United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. A-1 SEWER AND WATER CONTRACTORS, INC., Respondent.	OSHRC Docket No.: 21-0562

For Complainant: Arsalan Nayani, Esq., Office of the Solicitor, 230 South Dearborn Street, Chicago, IL

For Respondent: Anthony M. Ciccone, *Pro Se*[1], A-1 Sewer and Water Contractors, Esq. 903 North Ridge Ave., Arlington Heights, IL

Before: First Judge Patrick B. Augustine, United States Administrative Law Judge

DECISION AND ORDER

I. PROCEDURAL BACKGROUND.

Respondent was engaged in trenching and excavation work at the time of the inspection commenced on April 30, 2021, at Respondent's worksite located at 1105 W. Busse Ave., Mount Prospect, Illinois[2]. As a result of the inspection, the Occupational Safety Health Administration (OSHA) issued Respondent a Citation and Notification of

[1] Although the Commission recognizes the difficulties a self-represented litigant may face when participating in the Commission's proceedings, the Commission still requires the self-represented litigant to follow the rules and exercise reasonable diligence in the legal proceedings in which it is taking part. *Sealtite Corp*., 15 BNA OSHC 1130 (No. 88-1431, 1991). An unrepresented employer must "exercise reasonable diligence in the legal proceedings" and "must follow the rules and file responses to a judge's orders, or suffer the consequences, which can include dismissal of the notice of contest." *Wentzel d/b/a N.E.E.T. Builders*, 16 BNA OSHC 1475, 1476 (No. 92-2696, 1993) (citations omitted).

[2] When Citation 1, Item 1 was issued it stated the inspection occurred at 1105 W. Busse Avenue, Arlington Heights, Illinois. On February 3, 2022, the Court granted an unopposed Motion to Amend the Citation to reflect the location was in Mount Prospect, Illinois.

Penalty containing one item classified as a serious citation[3] and proposed a penalty of $1985.00 (Citation). Ex. C-1. Respondent timely contested the Citation by filing a Notice of Contest. This case was designated as a simplified proceedings case.

The Commission has adopted Rules for Simplified Proceedings, which apply in this case. *See* Subpart M of 29 C.F.R. Part 2200 (29 C.F.R. §§ 2200.200 - 2200.211). The trial was held under the Simplified Proceedings rules, where the "Judge will receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious or unreliable. Testimony will be given under oath or affirmation." 29 C.F.R. § 2200.209(c). Since the Federal Rules of Evidence did not apply in this simplified proceeding[4], *see id*., hearsay is admissible, "[p]rovided it is relevant and material," and under certain circumstances, "can constitute substantial evidence." *Bobo v. United States Dept. of Agriculture*, 52 F.3d 1406, 1414 (6th Cir.1995) (citation omitted).

A trial was held on July 25, 2022, in Chicago. IL. The Parties could not agree on any stipulated facts. Tr. 18. Complainant filed a post-trial brief. Respondent elected not to file a post-trial brief.

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and arguments of counsel, the Court issues this Decision and Order as its Finding of Facts and Conclusions of Law. In this very straight forward case, the Citation is VACATED for failure of Complainant to carry his burden.

[3] The Citation alleges Respondent violated 29 C.F.R. § 1926.652(a)(1) by failing to protect an employee in an excavation from cave-in hazards by a protective system.
[4] The Parties did not stipulate to the Federal Rules of Evidence applying in this case. *See* Commission Rule 209, 29 C.F.R. § 2200.209. Tr. 11.

II. JURISDICTION

The record supports Respondent is engaged in a business affecting interstate commerce and is an "employer" within the meaning of § 3 of the Occupational Safety and Health Act, 29 U.S.C § 651 *et seq*. The use of the term "affecting commerce" indicates a congressional intent to "exercise fully its constitutional authority under the commerce clause." *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976); *U.S. v. Dye Construction Co*., 510 F.2d 78 (10th Cir. 1975); *Brennan v. OSHRC*, 492 F.2d 1027 (2nd Cir. 1974); *see also Piping of Ohio, Inc*., 16 BNA OSHC 1236 (No. 91-3481, 1993). Commerce, according to § 3(3) of the Act, "means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof...." Following the Ninth Circuit in *Usery v. Franklin R. Lacy,* 628 F.2d 1226 the Commission has found interstate commerce where it "is in a class of activity that as a whole affects commerce." *Clarence M. Jones d/b/a Jones Co*., 11 BNA OSHC 1529, 1530 (No. 77-3676, 1983). In that case, the Commission went on to find "[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce." *Id*., citing *NLRB v. Int'l Union of Operating Engineers, Local 571,* 317 F.2d 638, 643 n. 5 (8th Cir. 1963) (judicial notice taken that construction industry affects interstate commerce).

Excavation work qualifies as "construction work" which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1926.32(g). The construction industry of which excavation work is part of affects commerce, and even small employers within that industry are engaged in commerce.

Slingluff v. OSHRC, 425 F.3d 861, 866-67 (10th Cir. 2005);, *d/b/a C. Jones Clarence M. Jones Co*., 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). Because Respondent is engaged in construction work, the undersigned finds it is engaged in a business affecting interstate commerce. Tr. 48, 218.

As to whether Respondent was an "employer" under the Act, Respondent testified Ramirez was its employee. Tr. 47, 74-75, 221. The Court finds Respondent was an "employer" under the Act.

Finally, the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act by Respondent filing its Notice of Contest. *Joel Yandell*, 18 BNA OSHC 1623, 1628 n.8 (No. 94-3080, 1999). *See also* 29 U.S.C. § 659(c).

III. THE INSPECTION

On the date of the inspection, Respondent was in the process of installing a water line system for a basement which was being constructed at an existing residential building built in the 1990s. Tr. 44, 219-220. There were two workers present at the worksite, Company owner Anthony Ciccone (Ciccone) and an employee by the name of Pablo Ramirez (Ramirez). Tr. 47, 74, 75, 221. Ciccone testified he was the competent person on the worksite, and he was the owner of Respondent. Tr. 48-49, 70-71, 212, 218, 222.

During the inspection, Compliance and Safety Officer Emil Szotko (CSHO) observed two trenches at the worksite. One trench (Trench 1) ran from the sidewalk to the front wall of the house and a second trench (Trench 2) went from the street to the sidewalk. Tr. 46, 48, 219. The CSHO inspected both trenches. The Citation issued is based

on the CSHOs inspection of Trench 1. Tr. 44. Therefore, any discussion during the trial as to Trench 2 is not relevant to the issue in this case.

The Citation involves Trench 1 because the CSHO witnessed Ramirez working inside of it. Tr. 45-47. Respondent was engaged in the installation of a water line in Trench 1. Tr. 220, 232-233. Ramirez was operating a vertical mounted drill against the building's foundation inside Trench 1. Tr. 60. The travel area in the excavation where Ramirez was working was between the access ladder and the vertical mounted drill located near the building's foundation[5]. Tr. 59, 61, 92-93, Ex. C 6-9. Ciccone was standing at ground level of the edge of Trench 1 and had verbal and visual contact with Ramirez. Ciccone testified he was the supervisor of Ramirez. Tr. 44-46, 74-75.

Using an engineering rod[6] and measuring tape, the CSHO measured Trench 1 as being 4-feet wide, 20-feet long with a depth of approximately five feet and six inches. The CSHO testified the soil in the working area was previously disturbed during the construction of the residence. Tr. 48-50, 55, 65, 204. Due to this disturbance, the CSHO classified the soil as Type B. Tr. 61-62, 168. The CSHO testified: (i) the walls of Trench 1 were vertical with no sloping or bench systems; and (ii) there was no shoring or shielding protective systems installed inside Trench 1. Tr. 58-59, 71, 206 and Ex. C-2.

[5] The Parties used the term "travel area" and "working area" to define the area in which work was being performed. There is no dispute between the Parties the area where work was bring performed was from the access ladder to the foundation of the residential structure. For the purpose of uniformity that area will be referenced by the Court as the "working area." The working area is the only area in dispute in this case because Ramirez, the employee working in Trench 1, was only working in the work area. Tr. 59, 61, 92-93. The CSHO agreed the area in which the Ramirez was working was between the area from the ladder to the foundation of the residence. *Id*.

[6] The Parties used the term engineering rod, trench rod and measuring rod during the trial. The purpose of the rod was to take measurements. The Court will use the term "measuring rod" for uniformity.

IV. APPLICABLE CASE LAW

For most standards, including the one at issue here, Complainant is not required to prove the existence of a hazard each time a standard is enforced.[7] *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981); *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978) (Complainant not required to prove violation related to walking and working surfaces constituted a hazard). Instead, the hazard is presumed, and the Complainant's burden is limited to showing: (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Grp., Inc*., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009); *Atl. Battery Co.,* 16 BNA OSHC 2131 (No. 90-1747, 1994).[8]

Complainant must establish his case by preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

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[7] The Commission has held that, when a standard prescribes specific means of enhancing employee safety, [a] hazard is presumed to exist if the terms of the standard are violated."). *Joseph J. Stolar Constr. Co*., 9 BNA OSHC 2020, 2024 n.9 (No. 78-2528, 1981). *See also Kaspar Electroplating Corp*., 16 BNA OSHC 1517 (No. 90-2866, 1993). *See also Sanderson Farms, Inc. v. Perez*, 811 F.3d. 730 (5th Cir. 2016). In this case the regulation cited does not require the Secretary to prove the existence of a hazard since it is a specification standard. It is not necessary to show Respondent understands or acknowledges the physical conditions were actually hazardous. *Phoenix Roofing, Inc*., 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

[8] The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court applies the precedent of the Seventh Circuit where it differs from the Commission in deciding this case.

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.
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> *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

V. CITATION 1, ITEM 1

The cited regulation, as written and issued by Complainant, states:

> 29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(b) or 1926.652(c).
>
> a) On April 30, 2021, an employee was not protected from the hazard of cave-in while working in a trench measuring **approximately** 5.6 feet in depth. (Emphasis added.)

However, the complete regulation, which was not set forth in the Citation, states as follows:

> 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 in entirely stable rock; or (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.** (Emphasis added).
>
> 29 C.F.R. § 1926.652(a)(1).

VI. APPLICATION OF THE REGULATION

Under Commission precedent, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited

employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *KS Energy Servs., Inc.,* 22 BNA OSHC 1261, 1267 (No. 06-1416, 2008) (finding "the cited ... provision was applicable to the conditions in KS Energy's traffic control zone"), *aff'd*, 701 F.3d 367 (7th Cir. 2012); *Active Oil Serv., Inc.,* 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005) (finding "that the confined space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.,* 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004) ("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.").

Respondent's position is the standard does not apply because Complainant failed to establish the depth, in the working area of Trench 1, was five feet or greater because of how the measuring rod and ladder were placed within Trench 1 when the CSHO took his third measurement which was outside the working area.

Therefore, Complainant must establish the depth in the "working area of Trench 1 must be five feet or greater for the regulation to apply. If the depth in the working area of Trench 1 was less than five feet, for Respondent to prevail through the exception defined in the regulation, it must establish a competent person made a determination there was no cave-in potential. *Manti d/b/a Manti Himes*, 16 BNA OSHC 1458, 1461 (No. 92-2222, 1993). *See also* Commission 30(g), 29 C.F.R. § 2200.30(g).

A. Complainant Failed to Prove the Working Area of Trench 1 was Five Feet or Greater in Depth

Complainant seeks to establish the depth within the working area of Trench 1 was greater than five feet through the testimony of the CSHO and two pictures introduced at trial. *See* Ex. C-4, pp. 1-2.

The CSHO testified the depth of the working area of Trench 1 was "approximately" 5 ft. 6 inches." Tr. 52-55, 205. His testimony indicated he measured the depth of the working area of Trench 1 on the side of the access ladder facing the sidewalk which Mr. Ramirez used to exit Trench 1. Tr. 51-562, 54. *See also* C-4, pp. 1-2 which indicates the measuring rod was on the side of the access ladder facing the sidewalk which is not in the defined working area. The CSHO also testified the floor of Trench 1 was level. Tr. 54, 205. While the photographs at Ex. C-4, show the access ladder and the side of the access ladder from which the CSHO took the measurements from, Ex. C-4 does not show the floor of Trench 1 to ascertain if the floor was level.

Complainant relies on Ex. C-4, pp. 1 and 2 to establish the depth of the working area of Trench 1 was five feet or greater. The CSHO testified, by looking at the access ladder in Trench 1 as depicted in Ex. C 4, p.1 and counting the rungs or steps of the access ladder from the bottom of Trench 1 to the top of it, a determination of the depth can be made that the working area of Trench 1 was greater than five feet. Tr. 53, Ex. C-4, p. 1. The CSHO stated the distance between each rung or step was one foot. Tr. 50. A measuring rod in Trench 1 is also captured in Ex. C-4, p. 1. There was no testimony as to what the measuring rod showed in this specific picture; therefore, the Court cannot conclude by merely looking at the picture what depth the measuring rod depicts.

The Complainant also presented evidence the measuring rod in Ex. C-4, p. 2 shows the depth of Trench 1 is greater than five feet. At first glance merely looking at Ex. C-4, p. 2, an individual could conclude that without other factors weighing into the determination, the depth of Trench 1 was greater than five feet.

Respondent disputed the conclusion of the CSHO that the depth of the working area in Trench 1 was greater than five feet based on: (i) the measurement taken by the CSHO was not within the working area of Trench 1; and (ii) the access ladder, in both pictures, were leaning at an angle and was not vertical against the excavation wall. Tr. 228. Mr. Ciccone testified the correct way to measure the depth of the working area of Trench 1 would be to place the measuring rod and the ladder in a position where it was vertical against the excavation wall. Tr. 228-229. Mr. Ciccone's testimony that the ladder which was used as the basis for measurement of the depth of Trench 1, contradicts the CSHO's testimony that the ladder, when the measurements were taken, was vertical or straight against the trench wall. Tr. 53-54, 91, 208. The Court assigns greater weight on this issue to the position of Respondent. First, looking at both pictures in C-4, the ladder is at an angle. It is not straight and vertical as testified to by the CSHO. Second, the CSHO contradicted his own testimony on this issue when he responded to questions regarding Ex. C-6, Complainant asked the CSHO whether the ladder shown in Ex. C-6 was the same ladder that appears in Ex. C-4, pp, 1, 2. The CSHO responded that it was and stated "the access ladder was leaning against the right side of the trench wall." Tr. 60-61, Ex. C-6. Third, the CSHO testified the ladder was in a manner in which Ramirez was able to freely use the ladder to access as well as exit Trench 1. Tr. 47-48, 60, 74, 204-205. If the ladder

was straight and vertical against the trench wall it would have been difficult, according to common sense and the laws of physics, for Ramirez to easily access or exit Trench. There was no testimony the ladder was secured or anchored at the top of the ladder to prevent the ladder from falling backwards if an individual was exiting the trench by climbing up a straight and vertical ladder. So logic would conclude for Ramirez to easily access or exit Trench 1, the access ladder would have had to been tilted against the right side of the excavation wall as the CSHO testified when questioned regarding Ex. C-6. The CSHO also testified he did not move or touch the access ladder before, during or after taking his measurements. Tr. 52.

Respondent also testified the CSHO measured two additional places in the "working area" and those measurements indicated the depth of Trench 1 were not over five feet. Tr. 226-227.

In addition, the third measurement which supports the issuance of the Citation, was taken in an area which Respondent argues was not within the defined working area. The area the measurement was taken from is depicted in Ex. C-4, p.1 and confirmed by the CSHO. It shows that measuring rod on the side of the access ladder which faces the sidewalk – not the residence. Respondent argues: (i) this area is not within the working area Ramirez traveled while in Trench 1; and (ii) Ramirez would not have had to go as far as where the measuring rod is to exit Trench 1. The CSHO testified he chose this area of Trench 1 because he observed that was exactly where Ramirez stepped onto the ladder to exit and because the depth of the trench at that location was "a bit deeper." Tr. 52. The Court is left with the question how the CSHO knew that area was the exact spot stepped at

by Ramirez and the bottom of trench was a "bit deeper" when he previously testified the bottom of the trench was even and it did not have any change in elevation. Tr. 54. In addition, the observations of the CSHO would have had to been observed while he was standing at surface level since he testified he never entered Trench 1. Tr. 48-51.

Respondent's argument regarding the effect the angle or tilt of the ladder and the measuring rod in Trench 1 would have on the measurement that was taken, is simple to understand in layman's term. What Mr. Ciccone was stating, in layman's terms, is nothing other than a well-recognized geometry principle documented by reliable publications. And that principle is "the longest side of a right triangle is the hypotenuse" using the Pythagorean theories.[9] The Court takes judicial notice[10] of this well-known and established geometry principle which Mr. Ciccone was trying to relay in his testimony. The Court finds the measurement and counting of ladder steps on which Complainant relies to establish Trench 1 was five feet or greater are inaccurate based on the tilt or angle placement of the ladder. The tilt or angle of the ladder is the lynchpin since the issue is whether the ladder being at an angle or tilt added approximately seven inches to the depth of Trench 1 so the Citation was supportable in that context.

It was not impossible or impractical for the CSHO to have had the ladder and measuring rod be placed directly vertical to the excavation wall to obtain the depth measurement. It would have taken the CSHO little time and effort to ensure the vertical

[9] *See Hypotenuse* at Encyclopedia of Mathematics, http://encyclopediaofmath.org/index.php?title=Hypotenuse&oldid+32067

[10] The decision on whether to take judicial notice is one for the court alone to make pursuant to Fed.R.Evid. 104(a). *U.S. v. Bello*, 194 F.3d 18 (1st Cir. 1999). Judicial notice is appropriate when certain facts are beyond any serious dispute because they are such common knowledge or accurate determinations that evidence their existence is not necessary. *York v. American Tel. & Tel. Co*., 95 F.3d 948 (10th Cir. 1996).

placement of the ladder and measuring rod when taking his measurements. In this case, where the issue boils down to "approximately" seven inches from having the regulation apply or not apply (from 4 ft. 11 inches to approximately 5 ft. 6 inches as set forth in the Citation), being thorough and complete in the correct placement of the measuring rod and ladder would have not placed the measurements of Complainant into question.

In addition, the CSHO testified he was trained and had used in the past a method which would been better to use in this case to obtain accurate measurements when entry into a trench is not feasible. He referred to that method as a "fish tape" method. This method is where fish tape is put on the top of a measuring rod and then dropped into the trench to obtain measurements. Tr. 50-51. This certainly would have avoided the geometry principle invoked by Respondent to invalidate the method and measurement taken by the CSHO in this case.

Finally, the wording used by Complainant in the alleged violation description contained in the Citation, by describing the depth as "approximately five feet six inches" did send a message to the Court the Complainant himself was unsure about the actual depth of Trench 1 and the methods utilized in this case.

For all of the reasons stated above, the Court finds Complainant did not carry his burden of proof to present reliable evidence that Trench 1 was five feet or greater for the regulation to apply.

B. Trench 1 was Not in Stable Rock

While there is a dispute between Complainant and Respondent as to the composition of soil in Trench 1 the Court finds that dispute is not material to a finding of

whether Respondent can rely on an exemption set forth in the cited regulation. Respondent contends the soil was "mixed" soil with clay, gravel with a black dirt top. Tr. 229-230. Complainant defined the soil as clay and sand. Tr. 61-62, 168. While there may be a dispute as to what the composition of the soil for soil classification purposes, there is no dispute the soil was not stable rock for the purpose of determining the applicability of one of the exceptions. Whether the soil was a combination of clay, dirt or sand, it does not constitute stable rock. The exception contained in the regulation on the basis of stable rock is not available to Respondent.

C. Competent Person

Respondent argued Trench 1 was less than five feet and a competent person made a determination there was no potential cave-in. Complainant having failed in its' proof Trench 1 was five feet or greater, the analysis now goes to whether a competent person was at the worksite the day of the inspection. It is undisputed Ciccone was the competent person at the worksite. Tr. 48-49, 70-71, 212, 218, 222.

D. Determination of Competent Person Trench 1 Had no Cave-in Potential

The final determination is whether Mr. Ciccone, as the competent person, made a determination of the ground in Trench 1 to determine there is no cave-in potential. Ciccone testified he did make that determination. Ciccone testified he first made a determination the excavation did not need to go five feet or over. He stated he talked to the plumbing inspector to obtain his approval to not go five feet in depth as required by the city code and instead would dig only to the top of a footing. The city inspector gave his approval. Being permitted to dig to the top of the footing of the current space would

not require Respondent to dig down five feet. Tr. 220, 232-233. Performing the job in this fashion is the likely reason when the CSHO conducted his first measurement, the depth of Trench 1 was not over five feet. Second, Mr. Ciccone indicated he next measured the excavation on where to place the access ladder. He then measured the depth of Trench 1 between the access ladder and the foundation, i.e. working area to determine if the depth was under five feet, Mr. Ciccone testified those measurements indicated the depth of Trench 1 was under five feet This also could account for the reason the CSHO's second set of measurements also indicated the depth was under five feet. Finally, the placement of the access ladder was to define a working area where the depth was not greater than five feet. Tr. 224, 230-236.

As to Mr. Ciccone examination of the ground conditions, he stated three feet from the foundation has been previously disturbed when the residence was built. Thus, he classified that as Type B. For the ground three feet from the foundation forward to the sidewalk, he determined the soil was previously undisturbed and was made of clay with a black dirt top. He classified that soil as Type A. Mr. Ciccone stated he did not find a hazard of a cave-in due to this soil configuration. Tr. 229-235.

Complainant evidentially takes the position such determination should have been documented since during trial he elicited testimony that Mr. Ciccone's actions were not documented. Tr. 223-224. The cited regulation does not require the determination has to be documented. Complainant did not cite to any case precedent to support this position. Ciccone's testimony was not contradicted by Complainant. The Court finds Respondent,

through its competent person, did make a determination that the ground soil in the working area of Trench 1 did not have a cave-in potential.

VII. CONCLUSION

The Court finds: (i) Complainant failed to establish the working area of Trench 1 was five feet or greater; (ii) Respondent did establish Mr. Ciccone was the competent person at the worksite on the day of the inspection; and (iii) Respondent did establish Mr. Ciccone made a determination that based on ground conditions there was no cave-in potential in Trench 1.

Based upon the above findings of fact and conclusions of law Citation 1, Item is VACATED.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
First Judge - OSHRC

Denver, CO
Dated: September 28, 2022