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. HUBBARD CONSTRUCTION COMPANY, Respondent.	OSHRC Docket No. 11-3022

APPEARANCES:

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For the Complainant.

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For the Respondent.

BEFORE: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (the Act). The Occupational Safety and Health Administration (OSHA) inspected a worksite of the Respondent, Hubbard Construction Company (Hubbard), on September 12, 2011. The site was a road construction project involving U.S. Highway 19 in Clearwater, Florida. The inspection resulted in OSHA

issuing to Hubbard a one-item repeat citation that alleged a violation of OSHA's excavations standard. Hubbard contested both the citation and the proposed penalty of $38,500. The hearing took place in Tampa, Florida, on October 4, 2012. Post-hearing briefing was completed on December 21, 2012.

For the reasons described below, the repeat citation is affirmed and a penalty is assessed in the amount of $25,000.

Jurisdiction

Hubbard timely filed a notice of contest and thus the Commission has jurisdiction over this matter pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c).

Hubbard admits that at the time of the inspection on September 12, 2011, it was an "employer" engaged in business affecting commerce with employees as defined in § 3(5) of the Act, 29 U.S.C. § 652(5). (Answer, December 21, 2011). Hubbard was thus subject to the requirements of the Act.

Findings of Fact

Four witnesses testified at the hearing: (1) Brian Robinson, the OSHA Compliance Safety and Health Officer ("CO") whose inspection of the worksite resulted in the issuance of the citation; (2) Keven Yarbrough, the OSHA Acting Area Director in the Tampa, Florida office; (3) Rex Roberts, an Environmental Health and Safety Manager for Hubbard; and (4) Joseph Etter, Hubbard's Environmental Health and Safety Director, and also its Risk Manager. (Tr. 19, 186, 247, 259). The following findings of fact are based on their testimony and the exhibits received in evidence.

On September 12, 2011, CO Brian Robinson conducted a programmed inspection of Hubbard's worksite at a road construction project involving a two-mile segment of U.S. Highway 19 in Clearwater, Florida. Hubbard was the general contractor for the

project. (Tr. 36).

Part of the project entailed creating a trench excavation for the installation of an underground pipe for storm water. (Tr. 249). The trench that is the subject of the citation ran in a north-south axis along the west side of the highway. The sections of pipe were approximately eight feet in length and two feet in diameter, and were being installed on a southerly course. At the time of the inspection, about fifteen installed sections of pipe lay exposed on the floor of the open trench, with the most recently installed section of pipe situated at its southern terminus.

No persons were in the trench when the CO arrived to inspect the trench; two Hubbard employees, J.P. and D.G., were standing nearby. (Tr. 42). The backhoe used to create the excavation was situated at the south end of the trench with its engine running, as if poised to continue the digging the excavation southward. A single trench box was on site and was positioned outside the trench.

The area of the trench that is most relevant to the citation is the location of the last-installed pipe section as of the time of the inspection. For the reasons that are described below, this section of the excavation is referred to hereinafter as the "Unshielded Area."[1]

The soil in the trench was Type C soil as defined in Appendix A to Subpart P of 29 C.F.R. Part 1926. (Exh. C-4; Tr. 54-55). The width of the trench was approximately seventeen feet. (Exhs. C-10 and C-11; Tr. 94). The width of the trench floor was about six feet, including the width of the pipe, which was not centered on the trench floor, but rather was offset toward the western slope. Thus, the distance between the pipe and east

[1] The Unshielded Area is depicted in Exhibit C-1 as being that part of the trench beginning at the blue extension ladder and continuing to the end of the trench at the bottom of the photo.

slope was about three feet, and the distance between the pipe and the west slope was about one foot.[2] The depth of the trench was about six feet and two inches. (Tr. 71; Exhs. C-10 and C-11). The angle from horizontal of the west slope was around 48.8 degrees. (Tr. 71; Exhs. C-10 and C-11). The angle from horizontal of the short south slope, at the end of the trench, was around 33.7 degrees. (Ex. C-10; Tr. 85). The angle from horizontal of the east slope was about 33.9 degrees.[3] However, at a point about two to three feet above the trench floor, a "cut" had been dug out of the east slope that resulted in a somewhat irregular surface, and with a slope angle throughout that was steeper than 34 degrees and that in spots was near vertical. (Exhs. C-1, C-2, C-5).

There was not enough terrain along the route of the pipeline to accommodate an excavation with slopes no steeper than 34 degrees for all sides of the trench. Because of this, Hubbard had used the trench box as a protective system for employees who were entering and working in the trench during the installation of all sections of the pipeline in areas outside of the Unshielded Area. (Tr. 62; Exhs. C-1 and C-2).

In the course of creating the trench in the Unshielded Area, an underground utility line was encountered at a depth of about three feet. This line traversed the trench on a diagonal path from northeast to southwest; it was about three inches in diameter and was flexible and hose-like in appearance. (Exhs. C-1 and C-2). It was lying on top of the

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[2] The CO did not enter the trench and did not measure the trench floor. The findings as to the distances between the pipe and the opposite sides of the trench are based on the scale of the two-foot diameter pipe relative to the trench floor as reflected in Exhibits C-1, C-2, and C-9.

[3] The findings in this paragraph respecting the slope angles and depth in the Unshielded Area are based upon the CO's testimony regarding the measurements he made using certain instruments. After the inspection, Hubbard conducted independent measurements of the Unshielded Area. Hubbard has not challenged the accuracy of the CO's measurements. (Tr. 105, 107, 250).

last-installed section of pipe at the point of intersection at the time of the inspection.[4] (Exhs. C-1, C-2, C-5, C-6, and C-9).

Hubbard's foreman overseeing the installation of the pipe also functioned as its designated "competent person" as defined in 29 C.F.R. § 1926.650(b). (Ex. 14, Response to Req. for Admis. No. 4; Tr. 249). Upon encountering the traversing utility line, the foreman determined not to use the trench box for the installation of the last-installed pipe section, and the trench box was removed from the trench. (Tr. 78, 95). The foreman instructed two of Hubbard's employees to enter the Unshielded Area to continue the installation without the use of the trench box or other protective system. (Tr. 69-70, 89-90, 95).

During the inspection the foreman told the CO that (1) the trench was being dug in Type C soil, (2) the trench was six feet deep, (3) the pipe being installed was two feet in diameter, (4) he had used the trench box in the excavation until he encountered the conflict with the traversing utility line in the Unshielded Area, at which point he caused the trench box to be removed from the excavation, (5) he had 30 years of experience in doing similar work, (6) he thought the trench was safe when he instructed the two employees to enter the trench to install the pipe section without the trench box in place, and (7) the two employees had worked in the Unshielded Area without the protection of the trench box for five or six minutes. (Ex. C-11; Tr. 87-95).

In the CO's interviews with the two employees who had worked in the Unshielded Area, each confirmed having complied with the foreman's instructions to

[4] Also, four additional underground utility lines were embedded about three to four feet deep near the surface of the western slope, but these lines were routed parallel to the path of the pipeline and did not cross the trench. (Exh. C-6).

enter and work in that area without the use of the trench box.[5]

As a result of the inspection, the Complainant issued to Hubbard a single item citation alleging a repeat violation of the standard set forth in 29 C.F.R. § 1926.652(a)(1).

The Citation

The citation alleges a repeat violation of the cited standard as follows:

> 29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one half horizontal to one vertical (34 degrees measured from the horizontal):
>
> (a) Employees working in a 8 foot deep trench were exposed to a crushing hazard in that, the east side of the trench where the crew was working was sloped at 48.8 degrees. The west side of the trench was sloped at 38 degrees in type C soil. No protective system was provided for workers in the trench.
>
> Hubbard Construction was previously cited for a violation of this occupational safety and health standard 29 CFR 1926.652(a)(1) which contained inspection number 310607981 citation 1 item 1 and was affirmed as a final order on 10/16/07, with respect to a work place located at Colonial Rd & Daniels Rd Winter Garden, FL 34777.

The Complainant's Motion to Amend the Citation

Hubbard's initial challenge to the citation relates to the erroneous description of the trench's depth, slope angles, and directional orientation as established by the evidence. As described above, (1) the trench was approximately six feet deep (not eight feet as alleged), (2) the *west* side of the trench had a slope of 48.8 degrees (not the east side as was alleged), and (3) a portion of the opposite side of the trench (the *east*, not the west side as alleged) had a slope of 33.9 degrees (not 38 degrees as alleged). Moreover,

[5] No evidence was presented as to whether either of the employees stated how long they had been in the Unshielded Area, or precisely where they were positioned in that area. Similarly, no evidence was presented as to whether they had received any special instructions from the foreman regarding their activities or positioning while in the Unshielded Area.

the description of the trench in the citation made no mention of the east side of the trench having a "cut" that caused the lower part of that slope to be steeper than 34 degrees.

Hubbard argued in its post-hearing brief that the citation should be vacated because "the proof does not match the allegations" and that "the Secretary has never moved to amend the pleadings to conform to the evidence." (Resp't Br. p. 7). The Complainant's post-hearing brief stated that "[t]o the extent necessary to clarify the record," the Complainant requested that the citation's alleged violation description "be amended to reflect the evidence as developed at the hearing" as follows:

> Employees working in a 6 foot deep trench in type C soil were exposed to a crushing hazard in that, one side of the trench where the crew was working was sloped at 48.8 degrees. The other side of the trench had a three foot tall unsupported vertical cut to the floor of the trench, and was sloped at 33.9 degrees above the cut. No protective system was provided for workers in the trench.

(Complainant's Br. p. 22). Hubbard challenges the proposed amended description, asserting that such an amendment would be "futile" because the evidence failed to support all particulars of the proposed amended allegations. (Resp't Reply Br. p. 1).

For the reasons described below, Hubbard's request to vacate the citation is denied, and the citation is amended to conform to the evidence in accordance with Rule 15(b)(2) of the Federal Rules of Civil Procedure.

Commission Rule 34(a), 29 C.F.R. § 2200.34(a), requires that a complaint set forth "with particularity … [t]he time, location, place, and circumstances" of each alleged violation. In this case, the complaint incorporated by reference the flawed alleged violation description set forth in the citation.

The standards by which administrative pleadings are assessed in proceedings before the Commission were stated in *General Dynamics Land Systems Div. Inc.*, 15 BNA OSHC 1275, 1279 (No. 83-1293, 1991) (internal citations omitted):

> It is well settled that administrative pleadings are to be liberally construed and easily amended. This has been particularly true for citations issued under the Act, which are drafted by non-legal personnel who are required to act with dispatch. To inflexibly hold the Secretary to a narrow construction of the language of a citation would unduly cripple enforcement of the Act.
>
> That administrative pleadings are to be liberally construed does not, however, obviate the need for particularity in the statement of the charge against the employer. Administrative pleadings must afford the employer a fair opportunity to prepare and present a defense. A citation must be drafted with sufficient particularity to inform the employer of what it allegedly did wrong and that it must either contest the Secretary's allegations or pay the proposed penalty.

In proceedings before the Commission, Rule 15(b)(2) of the Federal Rules of Civil Procedure governs the amendment of pleadings after hearing. *Nordam Grp.*, 19 BNA OSHC 1413, 1414 (No. 99-0954, 2001). Rule 15(b)(2) provides as follows:

> ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Rule 15(b)(2) is mandatory, not merely permissive, "in requiring that issues that are tried, though not raised in the pleadings, be treated as if they were raised in the pleadings." *Ostano Commerzeanstalt v. Telewide Sys., Inc.*, 880 F.2d 642, 646 (2d Cir. 1989). Thus, "[w]hen issues not mentioned in the complaint … are nevertheless litigated with the consent of the parties, the complaint is … simply an irrelevance so far as those issues are concerned." *Torry v. Northrup Grumman Corp.*, 399 F.3d 876, 878 (7th Cir. 2005) (Posner, J.).

Amendment under Rule 15(b)(2) "is proper only if two findings can be made – that the parties *tried* an unpleaded issue and that they *consented* to do so." *McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129 (No. 80-5868, 1984) (emphasis in original).

"Trial by consent may be found only when the parties knew, that is, *squarely recognized*, that they were trying an unpleaded issue." *Id.* at 2129-30 (emphasis added).

For purposes of this analysis, the undersigned will assume that the disparity between the allegations and the evidence as to (1) the directional orientation of the trench, (2) the depth of the trench, (3) the angle of one of the slopes of the trench, and (4) the presence of a "cut" in one of the slopes, each constitutes "an issue not raised by the pleadings" within the meaning of Rule 15(b)(2).[6] The only reasonable view of the record is that the parties (1) actually tried those issues, and (2) impliedly consented to do so.

It was abundantly clear from the very outset of the hearing that both parties recognized that the citation contained flawed allegations of fact regarding depth and slope angles. The opening statement of counsel for the Complainant foreshadowed the discrepancy between the allegations of the citation and the expected evidence to be presented. (Tr. 12-13). Similarly, Hubbard's counsel addressed the discrepancies head-on in his opening statement. (Tr. pp. 15-16). The discrepancies were thoroughly explored in the course of the one-day hearing, which is to say they were "actually tried." Further, the parties without question "squarely recognized" that the matter being tried was the configuration of the trench as described by the CO in his testimony, and not as was erroneously described in the citation.

[6] These specific matters might be more correctly viewed simply to be *erroneously* pleaded allegations of fact (not *unpleaded* issues of fact) that related to the *pleaded* issue of whether the trench met the cited standard. Considered in such a light, these erroneous allegations would not constitute "an issue not raised by the pleadings" within the meaning of Fed. R. Civ. P. 15(b)(2), and there would be no cause to consider whether such allegations of fact were tried by consent. Rather, the adequacy of the complaint would be evaluated solely against the standard described in *General Dynamics*. The complaint meets that standard in that it was "drafted with sufficient particularity to inform the employer of what it allegedly did wrong." *Id.* at 1279.

The erroneous allegations of the citation did not prejudice Hubbard in the presentation of its defense. Hubbard points to no evidence it would have presented if the citation had been more accurately drafted. It does not assert that the erroneous allegations had any adverse effect on the manner of its presentation of its case or on its theory of defense. Hubbard had a full and fair opportunity to present a defense.

Accordingly, the issues respecting the configuration of the trench that varied from the allegations of the citation *must* be treated as if they had been raised by the pleadings pursuant to Rule 15(b)(2). The Secretary's motion to amend the citation in the manner requested is therefore granted.[7, 8]

The Cited Standard

The cited standard, 29 C.F.R. § 1926.652(a)(1), 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.

Paragraph (b) of § 1926.652, which is referred to within the cited standard, provides in pertinent part as follows:

> (b) *Design of sloping and benching systems.* The slopes and configurations of sloping and benching systems shall be selected and

[7] The granting of the motion to amend does not amount to a finding that all matters alleged through the amendment were necessarily proven by a preponderance of the evidence. As reflected by the findings of fact above, the weight of the evidence does not support a finding that the cut in the eastern slope resulted in a three-foot high vertical lower section of the east slope in the Unshielded Area.

[8] The Complainant is reminded that the Commission disapproves of the practice of interposing a motion to amend the pleadings in a brief, and that the proper method of seeking such a post-hearing amendment is by separate written motion. *See McWilliams Forge*, 11 BNA OSHC at 2131. In this case, no prejudice resulted to Hubbard because it was able to respond to the Complainant's request in its reply brief.

> constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3), or, in the alternative, paragraph (b)(4), as follows:
>
> (1) *Option (1)—Allowable configurations and slopes.* (i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.
>
> (ii) Slopes specified in paragraph (b)(1)(i) of this section, shall be excavated to form configurations that are in accordance with the slopes shown for Type C soil in appendix B to this subpart.
>
> (2) *Option (2)—Determination of slopes and configurations using Appendices A and B.* Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.

Paragraph (c) of the § 1926.652, which is also referred to within the cited standard, sets forth design options for various protective systems, including shield systems such as a trench box.

The Complainant's Burden of Proof

To prove a violation of an OSHA standard, the Complainant must show by a preponderance of the evidence that: (1) the cited standard applies; (2) its terms were not met; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violation. *Astra Pharm. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Whether the Cited Standard Applies

To establish that 29 C.F.R. § 1926.652(a)(1) applies to the trench, the Complainant must show that employees were working in an excavation more than five feet deep, unless the excavation was dug in stable rock. The depth in the Unshielded Area was approximately six feet and two inches. Hubbard's employees were performing

work while inside the trench. The Complainant has established that 29 C.F.R. § 1926.652(a)(1) applies.

Whether the Terms of the Cited Standard Were Met

Hubbard did not meet the terms of the standard as to work done by employees within the Unshielded Area of the trench. In order to meet the cited standard in Type C soil without the use of a protective system such as a trench box, the slopes of the trench were required to be no steeper than 34 degrees from horizontal. Moreover, any excavation in Type C soil with a slope that does not exceed 34 degrees, but that has any vertically sided lower portion, must be shielded or supported to a height at least 18 inches above the vertical side. *See* Figure B-1.3 in Appendix B to Subpart P of Part 1926. The configuration of the trench in the Unshielded Area failed to meet these standards.

With a slope angle of 48.8 degrees, the west slope caused the trench to fail to conform to the minimum slope angles for an unsupported or unshielded trench in Type C soil. Moreover, the east slope of the Unshielded Area likewise caused the trench to fail to conform to the minimum slope angle for an unsupported or unshielded trench in Type C soil -- the irregular surface of the cut resulted in a slope greater than 34 degrees throughout the part of the slope where the cut had been dug out. This rendered the trench non-conforming to the cited standard absent the use of a support or shield system.

The Complainant has established that the terms of 29 C.F.R. § 1926.652(a)(1) were not met.

Whether Employees Had Access to the Violative Condition

Employee access to a violative condition may be shown through either actual employee exposure, or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger." *Gilles & Cotting,*

Inc., 3 BNA OSHC 2002, 2003 (No. 504, 1976). The test of whether an employee would have access to the "zone of danger" is based on "reasonable predictability." *Id.; Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996) (citation omitted).

Hubbard argues that "the exposure of the employees to any hazard was minimal at best" because (1) "the majority of the footprints were on the eastern side, away from the steeper western slope," (2) "some of the footprints were on top of the two foot diameter pipe," and (3) the "employees who worked in the trench were only present for approximately five to six minutes." (Resp't Br. pp. 4-5).

The Complainant has established employee access to the violative condition through proof of actual exposure for a period of five to six minutes. Contrary to Hubbard's assertion, most of the boot prints were nearer to the steeper western slope, particularly the boot prints on the top of the installed pipe, which nearly abuts the western slope in parts of the Unshielded Area. (*See* Exhs. C-1, C-2, C-5, C-9). The employees were actually exposed to a cave-in hazard while present in the locations established by their boot prints in the Unshielded Area, as well as every other location within the Unshielded Area in which they were necessarily present in the course of installing the pipe section.

Hubbard's seeming suggestion that exposure to the violative condition was obviated or mitigated when an employee was standing on the two-foot diameter pipe that had been installed in the six-foot trench, is rejected. One court has harshly criticized a similar argument as follows:

> The safety standard is implicated by the depth of a particular trench, without regard to an individual worker's precise position in it. The notion that having workers stand on a laid pipe within a trench is a satisfactory method of protecting them from the risk of cave-ins is

> nonsense.… [T]he regulations … allow employers to choose from a limited universe of acceptable procedures, not to jury-rig convenient alternatives and impose them on an imperilled [sic] work force.

P. Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 109 (1st Cir. 1997) (citing *Ford Dev. Corp*., 15 BNA OSHC 2003, 2011, *aff'd*, 16 F.3d 1219 (6th Cir. 1994)). The Secretary has proven that employees had access to the violative condition.

Hubbard's contention that "the exposure of employees to any hazard was minimal at best," even if accepted as accurate, is no defense to the "employee access" element of an alleged violation. The cited standard, 29 C.F.R. § 1926.652(a)(1), is a specific "occupational safety and health standard" as defined by section 3(8) of the Act, 29 U.S.C. § 652(8), that was promulgated pursuant to section 6(b) of the Act, 29 U.S.C. § 655(b). Such a specific occupational safety and health standard "presupposes the existence of a hazard when its terms are not met." *Del-Cook Lumber Co.*, 6 BNA OSHC 1362, 1365 (No. 16093, 1978). The Complainant "is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation." *Austin Bridge Co.*, 7 BNA OSHC 1761, 1766 (No. 76-93, 1979).

Whether Hubbard Had Knowledge of the Violation

To establish employer knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, could have known of the conditions constituting the violation. *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007). The actual or constructive knowledge of its supervisors and foremen is generally imputable to the employer. *Rawson Contractors Inc.*, 20 BNA OSHC 1078, 1080-81 (No. 99-0018, 2003); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991).

Hubbard's foreman at the worksite served also as the designated "competent person," as defined in 29 C.F.R. § 1926.650(b). In the course of the inspection, the foreman told the CO that the trench was being dug in Type C soil, that it was six feet deep, and that a trench box had been used in the trench up to the time that the utility line that crossed the trench was encountered. The foreman told the CO that he instructed the employees to continue the installation without using the trench box. The actual use of the trench box up to the time of the utility line issue establishes that the foreman had actual knowledge that the trench was not sufficiently sloped to comply with the cited standard and that the use of some support or shield system was necessary to conform to the standard. The foreman's actual knowledge of the violation is imputed to Hubbard. The Complainant has established Hubbard's knowledge of the violative condition.

Affirmative Defense of Infeasibility

Hubbard did not interpose the affirmative defense of "infeasibility" in its Answer to the Complaint and did not seek to amend its Answer before or during the hearing.

In Hubbard's post-hearing brief, Hubbard argued for the first time that compliance with the standard in the Unshielded Area was infeasible because of the interference of the utility line. After filing that brief, Hubbard filed a "Motion to Amend Affirmative Defenses" to assert "the affirmative defense that compliance with the cited standard was infeasible." The Complainant opposes the motion to amend.

When an OSHA standard "states a specific method of complying, an employer seeking to be excused from liability for its failure to comply with the standard has the burden of demonstrating that the action required by the standard is infeasible under the circumstances cited." *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160 (No. 90-1620, 1993)(consolidated). An employer who raises the affirmative defense of infeasibility has

the burden to prove that "(1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) *either* an alternative method of protection was used *or* no alternative means of protection was feasible." *Id.* (emphasis in original).

The legal standards applicable to Hubbard's motion to amend the pleadings after hearing are set forth above in connection with the discussion of the Complainant's motion to amend the complaint. Here, it would be improper to grant Hubbard's motion because the parties neither tried the issue of infeasibility nor impliedly or expressly consented to do so. *McWilliams Forge Co., Inc.*

Moreover, even if Hubbard were allowed to amend its Answer post-hearing, the evidence presented at the hearing was insufficient to support even a *prima facie* case of the infeasibility defense.

Accordingly, Hubbard's post-hearing request to interpose an infeasibility defense fails on both procedural and substantive grounds. Hubbard's motion to amend is denied.

"Repeat" Classification of Violation

A violation may be deemed a repeat violation "if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). A *prima facie* case of substantial similarity may be established "by showing that the prior and present violations are for failure to comply with the same standard." *Id.*

The violation occurred on September 12, 2011. The Secretary alleges that it is a repeat violation because a citation had been issued against Hubbard on November 9, 2006, that charged a "serious" violation of the same standard involved here that occurred on October 30, 2006 in Winter Park, Florida. The citation in the prior case alleged that Hubbard's employees were working in an unprotected excavation that was sloped at an

angle steeper than the 34-degree maximum allowed by § 1926.652(b)(1)(i). The parties settled the prior citation as an "other than serious" violation through an informal settlement agreement dated December 1, 2006, which became a final order on October 16, 2007. (Ex. C-14, Resp't Resp. to Req. for Admis. No. 14).

Both the prior and present violations were of the same standard. In both cases, Hubbard caused its employees to perform work in an unprotected excavation with a slope that was steeper than the maximum permissible angle of 34 degrees measured from horizontal. (Ex. C-12). The Complainant has established that the present violation is substantially similar to the 2006 violation.

Hubbard challenges the "repeat" classification because the present violation occurred more than three years after the date of the final order of the prior violation. Until October 1, 2010, the Complainant's policy had been to consider a violation to be a "repeat" only if it occurred within three years of the either final order date or the final abatement date of a prior violation, whichever was later. This policy has been set forth in OSHA's Field Operations Manual (FOM).

In September 2010, the Complainant announced that effective October 1, 2010, this three-year time frame would be expanded to five years. (Ex. A). The Complainant's articulated reason for this expansion of the time frame (as well as for other changes to the administrative penalty calculation system) was that the former policies had resulted "in penalties which were often too low to have an adequate deterrent effect." (Ex. A).

Hubbard argues that the Complainant's change of policy is arbitrary and capricious and thus unlawful under the judicial review provisions of the Administrative

Procedure Act (APA), specifically 5 U.S.C. § 706(2)(A),[9] because the Complainant "failed to provide any reason or explanation whatsoever for the Agency's departure from its prior policy of looking back only three years for repeat violations." (Resp't Br. p. 9). Hubbard contends that it is unlawful to classify the instant violation as a repeat by application of the expanded five-year time frame.

Hubbard's assertion that the Complainant provided no reason or explanation for the change in policy is simply incorrect. In the public announcement of the change, the Complainant articulated a reason for the change -- to enhance the deterrent effect of penalties. *See* Exhibit A.

An agency's change in policy in the enforcement of the statute it administers will withstand scrutiny against a claim of arbitrariness or capriciousness under 5 U.S.C. § 706(2)(A) if the new policy "is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 1811 (2009) (emphasis in original).

The Complainant's articulated reason meets this standard. Expanding the time frame for a potential repeat violation from three years to five years is permissible under the Act because "the time between violations does not bear on whether a violation is repeated" under section 17(a) of the Act, 29 U.S.C. § 666(a). *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003), quoting *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1168 (No. 90-1307, 1993). Moreover, OSHA materials such as the FOM "are only a guide for OSHA personnel to promote efficiency and uniformity, are not

[9] Section 706(2)(A) requires that on judicial review of an agency action, "[t]he reviewing court shall -- … hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not according to law."

binding on OSHA or the Commission, and do not create any substantive rights for employers." *Id.* (upholding a "repeat" classification even though prior violations occurred beyond the three-year time frame then set forth in OSHA's predecessor manual to the current FOM).

The Secretary's classification of the violation as "repeat" based on a five-year time frame was lawful. Hubbard's assertions to the contrary are rejected.

Penalty Assessment

The Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). The permissible range of penalties for a repeat violation is from no penalty to $70,000. 29 U.S.C. § 666(a). The Complainant seeks imposition of a penalty of $38,500.

Section 17(j) of the Act, 29 U.S.C. § 666(j), 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. *Specialists of the South, Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). 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 OSHC at 1064. Further, 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.*

In regard to size, Hubbard is a relatively large employer with over 500 employees (Tr. 96-97; Exh. C-11), and thus no reduction of the penalty for size would be appropriate.

As to good faith, Hubbard's foreman and competent person on site made a conscious decision to instruct the two employees to perform work in an unshielded and unsupported trench that the foreman knew did not conform to the excavation standard. The foreman professed to believe that the trench was "safe" for the employees to work in without any shield or support system, but such belief by the designated competent person on site was objectively unreasonable. Hubbard is thus due no reduction for "good faith."

As to history, Hubbard violated the same standard at another work place less than five years before the prior violation. Hubbard is, consequently, due no reduction of the penalty based on its history of violations. However, even though the prior violation was finally adjudicated as "other than serious," OSHA enhanced its proposed penalty by ten percent on the mistaken understanding that it had been adjudicated as serious. (Tr. 219). This enhancement was based on a plain error of fact and was inappropriate.

The undersigned concludes that the violation of the cited standard is of high gravity. 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," and that in response to this problem, OSHA established in 1985 a National Emphasis Program (NEP) respecting

trench and excavation safety. *Calang Corp.*, 14 BNA OSHC 1789, 1794 (No. 85-0319, 1990). That same NEP continues today. (Tr. 243-44). The continuation of the NEP that was initiated in 1985 indicates that the failure to comply with the excavation standards remains a serious problem in occupational safety today. *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, as in *Calang Corp.*, the employer's "[c]onscious disregard of OSHA trenching requirements warrants a substantial penalty because the incidence of cave-ins is high, and the likelihood of death or severe injury to employees in a collapsing trench is also high." *Id.* While the evidence established that the employees were exposed to the violative condition for only five to six minutes, a trench can collapse without warning "in the blink of an eye." (Tr. 209). If a cave-in had occurred during the five to six minute period of exposure, there would have been a "substantial probability that death or serious physical harm could result." (Tr. 205-212). *See Illinois Power Co. v. OSHRC*, 632 F.2d 25, 28 (7th Cir. 1980) ("[T]he language in Section 17(k) requiring a 'substantial probability that death or serious physical harm could result' in order to find a serious violation refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result").

Factors that increased the probability of a cave-in occurring during the five to six minute period of employee exposure included (1) the vibrations from the heavily-traveled highway that ran parallel to and only about 20 feet away from the trench, (2) the vibrations from the backhoe that was running when the CO arrived to inspect the trench,

and (3) the fact that the Type C soil was previously disturbed, as reflected by the utility line that crossed the path of the pipeline in the Unshielded Area, as well as the four utility lines that were partially embedded in the 48.8-degree west slope.

A factor that weighs in favor of assessing a lower penalty than that proposed by the Complainant is the citation's overstatements regarding the depth of the trench and the slope angle of one side of the trench. It is likely that the OSHA officials who calculated the proposed penalty presumed that the trench was configured as the citation erroneously alleged. Such OSHA officials may well have mistakenly concluded that the violative condition that was alleged posed a greater hazard to workers than the hazard that actually was present.

Considering all the factors described above, the undersigned determines that the appropriate penalty to be assessed is $25,000.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based on the above Findings of Fact and Conclusions of Law, it is ordered that Repeat Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED, and a penalty of $25,000 is assessed.

/s/
WILLIAM S. COLEMAN
U.S. OSHRC JUDGE

Date: March 25, 2013
Washington, D.C.