoints of the center segment.

First, the CO's measurements of 70 inches at the electrical duct bank and 64 inches near the east end of the center segment are uncontroverted empirical evidence that the excavation was deeper than five feet at these locations. (Exs. C-9, C-10). Other than the depth measurements taken by the CO, there was no evidence of any other measurements of the depth of any part of the excavation.[5] The CO's measurement of 64 inches at the cave-in area, establishes the excavation was deeper than five feet at the location of the cave-in, wholly independent of LL's testimony. (T. 302). Second, the general process for replacement of the water main – replacement of one 20-foot segment of old water main with one 20-foot segment of new water main, one at a time (T. 141-142) – is corroborative of LL's testimony that the old pipe had been removed from the center section as he was preparing the center segment for installation of the next section of new pipe. Third, the photographic exhibits C-7 and C-8 show no visible pipe

[5] A photograph taken by Ayoub in the immediate aftermath of the cave-in, before the CO arrived, shows a yellow tape measure extended into the excavation at the location of the cave-in as if someone was measuring the depth, but the photo does not show who is holding the tape measure. (Ex. C-1, p. 5; T. 149, 164).

between the opening of the new pipe in the west segment and the opening of the old pipe in east segment.

Triumph points to the testimony of Ansaldi as establishing that the excavation was less than five feet deep at the location of the cave-in. (Resp. Br. 6, 13, 15). Ansaldi testified that at the time of the cave-in LL was standing on the floor of the excavation on a section of old water pipe that remained buried. (T. 451-53). This testimony is not corroborated by any reliable evidence and is controverted by the CO's objective measurements, LL's testimony, and Ayoub's testimony.

The CO's measurements, by themselves, decisively contradict Ansaldi's testimony and corroborate LL's testimony. If the old pipe had actually been in place in the center segment at the time of the cave-in as Ansaldi testified, it would have been impossible for the CO to have measured a depth of 64 inches in between slabs of pavement that had collapsed onto the floor of the excavation in the cave-in. The 64-inch measurement taken at the location of the cave-in shows the old pipe had been removed and the depth was greater than five feet at the time of the cave-in.

Moreover, if before the cave-in the depth of the excavation at LL's location had been no deeper than 48 inches, then the measurements in that area after the cave-in likely would have been shallower than 48 inches and certainly would not have been deeper than 48 inches. However, the CO's shallowest measurement in the area of the cave-in was at 53 inches to the top of a slab of pavement that had collapsed into the excavation. This is five inches deeper than the 48-inch depth that Ansaldi testified had existed before the cave-in.

Ansaldi's largely unfathomable explanation for why a section of the old pipe would have remained unexcavated in the center section, in between the exposed open ends of the new pipe in

the west segment and the old pipe in the east segment, was unconvincing.[6] In contrast, the photographic evidence and depth measurements in the area of the cave-in are corroborative of LL's testimony and controvert Ansaldi's testimony. (Exs. C-7, C-8).

Triumph also points to the testimony of the DDC inspector, Ayoub, as being corroborative of Ansaldi's testimony that at the time of the cave-in LL was standing on top of a section of unexcavated old water pipe. Ayoub's description of the excavation at the location of the cave-in is uncertain at best, and is not reliable. Ayoub provided testimony pursuant to subpoena requested by the Secretary. (T. 136). He initially testified that at the time of the cave-in, LL was standing on the top of a section of new 20-inch water pipe that was exposed in the excavation with no fill on either side of it. (T. 159-60, 193, 215-16, 220). Referring to the soil and debris from the cave-in on the floor of the excavation (as depicted in Exhibit C-7), Ayoub testified that "[a]ll the dirt you see there came from the cave in." (T. 213-16). Ayoub thereby

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[6] Ansaldi's testimony about why there was a section of old pipe left unexcavated in the center section is as follows:

> Q: Can you tell us why … there's an old piece of water main in there … and then there's a space before the new water main at the bottom of the picture [in Exhibit C-7]. Do you see that?
>
> A: Why [the opening to the old water main in the east segment] is exposed? I got. Okay. When we first do the water main shutdown, the old valves that hold the water back are old, from the 1800s. They don't hold the water 100 percent anymore. So in the beginning of the job, we have to open the pipe. We hit with the machine, it's an old cast iron pipe, we make a hold and that's where the pumps go. So that's done prior to us removing the old water main at the beginning of the section that's being replaced so that we could work in a dry trench. So that portion of pipe [that had been connected to the resulting open end of the old pipe shown in Exhibit C-7] was removed prior -- as soon as the water main was shut down on 9:00 in the morning….
>
> Q: [But why] would you leave a section of old pipe in the middle?
>
> A: Because you can't work your way from where you're going to stop to where you began. You have to continuous run the pipe in a continuous stage. So you have to stop the water, stop the problem of where the water's going to come into the trench to make mud, of course, which is no good for the water main; can't let it go inside the new pipe. And then you continue going from where you left off. (T. 459-61).

confirmed his recollection that LL was standing on top of a 20-inch pipe that was exposed in the excavation with no backfill on either side of it.

Upon further questioning about his original testimony, however, Ayoub equivocated and ultimately stated that he was unsure whether LL was standing on an old or a new water pipe at the time of the cave-in, and stated further that the area where LL was standing "could have been to grade." (T. 221-224; Ex. C-7).

In any event, even if Ayoub's original testimony were accepted at face value (that at the time of the cave-in LL was standing on top of a 20-inch pipe that was fully exposed on the floor of a 68-inch deep excavation), that testimony would establish that LL was in an unprotected excavation that was more than five feet deep. *See Ford Dev. Corp.*, 15 BNA OSHC 2003, 2011 (No. 90-1505, 1992), *aff'd*, 16 F.3d 1219 (6th Cir. 1994) (rejecting argument that employees standing on pipe in excavation deeper than five feet established the exception of § 1926.652(a)(1)(ii), observing that "the standard speaks of the depth of the trench, not of the position of the employees in the trench"). Thus, rather than corroborate Ansaldi's testimony that at the time of the cave-in LL was standing on top of a section of *unexcavated* old water main, Ayoub's original testimony actually contradicts Ansaldi's testimony.[7] (T. 61, 76).

[7] Besides Ayoub's uncertain testimony about the condition of the center segment at the moment of the cave-in, the overall reliability of Ayoub's testimony about the condition of the excavation and the safety measures in place at the time of the cave-in is generally questionable. For example, Ayoub testified that "this is a very shallow trench" (T. 214), and he mistakenly believed that the depth of the excavation near the exposed opening of the new water pipe was no more than three or four feet, so that workers did not have to stand on the pipe in that area to be safe but rather "could stand wherever they want." (T. 206-07 & 214). In actuality, the depth of the excavation at that location at the time of the cave-in was 70 inches. (Ex. C-7 & C-10).

Another example is that even though Ayoub testified that it was his job to monitor everything on the job including "safety" (T. 189) and that "we follow OSHA" (T. 198), Ayoub testified that he "felt it was safe" for a worker to stand on top of a 20-inch pipe in a 68-inch excavation with no fill around the pipe. (T. 215-216). *Cf. Ford Dev. Corp.* And one more

Ansaldi's testimony that the part of the center section where the cave-in occurred was less than five feet deep is not supported by the evidence and is not credited.[8]

The great weight of the evidence establishes that the area of the cave-in, which is where LL was positioned at the time of the cave-in, was deeper than five feet. Triumph has failed to establish that the excavation meets the exception of § 1926.652(a)(1)(ii) at that part of the excavation.[9]

Excavation Depth near the Crossing Electrical Duct Bank

Triumph also failed to establish that the depth in the vicinity of the crossing electrical duct bank and 2-inch gas service line in the western end of the center segment was shallower

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example is that Ayoub mistakenly believed that there was some protective sheeting in place in parts of the excavation, which he called "skeleton sheeting" (T. 146-47), when in actuality this so-called "sheeting" was pieces of lumber that Triumph put in place to secure exposed utility lines, not to provide cave-in protection to employees. (T. 259, 490-95, 541, 547).

[8] Ansaldi's testimony about disputed material facts is due little, if any, weight. In addition to the discredited testimony that LL was standing on an unexcavated section of old pipe at the time of the cave-in, Ansaldi made a number of statements that strained credulity or were just palpably wrong. For example, when asked to estimate to what degree the material that had collapsed into the excavation had raised the excavation's floor, he testified: "By a couple of inches. If that." (T. 482). The photographs and other testimony make it clear that the debris from the cave-in added considerably more than "a couple of inches" elevation to the excavation's floor, and it is highly unlikely that only a "couple of inches" of soil and debris would have trapped LL as it did, and required the use of heavy equipment and the help of three other workers to free him. Another example is that during the CO's inspection, Ansaldi told the CO the excavation was less than five feet deep because it was not necessary to excavate deeper than five feet to install the water main. (T. 351-52). This was clearly a misstatement, in that the project required four feet of cover over the 20-inch pipe, resulting in a minimum depth eight inches deeper than five feet.

[9] The Secretary has not argued that even if Triumph had established that the excavation depth at the location of the cave-in was shallower than five feet, that Triumph still would have failed to prove that the excavation met the "depth" exception of § 1926.652(a)(1)(ii), because of LL's close proximity to the depths of 68 inches or more both east and west of his position at the time of the cave-in. Thus, this decision neither addresses nor adjudicates that issue.

than five feet when LL was working in that area before the cave-in. Rather, a preponderance of the evidence established that LL was working in that vicinity when it was 70 inches deep.

The CO testified that during his inspection Ansaldi told him that LL had been clearing dirt from under the crossing utilities near the 2-inch gas service line because machines could not operate in that area without risking damage to them, and that at the time of the cave-in LL had moved eastward to wait for the excavator to stop working so he could exit the excavation using a ladder in the east segment.[10] (T. 236-38, 258-59, Ex. C-1,).

The CO's testimony of what Ansaldi said was a reliable and objective account of what Ansaldi actually said. The CO took contemporary notes of what Ansaldi told him during the inspection, which are corroborative of his hearing testimony of what Ansaldi said, indicating that

[10] The CO testified at T. 236-38:

> Q: What did you discuss with Mr. Ansaldi?
>
> A:…[H]e told me that [LL] was standing in the trench waiting to exit the trench at the east end of the trench, close to the Avenue of the Americas because there was a ladder there and an excavator onsite was being operated … and it was excavating in the section of the trench between [LL] and the ladder. And [LL] had to wait until the excavator finished work so that he could proceed through that section of the trench and get up the ladder to get out.
>
> Q: What was your understanding about what [LL] was doing in the trench?
>
> A: Then I follow up and ask Mr. Ansaldi about what was [LL's] assigned task to the trench. Then he explained to me that [LL] was instructed to go into the trench, where the new water main was installed, where it was disconnected to hand dig in the grade in the trench, where the water main is connected because there are other utility crossing that section of the trench, … and point to me there's a gas line and there's electric conduits and they cannot -- normally they would use machinery to flatten the grade, but in this case they cannot because the machine can accidentally damage those cross utilities. Therefore, they had to send [LL] down there to do that work.
>
> And after [LL] finished doing what he was doing, he was walking towards the ladder to exit the trench and he was waiting in the area where the accident happened because … an excavator was being operated between [LL] and the ladder.

See also CO testimony at T. 258-59.

the CO's testimony of what he understood Ansaldi to have said to him almost a year earlier was not faulty.[11] (Ex. C-3). The CO's testimony accurately recounted the objective meaning of the words that Ansaldi said to him.

Ansaldi's statement to the CO during the inspection was admissible pursuant to Fed. Rule Evid. 801(d)(2)(D) as a statement "made by the party's agent or employee on a matter within the scope of that relationship and while it existed." The evaluation of the reliability of an employee's statement that is admissible under Rule 801(d)(2)(D) was addressed in *Regina Constr. Co.*, 15 BNA OSHC 1044, 1048 (No. 87-1309, 1991):

> Although admissions under Rule 801(d)(2)(D)[12] are not inherently reliable, there are several factors that make them likely to be trustworthy, including: (1) the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted.

[11] While the CO's notes were offered and received in evidence over objection as a "business record" under Fed. R. Evid. 803(6) (T. 246-47), in view of Ansaldi's subsequent controverting testimony that the CO had misunderstood him, the CO's notes of what Ansaldi said might also have been admitted under Fed. R. Evid. Rule 801(d)(1)(B)(ii) to rebut any implied contention that the CO had misremembered what Ansaldi had said to him. Rule 801(d)(1)(B)(ii) allows a statement to be admitted if the declarant testifies and is subject to cross-examination and the statement "is consistent with the declarant's testimony and is offered … to rehabilitate the declarant's credibility as a witness when attacked" on any ground other than recent fabrication, improper influence, or motive. 2014 Advisory Committee note to Fed. R. Evid. 801.

[12] In 2011, Fed. R. Evid. 801(d)(2) was amended so that it no longer termed an out of court statement of a party opponent as an "Admission by party-opponent," but instead now terms it "An Opposing Party's Statement." The advisory committee recommended this change on the rationale that "[t]he term 'admissions' is confusing because not all statements covered by the exclusion are admissions in the colloquial sense – a statement can be within the exclusion even if it 'admitted' nothing and was not against a party's interest when made." 2011 Advisory Committee note on technical changes to Fed. R. Evid. 801(d)(2).

All three enumerated factors described above in *Regina Construction Company* weigh heavily in support of the conclusion that Ansaldi's statement to the CO is likely to be more trustworthy than his conflicting exculpatory testimony at the hearing.

Ansaldi testified that the CO had asked him where LL had been working "throughout the day," and that he had responded by informing the CO where LL had been working earlier that day, when that area of the excavation had not been fully dug and was shallower than five feet.[13] (T. 476-77). This testimony is not credited. The CO plainly asked Ansaldi what LL was doing in the excavation at the time of the cave-in. Ansaldi could not reasonably have comprehended that the CO to be asking about LL's activities that were not directly connected to the accident. Ansaldi's statement to the CO on the day of the cave-in is more reliable than Ansaldi's conflicting testimony that he had said (or meant to say) something different to the CO.

There are other factors that render what Ansaldi said on the day of the cave-in about what LL was doing more reliable than his differing testimony on that subject. First, Ansaldi's description of what LL had been doing before the accident is corroborative of LL's testimony that before the cave-in LL had been working in the vicinity of the 2-inch gas line and had done some excavation by hand there. (T. 62-68; Ex. C-13). LL estimated that the depth of the

[13] Ansaldi testified at T. 475-76:

> Q: Okay. If you turn to C-7, did you ever indicate to the OSHA inspector that [LL] was working in the front of that new open pipe … depicted in C-7?
>
> A: He misunderstood me, because he asked me where was [LL] working throughout the day. Now, I had informed him that we were excavating to find the gas service, like I told you before; we find the gas services before the machine excavates. And I told him that [LL] also was digging around the electrical duct bank that we also pointed out. He was throughout the trench but not at the full depth of what the trench was excavated.
>
> Q: So he … would have been digging where that [2-inch gas service line] is to uncover the gas main service, but not digging below it?
>
> A: Correct.

excavation in this area was "around my height" (65 inches) and "around five feet" (60 inches) (T. 68). Both of these estimates controvert Ansaldi's indication that the excavation's depth at LL's work location was no more than 48 inches, and corroborate Ansaldi's statement to the CO that LL had been working in this area before repositioning to where the cave-in occurred.

Second, Triumph did not present the testimony of the foreman, Formoso. Formoso had instructed LL to enter the excavation and Formoso was speaking directly to LL just before the cave-in. Certainly Formoso was in as good, if not far better, position than Ansaldi to observe the condition of the excavation before the cave-in, and to observe what LL was doing immediately before and at the time of the cave-in.[14] The record is silent as to why Triumph did not present Formoso to testify in support of its position that the area in the excavation where LL was working was shallower than five feet. *See Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1968, 2003) ("when one party has it peculiarly within its power to produce

[14] It is notable that LL's testimony about what he was doing at the moment of the cave-in (shoveling in the vicinity of the crossing gas main [T. 56-59]), differed from what Ansaldi testified he was doing (cutting water service lines off the old water main pipe [T. 461-62]), as well as what Ansaldi said on the day of the cave-in (waiting near the crossing gas main for the backhoe to stop operating so that he could exit the excavation [T. 236-37]). LL's testimony about what he was doing at the time of the cave-in is credited over either version of what Ansaldi said LL was doing at that time.

Although Ansaldi testified that he observed the accident, there is reason to doubt whether his attention had been directed at what LL was doing at the time of the cave-in. The foreman Formoso, not Ansaldi, had instructed LL to enter the trench. Ansaldi had responsibility for the overall project and he testified, "I have a hundred things going on on that block during every part of the day." (T. 438). The DDC site inspector, Ayoub, was near the excavation when the cave-in occurred, and he took photographs of LL and others in the excavation in the aftermath of the cave-in. (T. 141; Ex. C-1; Stip. ¶ 14). Ansaldi is not depicted in any of the Ayoub's photographs that were offered and received in evidence. Ayoub did not recall Ansaldi being present when the cave-in occurred, and he noted that because Ansaldi was the superintendent over a project with multiple locations, Ansaldi could have been at another location at the time. (T. 140-41).

witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party").

Triumph asserts the absence of visible footprints in photographs of the excavation floor in the area where the two 70-inch measurements was taken proves that no one was working in that vicinity when the excavation was at that depth. (Resp. Br. 19). The fact that the photographs seem not to depict footprints in this area is hardly conclusive on whether employees had worked in this area when it was 70 inches deep. The direct evidence from both LL and Ansaldi's statement to the CO that LL had worked in that area is far weightier than the photographs, which are not conclusive as to the presence or absence of indentations caused by footfalls. It is notable that there are no obvious footprints in the photographs in Exhibit C-1 that show three workers in the excavation rescuing LL. Further, the activity of freeing LL from the excavation could have obliterated any visible footprints in the area where it was 70 inches deep.

Triumph has failed to establish that the excavation met the exception of § 1926.652(a)(1)(ii) to providing an adequate protective system designed in accordance with § 1926.652(b) or (c) at either the location of the cave-in or the area in the vicinity of the electrical duct bank.[15] A preponderance of the evidence establishes that the excavation was at least five feet deep in these two areas when LL was positioned there.

Triumph was required to protect employees from cave-ins in those areas by providing an adequate protective system designed in accordance with § 1926.652(b) or (c). At no time on August 22, 2014, prior to the cave-in was there such protective system in any part of the excavation. Triumph violated § 1926.652(a)(1) in the manner alleged.

[15] Because Triumph failed to prove the excavation was less than five feet where LL was positioned in the excavation, it is unnecessary to address the second prong of the exception in § 1926.652(a)(1)(ii) that a competent person determine the excavation does not present a cave-in hazard.

Employer Knowledge

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) (citations omitted). It is not necessary to show that the employer knew or understood the condition was hazardous. *Id.* Knowledge may be imputed to the employer "through its supervisory employee." *Am. Eng'g & Dev. Corp.,* 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) quoting *Access Equip. Sys.*, 21 BNA OSHC 1400, 1401 (No. 03-1351, 2006).

Triumph had actual knowledge of the violative condition through its foreman, Formoso, and its site superintendent, Ansaldi. To install the new 20-inch water main pipe with four feet of cover above it, the excavation had to be at least 68 inches (5 feet 8 inches) in depth. The depth of the excavation for this project, generally, was between 68 inches and 74 inches. (T. 102). The foreman, Formoso, instructed LL to enter the excavation in an area where he knew the old pipe had been removed and that the depth in that area was greater than five feet. (T. 54-58). Ansaldi knew the depth of the excavation near the 2-inch gas service line, where LL was working before moving in the excavation to the area where the cave-in occurred, was more than five feet. Formoso and Ansaldi knew no protective system was in place to protect LL from cave-ins in any part of the excavation. (T. 493, 541, 547; Stip. ¶12).

A preponderance of the evidence establishes that Triumph had actual knowledge that its employee was in the excavation that was more than five feet deep and was not protected from cave-ins by an adequate protective system designed in accordance with § 1926.652(b) or (c).

Employee Exposure

The Secretary must prove employee exposure to the violative condition.[16] This can be determined through actual exposure or it may be determined through evidence that "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2218 (No. 09-00042014) (consolidated) quoting *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). The zone of danger is the "area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *Id.* quoting *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995).

The excavation did not have a protective system designed in accordance with paragraphs (b) or (c) of § 1926.652 to protect employees from cave-ins. Employees were exposed to an unprotected excavation more than five feet deep at any area in which they worked, were expected to work, or used to access a work location, throughout the excavation except for the western end of the west segment where backfill covered the new pipe. *See R. Williams Const. Co. v. OSHRC*, 464 F.3d 1060, 1064 (9th Cir. 2006) (finding violation is "established so long as employees have *access* to a dangerous area") (emphasis in original) (citations omitted); *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997) citing *Ford Dev. Corp.*, 15

[16] To prove that the terms of § 1926.652(a)(1) were violated (the second element of the Secretary's burden), the Secretary was required to prove that an employee was in an unprotected excavation. Thus, the "employee exposure" element of the Secretary's burden of proof (the third element) for an alleged violation of § 1926.652(a)(1) is seemingly subsumed in the second element of the Secretary's burden. However, the context of the earlier discussion regarding LL's location in the excavation related to whether Triumph had established the exception set forth in § 1926.652(a)(1)(ii) relating to excavations shallower than five feet. Accordingly, the employee exposure element of the Secretary's burden of proof is addressed separately here.

BNA OSHC at 2011 (section 1926.652(a)(1) is "implicated . . . without regard to an individual worker's precise position" in an excavation).

As discussed previously, the evidence established two areas in the center segment of the unprotected excavation where LL had been working prior to and at the time of the cave-in.[17] A

[17] The Citation alleged the location of the violation was the "Jobsite trench, east end" on West 10th Street, but the CO drafted the Citation item intending to describe the violation as having occurred in the area where he had measured the depth at 70 inches at two locations -- one near the 2-inch gas service line that crossed the excavation just east of that opening, and the other near the electrical duct bank that crossed the excavation two or three feet to the east of the 2-inch gas line. (T. 66, 238-39, 158, 279, 328-29). The CO drafted the description of the violation in this manner because Ansaldi had told him that LL had been working in that vicinity before the cave-in. (*Id.*; T. 258-59). The CO did not draft the Citation with a view to describing the violation having occurred at the spot of the cave-in. (*Id.*) However, it is apparent that up to and through the early stages of the hearing, Triumph had interpreted the Citation to allege the violation having occurred at the spot of the cave-in, which was five to eight feet east of the electrical duct bank. (*See* statement of Triumph's attorney at T. 66-68). This is a reasonable interpretation of the Citation, considering the proximity of the 70-inch measurements to the spot of the cave-in, and considering that the Citation identified the location of the violation to be the "east end" of the excavation, and was not so expressly specific as the CO intended to be.

The Secretary did not move to amend the pleadings to expressly specify that the theory of the violation was the spot of the cave-in, and such a motion was probably not necessary because the Citation as drafted fairly encompassed that area of the excavation. However, to the extent that a violation in this part of the excavation was not encompassed by the Citation as drafted, post-hearing *sua sponte* amendment of pleadings to include such an unpleaded issue would be proper because the parties tried that issue and they consented to do so. *McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2130 (No. 80-5868, 1984); *Brand Energy Solutions, LLC*, 25 BNA OSHC 1386, 1390, n. 6 (No. 09-1048, 2015) (declining to amend citation *sua sponte* on discretionary review of judge's decision). "Consent may … be implied by the parties' words and conduct, even if neither party openly voices his consent." *McWilliams Forge Co., Inc.*, 11 BNA OSHC at 2129. The post hearing briefs are replete with argument regarding the depth of the trench where LL was struck with dirt and debris that caved in. (*E.g.*, Sec'y Br. 4-5, 10-12; Resp't Br. 15-17). The parties tried the theory of the violation having occurred in the area of the cave-in, and they impliedly consented to do so. Accordingly, *sua sponte* post-hearing amendment of the pleadings would be proper to expressly specify this theory of the violation.

The Secretary also argues that the evidence showed that unidentified employees were exposed in the west segment of the excavation while connecting the customer water service lines to the newly installed pipe. In its reply brief, Triumph correctly observes that "this was not the focus or the allegations of the Secretary's case against Triumph." (Resp't Reply Br. 8). Indeed,

preponderance of the evidence establishes that LL was exposed to a cave-in hazard presented by an excavation that did not have a protective system designed in accordance with § 1926.652(b) or (c) in both areas.

Repeat Classification for § 1926.652(a)(1) Violation

The Citation alleged the violation of § 1926.652(a)(1) was a "2nd Repeat" violation based on two previous OSHA citations issued to Triumph for violations of § 1926.652(a)(1) -- one that occurred in November 2008 and the other that occurred in July 2011.[18] The 2008 violation was resolved by a stipulated settlement agreement that resulted in a final order of the Commission of May 27, 2009.[19] (Exs. C-20, C-21, C-22). The 2011 citation was resolved by an Informal Settlement Agreement dated November 18, 2011.[20] (Ex. C-19).

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the citation alleged the violation had occurred in the east end of the excavation, not the west end where those service line connections would have been made. While there may be evidence to support such a theory of the violation, the record does not establish that Triumph expressly or impliedly consented to litigate this unpleaded issue. Accordingly, *sua sponte* amendment of the pleadings to include this unpleaded issue would not be proper, *McWilliams Forge Co., Inc.*, and that issue is not adjudicated here.

Also, the record is far from crystalline as to how LL accessed the excavation. Photographs taken by Ayoub, the DDC inspector, show a ladder at the east segment of the excavation, where the depth was more than five feet. (Ex. C-1). Ansaldi indicated that LL could not exit the excavation until the backhoe had finished its work, because the ladder was on the opposite side of the 6-inch gas main from where LL was at the time of the cave-in. (T. 237). If this ladder was LL's means of ingress and egress, then he would have been exposed to a cave-in hazard in an unprotected excavation in the east segment of the excavation as well as in the center segment. However, the parties did not litigate this theory of employee exposure, so that theory is not adjudicated.

[18] The Secretary's amended complaint similarly alleged both the 2008 and 2011 violations.

[19] The complaint and the Citation alleged a final order date of 5/02/2009, which is incorrect. The final order date was May 27, 2009. (Ex. C-22).

[20] The Citation alleged a final order date of 12/18/2011, which is incorrect. The Informal Settlement Agreement is dated 11/18/2011. (Ex. C-19).

The authority for classifying a violation as repeated is in section 17(a) of the OSH Act.[21] The OSH Act does not define what constitutes a repeated violation, but longstanding Commission precedent does. In *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979), the Commission declared that a violation may be deemed repeated "if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." The Secretary can prove substantial similarity by showing the employer failed to comply with the same standard as in the prior citation. *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1866 (No. 93-1122, 1996).

The Secretary has established the violation of § 1926.652(a)(1) proven here is for the same standard as the two previous citations, and thus that the violation here is substantially similar to those prior violations. Triumph does not argue otherwise, but does argue that the repeated classification cannot stand because (1) *Potlatch* requires a "Commission final order" and none exists in connection with the 2011 violation, and (2) for a prior violation to have supported the repeated classification here, the prior violation may not predate the Citation by more than the three-year period described in the OSHA Field Operations Manual (FOM) that was in effect from 4/22/2011 through 9/30/2015.

[21] Section 17(a) provides: "Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $70,000 for each violation." 29 U.S.C. § 666(a).

Informal Settlement Agreement as a
"Commission Final Order" under *Potlatch*

Triumph contends the 2011 violation established by the Informal Settlement Agreement cannot serve as a predicate violation for a repeat classification because it is not a "Commission final order" under the *Potlatch* decision. This argument is rejected.

On November 4, 2011, OSHA issued a citation to Triumph for a violation § 1926.652(a)(1) involving employees installing storm drains in a 9-foot deep excavation. (Ex. C-18). By a letter from its attorney dated November 10, 2011, Triumph submitted a notice of intention to contest the citation to the OSHA area office that issued the Citation within the 15-working-day-period set forth in section 10(a) of the Act.[22] (Ex. J-2). Commission Rule 33, 29 C.F.R. § 2200.33(a), required that the Secretary notify the Commission that the Secretary had received the timely filed notice of contest within 15 working days after the Secretary received it.[23]

Assuming that the Secretary received the notice of contest on November 10, 2011 (the date of the letter contesting the citation), the last day for the Secretary to timely notify the Commission of the notice of contest would have been December 2, 2011. However, on November 18, 2011, which was before the expiration of the contest period and before the

[22] Section 10(a) of the OSH Act, 29 U.S.C. § 659(a), allows a cited employer 15 working days within which to contest a citation, and provides further that if a citation is not contested within that time, then by operation of law it "shall be deemed a final order of the Commission." Such a resulting final order of the Commission results without any affirmative act or involvement of the Commission.

[23] Commission Rule 33, 29 C.F.R. § 2200.33, provides in relevant part as follows:

> Within 15 working days after receipt of … [n]otification that the employer intends to contest a citation or proposed penalty under section 10(a) of the Act, … the Secretary shall notify the Commission of the receipt in writing and shall promptly furnish to the Executive Secretary of the Commission the original of any documents or records filed by the contesting party and copies of all other documents or records relevant to the contest.

expiration of the time in which the Secretary was required to notify the Commission of Triumph's notice of contest, OSHA and Triumph executed the Informal Settlement Agreement. In that agreement, Triumph expressly "waived its rights to contest the above citation(s) and penalties, as amended." (Ex. C-19).

The OSHA Area Director did not thereafter notify the Commission of the notice of contest under Commission Rule 33 because the parties had fully resolved the matter before the expiration of the 15-working-day contest period. (T. 395-96).

Triumph does not challenge the legality of the Informal Settlement Agreement, but argues that it did not result in a Commission final order, and thus the violation of § 1926.652(a)(1) established by that agreement cannot serve as a predicate violation for a repeat classification for the violation proven here. The foundation of Triumph's argument is the Commission's declaration in *Potlatch* that a predicate violation be established by a "Commission final order."[24]

Triumph argues that because it timely contested the 2011 citation, it was necessary for the Commission to take some "affirmative step" in order for that contested citation to become a "Commission final order" within the meaning of *Potlatch*. Without such an affirmative step, Triumph argues, a "Commission final order" establishing the predicate violation simply does not exist. (Resp't Brief 30-31).

[24] Triumph recognizes that a citation that becomes a final order by operation of law pursuant to section 10(a) of the Act (because the employer has not contested it within the fifteen-working-day contest period) may serve as a predicate violation for a repeat classification. (Resp't Brief p. 30). *See Dun-Par Engineered Form Co.*, 8 BNA OSHC 1044 (No. 16062, 1980). Triumph also recognizes that a violation that becomes a final order of the Commission by virtue of being affirmatively approved by the Commission after the employer has timely contested the citation may also serve as the predicate for a repeat classification. *See Stone Container Corp.*, 14 BNA OSHC 1757 (No. 88-310, 1990). (Resp't Brief 30-31).

In the 2011 Informal Settlement Agreement, Triumph expressly waived its right to contest the citations and penalties as amended by the agreement. (Ex. C-19). This waiver of its right to contest that citation had a dual effect: (1) it nullified the timely filed notice of contest, and (2) it made the agreed amended citation a "Commission final order" within the meaning of *Potlatch*. Just as an uncontested citation becomes a final order by operation of law without any affirmative act by the Commission, an informal settlement agreement entered into before the expiration of the statutory contest period similarly becomes a final order without any affirmative act by the Commission. To conclude otherwise would immunize employers from the specter of a repeat citation predicated upon a prior violation that was established by an informal settlement agreement entered into before the expiration of the statutory contest period. In view of the likely thousands of informal settlement agreements that employers and OSHA enter into every year,[25] that result would be seriously disruptive to the orderly and efficient resolution of disputes between cited employers and the Secretary, and one that the Commission certainly could not have intended to engender by declaring in *Potlatch* that a predicate violation be established by a "Commission final order."

For these reasons, the Informal Settlement Agreement dated November 18, 2011, established a prior violation of § 1926.652(a)(1) that was tantamount to a "Commission final order" within the meaning of the Commission's declaration in *Potlatch*.

[25] In a statement to a subcommittee of the U.S. Senate, an OSHA official recently reported that in "FY 2015, 65% of inspections with a citation resulted in informal or expedited settlements between the employer and OSHA" before the expiration of the 15-working-day contest period. Testimony of Deputy Assistant Secretary Jordan Barab dated 02/11/2016 to the U.S Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management. (Accessed at following URL on 8/29/2016: https://www.hsgac.senate.gov/subcommittees/rafm).

Even if Triumph is correct in its argument that the violation established by the 2011 Informal Settlement Agreement cannot support a repeated classification for the violation proven here, the final order dated May 27, 2009 for an earlier violation can. The Citation alleged this 2009 final order as supporting the repeat classification, as did the Secretary's complaint dated June 5, 2015. As discussed immediately below, the May 27, 2009 Commission final order finding Triumph to have violated § 1926.652(a)(1) may serve as the predicate violation for the repeat classification in this case, even though that final order predates the repeat Citation here by more than five years.

"Look-back" Period for Predicate Violations

The OSHA Area Director testified that she approved classifying the violation of § 1926.652(a)(1) as a repeat violation in conformance with a then existing OSHA guideline that a repeat violation may be supported by a prior violation of the same standard in the previous five years. (T. 391-92, 400-01). The Area Director recalled that this so-called "look-back" period had been changed from three years to five years in August 2010. (T. 400-01). She testified further that the OSHA Field Operation Manual (FOM) embodied an OSHA policy identifying certain "gray area" situations in which OSHA Area Directors have the discretion to issue repeat citations based on prior violations that were established beyond the general look-back period. (T. 391).

The 2011 Informal Settlement Agreement was executed more than three years, but less than five years, before the issuance of the repeat citation here (on 2/13/2015). The Area Director did not regard the repeat citation here to have been issued outside of a five-year look-back period, and thus her decision to issue the repeat citation did not require her to exercise her discretionary authority to issue a repeat citation based on a prior violation outside that period.

Triumph asserts the Secretary may only use the most recent three years of citation history as the basis for a repeat citation, based on the policy set forth in the FOM that was effective from 4/22/2011 to 9/30/2015 (2011 FOM). Triumph's argument is based upon the language in the 2011 FOM (Ex. R-2) that is quoted *supra* in ¶ 36 of the Findings of Fact. The 2011 FOM containing this provision was in effect on the date Triumph executed the 2011 Informal Settlement Agreement (11/18/2011), as well as on the date of the violation (8/22/2014) and the date the citation was issued (2/13/2015).[26] (Resp. Br. 32-35).

[26] The 2011 FOM (Ex. R-2) was updated effective October 1, 2015 when it was supplanted by an updated FOM (2015 FOM). (Ex. R-3, OSHA FOM, CPL 02-00-159). The 2015 FOM reflected a change in the so-called "look back" period from three years to five years, but otherwise reflected no other changes to the policy in the 2011 FOM quoted *supra* in ¶ 36 of the Findings of Fact. (Ex. R-3). Triumph contends that the 2011 FOM and 2015 FOM establish that the look-back period was not effectively changed from three years to five years until October 1, 2015.

However, other information that the Secretary raised for the first time in his post-hearing brief indicates that OSHA actually changed the "look-back" period from three years to five years well before October 1, 2015. That information is a memorandum dated March 27, 2012 from the OSHA Administrator titled "Annual Review and Scheduled Modification to OSHA's Interim Administrative Penalty Policy." (This memorandum was accessed on 8/23/2016 at the following URL: https://www.osha.gov/dep/enforcement/admin_penalty_mar2012.html). (*See* Sec'y Br. 29; Resp't Opposition to Motion to Take Judicial Notice, dated 6/3/2016).

The Administrator's memorandum dated 3/27/2012, states that the date of the "Interim Administrative Penalty Policy" that the memorandum's title referenced was 9/27/2010. The 3/27/12 memorandum stated that it did not change any aspect of the Interim Administrative Penalty Policy dated 9/27/10 with respect to the time period for repeat violations. (*See* the "Annual Review" section of the memorandum, which states that except for a change in the "size reduction" criteria of penalty calculation, "[n]o other changes will be made to the September 27, 2010, administrative penalty policy.") Rather, by using the past tense to describe the change in the policy, the 3/27/12 memorandum indicated that the three-year period had been changed to five years by the Interim Administrative Penalty Policy dated 9/27/10: "The time period to consider for repeated violations *has increased* from three years to five years." (Emphasis supplied.)

A change from a three-year period to a five-year period in September 2010 would be largely consistent with the Area Director's recollection that the change occurred around August 2010. (T. 401). It is also consistent with a memorandum from the OSHA Administrator dated April 22, 2010, which was received in evidence at the hearing, that the "time period for repeat

Triumph argues that applying a look-back period greater than three years is arbitrary and capricious because there is no reasoned explanation for departing from the three-year policy described in the 2011 FOM. (Resp't Br. 32-33, 35; Resp't Reply Br. 22-28).

This argument is rejected on multiple grounds. The three-year period in the 2011 FOM did not constrain the Secretary from classifying a violation as repeated based on a prior violation that was established more than three years earlier.

First, a long line of Commission precedent has consistently held that OSHA's FOM (1) does not create any substantive rights for employers, (2) is not binding on the Commission or OSHA, and (3) is "only a guide for OSHA personnel to promote efficiency and uniformity." *Hackensack Steel Corp.,* 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003) (citations omitted); *accord Andrew Catapano Enters.*, 17 BNA OSHC 1776, 1780 (No. 90-0050, 1996) (consolidated); *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173 n. 24 (No. 87-922, 1993); *H.B. Zachary Co.*, 7 BNA OSHC 2202, 2204-05 (No. 76-1393, 1980); *FMC Corp.*, 5 BNA OSHC

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violations *will ... be increased* from three to five years." (Ex. J-1) (emphasis supplied). It is further consistent with documentary evidence that was presented in a different matter before the Commission, which reflected that OSHA had changed the policy from three years to five years in September 2010, to be effective on 10/1/2010. *Hubbard Constr. Co.*, 24 BNA OSHC 1689, 1698 (No. 11-3022, 2013) (ALJ).

Nevertheless, even if OSHA changed the time period from three years to five years as of 10/1/2010, the record contains no explanation why the 2011 FOM, which was effective for over four years from 4/22/2011 to 9/30/2015, did not reflect that change.

Accordingly, even accepting that the Interim Penalty Policy dated 9/27/2010 changed the time period from three to five years effective 10/1/2010, the evidence of record conclusively establishes that at all relevant times the 2011 FOM contained a three-year policy, and that the 2011 FOM was in effect from 4/22/2011 until it was supplanted by the 2015 FOM on 10/1/2015. Thus, an employer that was aware only of the 2011 FOM and not any policy changes within OSHA at variance with the 2011 FOM could reasonably conclude that OSHA's general internal policy included the general three-year look-back period described therein. Accordingly, it is through the lens of the three-year period described in the 2011 FOM, not the five-year period that the Area Director described as having been implemented in the year 2010, that Triumph's arguments will be addressed.

1707, 1710 (No. 13151, 1977). The 2011 FOM contains the following prominent "Disclaimer" in boldface type immediately before its table of contents that articulates the same view of the FOM's import. The relevant part of the Disclaimer provides as follows (Ex. R-2):

> This manual is intended to provide instruction regarding some of the internal operations of the Occupational Safety and Health Administration (OSHA), and is solely for the benefit of the Government. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Department of Labor or the United States.

Second, the part of the 2011 FOM that describes the three-year period simply does not limit the look-back period to three years. Instead, it confirms that "there are no statutory limitations on" the look-back period, and rather than making the three-year period mandatory, states instead that the three-year period "shall generally be followed." Moreover, consistent with the Area Director's testimony, the 2011 FOM contains guidance on circumstances when OSHA may consider deviating from that three-year policy, including "cases of multiple prior repeated citations," as here.

Third, Commission precedent does not limit the length of the look-back period for a repeated citation. The "time between violations does not bear on whether a violation is repeated." *Hackensack Steel Corp.*, 20 BNA OSHC at 1392, quoting *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1168 (No. 90-1307, 1993) *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994); *see also Potlatch Corp.*, 7 BNA OSHC at 1064 (finding the length of time between the past and current violations is not relevant to establishing the repeat violation).

Triumph cites to several cases, including *I.N.S. v. Yang,* 519 U.S. 26, 32 (1996), in arguing that OSHA departed from its own policies and procedures. (Resp't Reply Br. 23). Triumph points to *dicta* in *Yang* that

> [t]hough the agency's discretion is unfettered at the outset, if it announces and follows — by rule or by settled course of adjudication — a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Yang, 519 U.S. at 32. Even assuming that the 2011 FOM can reasonably be regarded as OSHA "announcing" "by rule or by settled course of adjudication" a general three-year policy (which it does not), the instant case does not involve a departure, irrational or otherwise, from the general policy stated in the 2011 FOM. This is because the general policy set forth in the FOM is that OSHA need not unvaryingly apply a three-year period. Rather, the policy stated in the 2011 FOM contemplates that repeat citations may be issued based on prior violations that have occurred beyond a three-year period. Where, as here, OSHA actually does so, the repeat classification cannot amount to a departure from that policy, much less an "irrational" one.

Triumph also asserts that it relied upon the three-year period in the 2011 FOM when it entered into the 2011 Informal Settlement Agreement on 11/18/2011. (Resp. Br. 33). First, the record is devoid of any evidence that Triumph actually relied on the policy stated in the 2011 FOM, so Triumph's argument lacks any underlying factual support. Even if there were evidence of actual reliance, such reliance would have been unreasonable, because the policy as expressed in the 2011 FOM observes that there are "no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation," and notes only that the three-year policy "shall generally be followed" and thus indicated that it may not be followed in every case. Such reliance would similarly be unreasonable because of the prominent Disclaimer in the 2011 FOM quoted above. In any event, as also noted above, as a matter of law the FOM creates no substantive rights. *Hackensack Steel Corp.*, 20 BNA OSHC at 1392. Further, "[the employer] is presumed to have knowledge of the Act, which has provided for repeated citations since its

effective date," with no limitation on the age of a predicate violation. *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990).

Triumph's arguments that it relied on the three-year time period in the 2011 FOM in deciding to enter into the Informal Settlement Agreement on November 18, 2011, and that it reasonably believed that any time after November 18, 2014, it could again violate § 1926.652(a)(1) with no risk of being cited for a repeated violation is rejected. (Resp't Br. 33).

The Secretary proved the characterization of the violation as repeated.

Protection of Employees From Loose Rock or Soil --
Alleged Violation of § 1926.651(j)(1)

Triumph was cited for a serious violation of 29 C.F.R. § 1926.651(j)(1), which provides:

> (j) *Protection of employees from loose rock or soil.* (1) Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

The Citation alleged that Triumph had violated this standard on August 22, 2014 at the "Jobsite trench, east end" on West 10th Street in the following manner: "Adequate protection was not provided to protect the employee from loose rock or soil from falling into the excavation. Loose soil rolled from an excavation face and a concrete slab, which was being supported by the soil, fell and struck the employee." (Citation 1, item 1).

Applicability of Standard

Section 1926.651(j)(1) requires an employer to protect employees from loose rock or soil on an excavation's face that could pose a hazard by falling into the excavation. As discussed *supra*, the excavation here meets the standard's definition of "excavation." The Secretary has

shown that Triumph employees were working in the excavation on August 22, 2014. The standard applies.

Significant Risk of Harm from the Hazard of Loose Rock or Soil

Section 1926.651(j)(1) does not presume that the hazard it addresses exists in every excavation. Rather, the standard requires an employer to provide "adequate protection … to protect employees from loose rock or soil *that could pose a hazard.*" (Emphasis supplied.) Consequently, because the standard does not presume the existence of the hazard that the standard addresses, in order to prove that the standard was violated "the Secretary must show more than the mere possibility of injury; he must show that the potential hazard presents a significant risk of harm." *Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57, 64 (2d Cir. 1983) (*Pratt & Whitney II*), citing *Pratt & Whitney Aircraft v. Secretary of Labor*, 649 F.2d 96 (1981) (*Pratt & Whitney I*); *Anoplate Corp.*, 12 BNA OSHC 1678, 1681 (No. 80-4109, 1986) (adopting the reasoning of *Pratt & Whitney I & II* and applying it in Commission proceedings). "A risk cannot be deemed significant absent some showing by the Secretary of the circumstances likely to give rise to the alleged hazard." *Pratt & Whitney II*, 715 F.2d at 66-67. "Whether there exists a significant risk depends on the seriousness of the potential harm and the likelihood of that harm being realized." *Id.* at 64. The "likelihood of injury and the corresponding measure of harm resulting therefrom" are issues of fact. *Id.*

The hazard that § 1926.651(j)(1) addresses is described in the 1989 preamble to the Excavations standard:

> [Section 1926.651(j)(1)] addresses a hazard similar to cave-ins, although it is not of the same magnitude. Loose rock or soil can fall or roll from an excavation face and, if in sufficient volume, endanger an employee even when an adequate cave-in protective system is in place. For example, when a shield is used in conjunction with sloping, the possibility exists for material to loosen and slide down and over the top of the shield, thus endangering employees.

Occupational Safety and Health Standards -- Excavations, 54 Fed. Reg. 45894, 45924 (Oct. 31, 1989). This language in the preamble shows that § 1926.651(j)(1) presupposes that the excavation to which it is to be applied complies with the cave-in protection requirement of § 1926.652(a)(1). The hazard that § 1926.651(j)(1) addresses of "loose rock or soil" that "can fall or roll from an excavation face … in sufficient volume [to] endanger an employee even when an adequate cave-in protective system is in place" is a different hazard from a cave-in hazard addressed by § 1926.652(a).[27]

The Secretary argues that the occurrence of the cave-in proves the existence of the hazard of "loose soil falling or rolling from the excavation's face in sufficient volume to endanger an employee," citing to *A.E. Burgess Leather Co., Inc.*, 5 BNA OSHC 1096 (No. 12501, 1977) *aff'd*, 576 F.2d 948 (1st Cir. 1978). (Sec'y Br. 26). In *A.E. Burgess*, the Commission observed that the "occurrence or absence of injuries caused by a machine is probative evidence of whether the machine presents a hazard" (and thus whether machine guarding to protect employees was required by the machine guarding standard at § 1910.212(a)(1)). *Id.* at 1097. Even so, the occurrence of a workplace accident alone does not establish that a standard was violated. *See Williams Enters. Inc.*, 13 BNA OSHC 1249, 1252-53 (No. 83-355, 1987) (noting that the Commission has "many times held" that "the cause of the accident is not necessarily relevant to whether a standard was violated"); *cf. Ford Dev. Corp.*, 15 BNA OSHC at 2010 (noting that "normally, the fact that an accident occurred, let alone the details, is irrelevant" to Commission

[27] The term cave-in is defined in § 1926.650(b) as follows:

> *Cave-in* means the separation of a mass of soil or rock material from the side of an excavation, or the loss of soil from under a trench shield or support system, and its sudden movement into the excavation, either by falling or sliding, in sufficient quantity so that it could entrap, bury, or otherwise injure and immobilize a person.

proceedings, but that "the very fact of the collapse [of an excavation wall] seems to demonstrate an instability at the scene of the accident").

While the occurrence of the cave-in may constitute evidence of the existence of the hazard of loose rock or soil on the face of the excavation that could endanger an employee, the Secretary otherwise presented no evidence of "circumstances likely to give rise to the alleged hazard." *Pratt & Whitney II*, 715 F.2d at 67. There was no evidence characterizing the appearance of the face of the excavation in the location of the cave-in prior to the cave-in, or describing that the face of the excavation contained loose rock or soil. *See generally, Freeze Tech. Int'l, Inc.,* No. 99-308, 2000 WL 896324, at *5, (O.S.H.R.C.A.L.J. June 23, 2000)(consolidated) (vacating citation for § 1926.651(j)(1) upon concluding that no evidence showed that the face of excavation posed a hazard); *Black Constr. Corp.*, No. 99-0512, 2000 WL 687783, at *3, (O.S.H.R.C.A.L.J. May 26, 2000) (finding Secretary did not meet burden to prove existence of "loose rock or soil that could pose a hazard" as required by § 1926.651(j)(1)).

Moreover, the Secretary presented no evidence that the hazard of loose rock or soil existed on the face of any part of the excavation that had *not* caved-in. Such evidence, if any existed, would have been apparent upon an examination of the portions of the excavation that remained intact. In the absence of any such evidence, the only reasonable conclusion is that there was no loose rock or soil anywhere on the excavation faces that posed the kind of hazard against which § 1926.651(j)(1) protects.

Lastly, when the hazard of loose rock or soil on the face of an excavation does exist, § 1926.652(j)(1) describes the protection that must be provided: "scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection." Other than the

occurrence of the cave-in, the Secretary presented no evidence that these forms of abatement were necessary to protect employees from loose rock or soil rolling or falling from the face of the excavation (which is a distinct hazard from a cave-in hazard).

Employer Knowledge

Even if the occurrence of the cave-in alone proved the existence of the kind of hazard against which § 1926.651(j)(1) protects employees (so that Triumph violated the standard by failing to employ any of the means of abatement prescribed by the standard), the Secretary failed to prove that Triumph knew or with the exercise of reasonable diligence could have known of the violative condition. *Revoli*, 19 BNA OSHC at 1684.

The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix*, 17 BNA OSHC at 1079-1080. It is not necessary to show that the employer knew or understood the condition was actually hazardous. *Id.*

Triumph asserts the condition that caused the cave-in was the unknown "cold joint" behind the face of the excavation that was created by the presence of wood sheeting that had been improperly left buried sometime in the distant past as part of the excavation from a nearby parallel sewer line. (Resp't Br. 29-30).

The Secretary argues that Triumph had constructive knowledge of the hazard of loose rock or soil on the face of the excavation by virtue of recognizing that the excavation was in the least stable type of soil (Type C) and that this previously disturbed soil was "further weakened by the excavator that was in operation at the time of the cave-in." (Sec'y Br. 25 & 27).

The Secretary's argument is rejected. As noted above, there is no evidence that any loose rock or soil was apparent on the face of the excavation. Moreover, there was no evidence that loose rock or soil is necessarily present on the face of an excavation in Type C soil. Also, there

was no direct evidence that vibrations from the excavator affected the stability of any loose rock or soil on the face of the excavation.

The CO acknowledged in his testimony that he had no reason to believe that Triumph knew or should have known of the presence of the cold joint behind the excavation's face at the location of the cave-in. (T. 297-98). The weight of the evidence supports the CO's belief. Triumph had been on the project for about 18 months and had not encountered any similar problems or incidents. (T. 184-85, 462-63, 528-29). No evidence was presented that would support a finding that Triumph, in the exercise of reasonable diligence, should have known that a cold joint caused by the ancient wood sheeting improperly left buried from a prior excavation would create the hazardous condition of loose rock or soil on the face of the excavation.

The citation for violation of § 1926.651(j)(1) is vacated because the Secretary failed to prove (1) that Triumph violated the standard by showing that there was a significant risk of harm from "loose rock or soil … that could pose a hazard by falling or rolling " from the face of the excavation, and (2) that Triumph knew or could have known of the presence of such a hazard in the exercise of reasonable diligence.

Penalty Assessment for Repeated Violation

The Commission and its judges make *de novo* penalty determinations and have the authority to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975) *aff'd*, 73 F.3d 1466 (8th Cir. 1996). The permissible range of penalties for a repeat violation is from no penalty to $70,000. 29 U.S.C. § 666(a). The Secretary proposed a penalty of $22,500 for the repeat violation of § 1926.652(a)(1).

Section 17(j) of the Act requires that in assessing penalties, the Commission 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. *Compass Envtl., Inc.,* 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010), *aff'd,* 663 F.3d 1164 (10th Cir. 2011).

Gravity is the primary consideration among these four statutory criteria, and is determined by "such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J.A. Jones Constr. Co.,* 15 BNA OSHC 2200, 2214 (No. 87-2059, 1993). The matter of an employer's "good faith" should take into account such factors as "aggravated conduct, disregard of the Act, or flouting." *Potlatch Corp*., 7 BNA OSHC at 1064. With respect to assessing the penalty for a repeat violation, other factors to be considered are "an employer's attitude (such as his flouting of the Act), commonality of supervisory control over the violative condition, the geographical proximity of the violations, the time lapse between the violations, and the number of prior violations." *Id*.

OSHA rated the violation as moderate gravity (high severity and lesser probability), which resulted in a base penalty of $5000, and then adjusted that amount with a 10% reduction due to Triumph's size of 230 employees, reaching an adjusted base penalty of $4500. (T. 286, 284). No reduction for good faith was applied. Because this was a second repeat violation, the OSHA protocol was to apply a multiplier of five to the adjusted base penalty, resulting in a proposed penalty of $22,500. (T. 286-87).

The evidence supports the Secretary's conclusion that the violation of the cited standard is of high severity. The Commission observed in 1990 that "[t]rench cave-ins, which are frequently caused by failure to comply with the Secretary's trenching standards, have been for

many years one of the most severe problems in occupational safety." *Calang Corp*., 14 BNA OSHC 1789, 1794 (No. 85-0319, 1990); *see also Mosser Constr*., 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) ("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"). Here, there was a cave-in accident that resulted in an employee sustaining serious injuries requiring surgery.

A 10% reduction in the base penalty amount because Triumph has 230 employees is not warranted in view of Triumph's record of violating the same standard three times in the span of less than six years. All three violations occurred in New York City and all involved utility excavations, a staple of Triumph's business. (Exs. C-18 & C-20; Finding of Fact ¶1, *supra*). The determination to employ a multiplier of five to the base penalty amount is appropriate for the third violation of the same standard over a span of less than six years. Accordingly, the penalty to be assessed for the repeated violation of § 1926.652(a)(1) is $25,000.

ORDER

The foregoing decision constitutes findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a). If any finding is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the contrary notwithstanding. Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1 (item 1) alleging a Serious violation of 29 C.F.R. § 1926.651(j)(1), is VACATED.

2. Citation 2 (item 1) alleging a Repeat violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED, and a penalty of $25,000 is assessed.

/s/
William S. Coleman
Administrative Law Judge

Dated: September 19, 2016