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

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	OSHRC DOCKET NOS. 10-0531
SHAWN TELSI, d/b/a LIFE TIME	:	& 10-0787
HOMES, GREEN PINES, and/or	:	
TELSI BUILDERS,	:	
	:	
Respondent.	:	

Appearances:	Paul J. Katz, Esquire U.S. Department of Labor Boston, Massachusetts For the Complainant.	Shawn Telsi West Roxbury, Massachusetts For the Respondent, *pro se.*
Before:	Covette Rooney Administrative Law Judge	

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") began an inspection of a construction work site of Respondent, Shawn Telsi, on August 24, 2009, due to a complaint about the site. As a result of the inspection, OSHA issued to Respondent a serious citation and a willful citation alleging various violations of OSHA's construction standards. OSHA conducted a second inspection of the same site on February 12, 2010. That inspection resulted in another serious citation, which also alleged violations of OSHA's construction standards. Respondent contested all of the alleged violations that resulted from the two inspections. The hearing in this matter was held in Boston, Massachusetts, on September 28, 2010. Both of the parties have submitted post-hearing filings.

The OSHA Inspection

The construction site was located in Newton, Massachusetts, and involved the building of a temple. OSHA received a complaint about the site, and the complaint referred to employees working in "trenches." On August 24, 2009, OSHA Compliance Officer ("CO") Kenneth Shedden went to the site, where he observed employees working next to the walls of an excavation.[1] One end of the excavation was about 8 feet deep, the other end was about 14 feet deep, and the walls were all vertical. There were spoils piles along the edges of the excavation's walls, and the piles were from 4 to 10 feet high. The employees were erecting foundation forms near one corner of the excavation. To do so, they worked in between the forms and the wall and on the opposite sides of the forms. The CO considered the situation extremely dangerous. If the wall collapsed, an employee between the wall and the forms would be trapped and be killed. And, an employee working on the other side of the forms could potentially be killed, since a cave-in could push the forms over on him. The CO approached an employee, asked who was in charge, and was directed to Shawn Telsi. The CO then spoke to Mr. Telsi, who confirmed that he was in charge and in control of the site. CO Shedden pointed out the hazards in the excavation and told Mr. Telsi he needed to get everyone out. Mr. Telsi told the workers to get out, and they immediately did so.[2] (Tr. 137-40, 193-96).

Mr. Telsi accompanied the CO for part of the walk-around inspection of the site. Besides the vertical walls and the spoils piles on the edges of the walls, the CO observed other hazards. First, no one in the excavation was wearing a hard hat, and employees could have been hit in the head by falling soil and rocks. Second, there were three 8-foot-square holes, each one 7 feet deep, in the excavation. The holes were not covered or guarded, and employees could have fallen into them in the course of their work. Third, the two access ladders at the site were defective, they were 80 feet away from where the employees were, and there was no other means of egress from the excavation. Finally, there was unguarded protruding reinforcing steel in the excavation, and employees could have fallen onto it. The CO discussed all these conditions with Mr. Telsi. He particularly noted how

[1]All dates in this decision will refer to the year 2009, unless otherwise indicated.

[2]These workers were employees of Ocean State Forms. Another individual at the site was operating excavation equipment, and he was an employee of Earth Connections. The workers at the site that day stated that Mr. Telsi was in charge and directing their work. (Tr. 143, 159-60).

dangerous the cave-in hazard was and the fact that somebody could be killed. Mr. Telsi said that he would make sure no one else went into the excavation and that he would fix the hazards immediately. The next day, CO Shedden returned to post an "imminent hazard" notice at the site.[3] He noted that all of the conditions he had seen the day before were the same and that workers were back in the excavation completing the form work. When he asked Mr. Telsi about it, Mr. Telsi refused to answer and walked away. The CO saw one further violation that day, *i.e.*, he saw Mr. Telsi using a single plank to cross over a part of the excavation. The CO determined this was a hazard, as Mr. Telsi could have fallen off the plank.[4] (Tr. 141-43, 146-47, 150, 154-61, 166-203).

The CO returned to the site on August 26, 29, 30 and 31. The conditions remained the same, but no one was at the site. It had rained on August 30, and the CO noted, during his visit on August 31, that the soil was becoming unstable; there were fissures in the spoils piles, and more rocks had fallen into the excavation. The CO went back to the site on September 24 to remove the "imminent hazard" notice. There was an employee working in the same corner where the other workers had been before. The employee was applying waterproofing, and he was not wearing a hard hat. And, while the rest of the excavation had been benched and the spoils piles had been removed or set back, the corner where the employee was had not been corrected. The employee identified himself as David Smith and said he worked for Mr. Telsi. The CO phoned Mr. Telsi and told him he was talking to his employee, Mr. Smith. Mr. Telsi said "oh," and that he would be there "very shortly." When Mr. Telsi arrived, the CO asked if he had given Mr. Smith any training. Mr. Telsi said that he had and that Mr. Smith should have been wearing his hard hat. The CO asked about the corner where Mr. Smith was working, and Mr. Telsi said he had put up the protective fence that was there.[5] (Tr. 144, 151-52, 184-86, 192, 240).

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[3]An "imminent hazard" notice is posted on sites OSHA considers the most dangerous. Here, the Area Director told the CO to go back to the site and post the notice. (Tr. 150).

[4]The CO identified the photos he took that showed the violative conditions. (Tr. 156-57, 169-73, 177-82, 186-88, 192-96, 200-01).

[5]The CO testified at the hearing that the orange fencing depicted in his photos was the fencing Mr. Telsi had referred to. The CO said that fencing would in no way protect against a cave-in and that it was basically what is called "snow fencing." (Tr. 186).

CO Shedden's last visit to the site was on February 12, 2010. The building was partially completed, and the roof was on. He saw two situations which required guardrails, and no guardrails were in place. One was a ramp made of two planks that went across an embankment to provide access to the building. Another was the elevator shaft, which was one of the open holes he had seen before. The CO concluded that because of these conditions, which he described as "very visible," there was no competent person to inspect the site to detect and correct safety hazards. (Tr. 203-08).

Jurisdiction

Respondent states in its answer that it neither admits nor denies that the Commission has jurisdiction over this matter. It makes this same statement with respect to whether it is an employer engaged in a business affecting interstate commerce. As the Secretary notes, the Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones, d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). As the Secretary also notes, Mr. Telsi admitted he goes regularly to Florida and Nevada for business purposes. (Tr. 38-39). I find that the Commission has jurisdiction over the parties and the subject matter of this proceeding.

Whether Respondent was the Controlling Employer at the Site

The Secretary contends that Mr. Telsi was the controlling employer at the site under the multi-employer work site doctrine. Under that doctrine, an employer who exercised sufficient control over the work site to prevent or detect hazardous conditions is liable for those hazards as a controlling employer. *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1206 (No. 05-0839, 2010). The Secretary further contends that Mr. Telsi was also the "creating" employer, in that he created the violations and is thus responsible for them. *Id*. *See also Smoot Constr.*, 21 BNA OSHC 1555, 1557 (No. 05-0652, 2006). The testimony in this regard follows.

CO Shedden testified that Mr. Telsi told him that he was in charge and in control of the site. Mr. Telsi also told him that he had rented the trailer at the site and that all the tools and equipment on site were his. The CO stated that at his opening conference, he gathered everyone around him and explained why he was there and what the hazards were in the excavation. All the workers, who were employees of either Ocean State Forms or Earth Connections, verified that Mr. Telsi was in charge.[6]

[6]The owners of these two companies also confirmed this was so. (Tr. 160).

And, Mr. Telsi said no one else was in charge and he was the only person who could fire someone at the site. The CO also stated that Mr. Telsi was the individual who told everyone to get out of the excavation on August 24. (Tr. 139-40, 143, 159-60, 163, 232-33).

The CO further testified that on August 25, he asked Leo Pare, the owner of Ocean State Forms, why he had gone back into the excavation. Mr. Pare said Mr. Telsi had told him he had an engineer's report and everything was "okay." The CO also spoke to Rabbi Prus, who was at the site that day. The Rabbi said that he was in charge of the temple and that Mr. Telsi had been awarded the contract for the project. The Rabbi also said that Mr. Telsi was in charge of the site and that another entity, ZVI, which was headed up by a member of the temple, oversaw the project in terms of the bidding process and ensuring that construction rules were followed. The CO later spoke to Pat Hogan and Michael Mahoney of ZVI. They told him Mr. Mahoney was to visit the site occasionally and that any problems he saw would be reported to Rabbi Prus. Rabbi Prus would then refer the matter to the temple's Board of Directors, which would have Mr. Telsi correct the problems. The ZVI officials stated they had no authority at the site. (Tr. 150-51, 163-64, 214-15).

Terry Watkinson testified that he works for Earth Connections and that Mr. Telsi hired his company to work at the site. He also testified that he operated excavation equipment there for 2.5 weeks; Mr. Telsi directed him as to what to do every single day, and he viewed Mr. Telsi as the job superintendent or the general contractor. Mr. Watkinson considered the site the most unsafe job he had ever been on. He spoke with Mr. Telsi many times about the trench not being sloped and the spoils piles being too close. He described some of the conversations as "heated," but nothing was done. Mr. Watkinson said he continued to work at the site as his boss told him to. (Tr. 79-84, 91-92).

Scott McDonald testified that he is a general contractor and that Mr. Telsi hired him to do grading work; he and three of his employees worked at the site for two days, and they were finished prior to OSHA's arrival at the site.[7] Mr. McDonald believed that Mr. Telsi was the general contractor on the job, because he directed his work. He brought to Mr. Telsi's attention the fact that the spoils piles were high and that it was "pretty dangerous." (Tr. 121-23).

[7]Mr. McDonald was hired to do grading work inside the excavation. None of that work had anything to do with the excavation's walls or the spoils piles. (Tr. 129-30).

Leo Pare is the owner of Ocean State Forms ("Ocean State"). He testified that he does foundation work, that Mr. Telsi hired him to do that work at the site, and that he and his employees started working there before OSHA's arrival. He said the site was a "mess" and "pretty dangerous," due to the vertical walls and the spoils piles sitting on top of them.[8] Mr. Pare discussed the hazards with Mr. Telsi, but he and his crew went ahead and put the footings in the excavation. They then left for a week, due to the excavation's condition, and Mr. Telsi was to fix it; when they came back, however, it was the same. Mr. Pare and his crew were in the excavation on August 24, when the CO arrived. The job was stopped, and the CO spoke to everyone, including Mr. Telsi, about how dangerous the excavation was. No more work was done that day.[9] The next day, conditions on the job were the same, but Mr. Pare and his crew continued their work in the excavation.[10] After the CO's second visit, Mr. Pare called the CO's supervisor, who told him to not pour the cement or do anything else until a plan was developed to do it safely. Mr. Pare said that Mr. Telsi was the general contractor and directed his work at the site the whole time he (Mr. Pare) was there. He also said that once the site was fenced in and closed off, he no longer listened to Mr. Telsi. Mr. Pare stated that he only became aware of ZVI later, when Mr. Telsi was dismissed from the job. He further stated that he had been wrong to work in the excavation in the shape it had been in. (Tr. 94-120).

David Berg is the structural engineer who approved ZVI's "remediation" for the excavation after OSHA's visits to the site. Mr. Berg testified the remediation met OSHA requirements, which, in this case, was sloping the walls "one on one" and removing the spoils piles. To his knowledge, ZVI was the project's construction manager and Mr. Telsi was the general contractor. (Tr. 18-22).

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[8]Mr. Pare believed that the walls were 15 feet high, due to the fact that his panels or forms, as shown in the CO's photos, are 12 feet high. (Tr. 97).

[9]Mr. Pare said that after the CO left, Mr. Telsi told him to go ahead and finish the forms and pour the cement; however, Mr. Pare and his crew went home. Mr. Pare noted that Mr. Telsi from the beginning wanted the job done quickly. He also noted that Mr. Telsi had told him that if he did not pour the cement he would get someone else to do it. (Tr. 100-01, 106-07).

[10]As noted above, the CO testified that Mr. Pare told him he went back into the excavation as Mr. Telsi told him he had an engineer's report and everything was "okay." (Tr. 150). Mr. Pare indicated this had happened at a later time. (Tr. 104). I conclude Mr. Pare was simply mistaken about when this event occurred and that it took place on August 25.

Mr. Telsi disputes that he exercised control over the project and contends that ZVI was the general contractor and was in charge of the job. (Tr. 16-17). *See also* R. Brief, p. 1. This contention, however, is not supported by the record.[11] The testimony of the other witnesses in this case, as set out above, was that Mr. Telsi was in control and in charge of the site and that he directed all the work on the job. Further, Mr. Telsi himself testified that he hired all of the contractors for the job from a group of companies he had done business with before. He negotiated the price to be paid to each contractor, he paid the contractors for their work, and he fired at least one contractor. He was at the site every day, managing the job and watching the contractors. He also bought materials for the job. Mr. Telsi admitted that his company's name, "Life Time Homes," was on the sign out in front of the project. (Tr. 27-46, 68). Based on the record, I find that Mr. Telsi was the general contractor for the project, that he exercised control over the site, and that he was in charge of all aspects of the work done on the job.[12] I also find that Mr. Telsi was both the controlling and the creating employer at the site under the multi-employer work site doctrine. His assertions to the contrary are rejected.

Docket No. 10-0531 – Serious Citation 1, Item 1

This item alleges a violation of 29 C.F.R. 1926.100(a), which requires employees to wear protective helmets when working in areas where there is a possible danger of head injury from falling objects. The CO testified that on August 24 and 25, he saw three to four employees working near the excavation's walls without hard hats; the employees were exposed to being struck in the head by rocks and soil falling from above. The CO's photos support his testimony; he and Mr. Watkinson circled parts of the photos showing rocks above areas where employees were or had been working and where rocks had fallen already. (Tr. 84-86, 89-90, 156-59, 169-70, 186-88). The CO

[11]Mr. Telsi points to two documents in the record in support of his contention. CA-2 is a letter from Mr. Telsi to ZVI with respect to his bid for the project. R-1 is an application for a building permit. Neither document persuades me that ZVI was the general contractor. Rather, they establish that ZVI accepted the bids for the project and also applied for the building permit.

[12]My findings are also based on having observed the demeanor of all the witnesses as they testified. I found all of the witnesses sincere and believable, other than Mr. Telsi, who was not a reliable witness. Mr. Telsi suggests that Mr. Pare was not credible, as he was also cited and was testifying in the hope of getting a "deal." R. Brief, p. 2. Mr. Pare testified he was in fact trying to get his penalty reduced. (Tr. 108-09). Regardless, I found him a credible witness.

said that some of the rocks were large and could have killed an employee upon striking him in the head; Mr. Watkinson agreed. (Tr. 90, 158-61). Mr. Telsi did not rebut this evidence.

To show a violation of an OSHA standard, the Secretary must prove that: (1) the standard applies, (2) its terms were not met, (3) employees were exposed to the cited condition, and (4) the employer either knew of the condition or could have known of it with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The evidence shows that the cited standard applies and that its terms were not met. The workers exposed to the condition were employees of Ocean State.[13] Regardless, Mr. Telsi was the controlling and creating employer at the site, in view of my findings above, and he is liable for the cited condition. And, it is clear that Mr. Telsi was at the site and knew of the condition; the CO, in fact, testified Mr. Telsi himself was exposed to the condition. (Tr. 158, 187). Item 1 is affirmed as a serious violation.

The Secretary has proposed a penalty of $1,500.00 for this item. The record indicates this item had high severity and probability. The employer was given reductions of 60 percent and 10 percent, respectively, for its small size and lack of history of previous violations. No reduction for good faith was given due to the fact that there was no safety plan in place at the site.[14] (Tr. 160-62). I find the proposed penalty appropriate. A penalty of $1,500.00 is assessed.

Docket No. 10-0531 – Serious Citation 1, Item 2

Item 2 alleges a violation of 29 C.F.R. 1926.501(b)(4)(ii), which requires employees on walking/working surfaces to be protected from tripping in or stepping into or through holes. The CO testified there were three uncovered 8-foot-square holes, each 7 feet deep, in the excavation; two of the holes were where jacuzzis were to be installed, and the other was for an elevator shaft. The CO saw the holes on August 24, and they were still uncovered the next day. The CO said the Ocean State employees had to go right by the holes to do their work and that falling into them could have caused serious injuries or death; the holes should have had covers or guardrails around them. C-4 and C-7

[13]The CO agreed there were no employees of Mr. Telsi at the site on August 24 and 25. (Tr. 234). But, Mr. Telsi admitted he at times got workers for the site from a local donut shop, which Mr. Pare verified. (Tr. 42, 106). And, Mr. Smith clearly was an employee of Mr. Telsi, as was Juan Reyes, who was at the site February 12, 2010. (Tr. 144-45, 184-85, 192, 205-06, 234).

[14]These same reductions have been applied to all of the penalties in this case.

show one of the holes. (Tr. 166-75). The Secretary has established the alleged violation, and this item is affirmed as serious. The record indicates this item had high severity and probability. (Tr. 168). I conclude that the proposed penalty of $2,100.00 is appropriate, and it is assessed.

Docket No. 10-0531 – Serious Citation 1, Item 3

Item 3 alleges a violation of 29 C.F.R. 1926.651(l), which requires walkways where employees are required or permitted to cross over excavations; guardrails are required for walkways 6 feet or more above lower levels. The CO testified that on August 25, he saw Mr. Telsi using a single plank to cross over a part of the excavation; C-8 and C-9 depict the scene.[15] The CO said the plank was about 7 feet above the excavation's floor and that Mr. Telsi could have fallen and struck his head on the rocks and concrete below, causing serious injury or death. The CO indicated that a walkway with guardrails could easily have been made. (Tr. 172-75). The CO saw only Mr. Telsi using the plank. (Tr. 172-73). It is reasonable to infer, however, that the Ocean State employees would have used the same means to cross over the excavation, particularly since there was evidently no other way to do so. I find, therefore, that the Secretary has met her burden proof as to this item, including the employee exposure element. This item is affirmed as serious. The proposed penalty for this item is $2,100.00. The record indicates that this item had high severity and probability. (Tr. 174). I find the proposed penalty appropriate. A penalty of $2,100.00 is assessed.

Docket No. 10-0531 – Serious Citation 1, Items 4a and 4b

Item 4a alleges a violation of 29 C.F.R. 1926.1053(b)(15), which requires ladders to be inspected periodically by a competent person for visible defects. Item 4b alleges a violation of 29 C.F.R. 1926.1053(b)(16), which requires ladders with structural defects to be removed from service until repaired. On August 24, upon learning that Mr. Telsi had access ladders for use at the site, the CO asked to see them. The two ladders presented were damaged. C-11 shows one ladder with a bent frame on the left side, and C-12 shows another ladder with its left "foot" bent outward; these conditions, according to the CO, made the ladders unstable and using them could result in falls and serious injuries. The CO determined that the likelihood of serious injury from using the ladders was great. (Tr. 175-78). The record establishes the alleged violations, and Items 4a and 4b are affirmed

[15]Mr. Telsi asserted at the hearing that the CO had asked him to cross over on the plank. The CO denied this was the case. (Tr. 223-24). Mr. Telsi's assertion is rejected.

as serious. The proposed penalty for these grouped items is $1,500.00. I conclude that that penalty is appropriate. It is accordingly assessed.

Docket No. 10-0531 – Willful Citation 2, Item 1

This item alleges a violation of 29 C.F.R. 1926.651(c)(2), which requires a stairway, ladder, ramp or other safe means of egress to be located in excavations 4 or more feet in depth, so as to require no more than 25 feet of lateral travel for employees. The CO testified that on August 24, he saw there was no means of egress from the excavation near where employees were working.[16] When he asked Mr. Telsi about it, the two ladders cited in Item 4, *supra*, were presented. The CO noted that the ladders had been located over 80 feet away from where the employees were working, and when he asked why they had not been within 25 feet, Mr. Telsi did not answer. The CO returned the next day. Ocean State employees were once again in the excavation, as was Mr. Telsi, and there were still no ladders or other means of egress nearby. (Tr. 178-83). The CO determined this condition had high severity and a high likelihood of injury; if a cave-in occurred and employees could not get out, they could die. The CO also determined the violation was willful. He learned through interviews that Mr. Telsi had been told, before OSHA's arrival, that a means of egress was required. And, even after the CO told Mr. Telsi what was required on August 24, and Mr. Telsi said he would get some new ladders, there was still no means of egress in the excavation the next day. Further, on August 24, the CO had make it clear to everyone at the site, including Mr. Telsi, how dangerous the excavation was, with the vertical walls and the spoils piles on the walls' edges. (Tr. 141-42, 159-60, 178-83).

To prove a violation was willful, the Secretary must show the violation was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-0355, 1987) ("*Williams*"). As *Williams* goes on to explain:

> A willful violation is differentiated by a heightened awareness – of the illegality of the conduct or conditions – and by a state of mind – conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. *Id.*

[16]The photo on the right side of C-14 shows what the CO saw on August 24. (Tr. 182)

I agree with the Secretary that this violation was willful. The evidence above shows that Mr. Telsi was told, even before OSHA's arrival, that a proper means of egress from the excavation was required. On August 24, the CO told everyone at the site, including Mr. Telsi, how dangerous the excavation was. He specifically informed Mr. Telsi that a means of egress had to be located within 25 feet of where the employees were working in the excavation. Mr. Telsi told the CO that he would get some new ladders. Despite this statement, however, when the CO returned the next day, there was still no means of egress in the excavation. I conclude that Respondent had a heightened awareness of the violation and that it acted "with intentional, knowing or voluntary disregard for the requirements of the Act." This item is affirmed as willful. I further conclude that the proposed penalty of $21,000.00 is appropriate for the violation. That penalty is assessed.

Docket No. 10-0531 – Willful Citation 2, Item 2

This item alleges a violation of 29 C.F.R. 1926.651(j)(2), which requires employees to be protected from excavated or other material that could pose a hazard by falling or rolling into the excavation by placing and keeping such materials at least 2 feet from the edge of the excavation. The record shows the cited excavation was about 8 feet deep at one end and about 14 feet deep at the other end. Its walls were all vertical, and there were spoils piles along the walls. The piles were from 4 to 10 feet high, and most of them were sitting right on the walls' edges. C-3, C-14 and C-31 show the Ocean State employees working near the vertical walls at the deep end of the trench, with the spoils piles up above them, on August 24.[17] The CO testified that on that day, after seeing the excavation, he told Mr. Telsi he needed to get the workers out; Mr. Telsi did so. The CO explained to everyone at the site, including Mr. Telsi, how dangerous the excavation was and that someone could be killed. He spoke to Mr. Telsi about the spoils piles, and Mr. Telsi knew they had to be set back at least 2 feet from the edge. Mr. Telsi told the CO he would make sure no one else went in the excavation and that he would fix the hazards immediately. The next day, however, the excavation was unchanged, and the employees were continuing their form work in the excavation. When the CO asked him why, Mr. Telsi did not answer and walked away. When the CO asked Mr. Pare why he and his crew had gone back in, Mr. Pare said Mr. Telsi had told him he had an engineer's report and

[17] *See* Mr. Pare's testimony about how high the walls were, set out in footnote 8, *supra.*

everything was "okay." The CO learned from other employers at the site, including Ocean State, Earth Connections and Mr. McDonald, that they had all warned Mr. Telsi that the vertical walls and the spoils piles were dangerous. (Tr. 138-43, 146-50, 155, 159-60, 183-84).

The CO went back to the site on September 24, to remove the "imminent hazard" sign he had posted on August 25. There was an employee in the same corner where the Ocean State workers had been before. The employee was applying waterproofing, and he was not wearing a hard hat. The rest of the excavation had been benched and the spoils piles had been removed or set back, but the corner where the employee was had not been corrected. The employee said he was David Smith and that he worked for Mr. Telsi. The CO phoned Mr. Telsi and told him he was talking to his employee, Mr. Smith. Mr. Telsi said "oh," and that he would be there "very shortly." When Mr. Telsi arrived, the CO asked if Mr. Smith had had any training. Mr. Telsi said that he had and that Mr. Smith should have been wearing his hard hat. The CO asked about the corner where Mr. Smith had been, and Mr. Telsi said he had put up the protective fence that was there.[18] (Tr. 142-44, 150, 184-86, 190-92, 240).

The foregoing plainly shows a violation of the cited standard. Ocean State employees and Mr. Telsi himself were exposed to materials from the spoils piles falling on them on August 24 and 25, and Mr. Smith was exposed to the same hazard on September 24. (Tr. 239-40). The fact that the spoils piles were 4 to 10 feet high and were right on the walls' edges, and the fact that employees were not wearing hard hats, demonstrates employees could have been struck by rocks, soil or other debris, causing serious injury or death. (Tr. 190). *See also* Item 1 of Serious Citation 1, *supra*.

The record also plainly shows the violation was willful. The testimony of Messrs. Watkinson, McDonald and Pare, set out on pages 5 and 6, *supra*, establishes that Mr. Telsi was told numerous times before OSHA arrived that the spoils piles were too high and too close to the edges and that the walls needed to be sloped. Mr. Watkinson considered the site the most unsafe job he had ever been on. (Tr. 82). And, the record shows that even after the CO's initial inspection of August 24, when Mr. Telsi told the CO he would not let anyone go back in the excavation and that he would fix all the hazards, the site was unchanged when the CO returned the next day. Further, as noted above, Mr. Pare stated to the CO that he went back in the excavation that day because Mr. Telsi had told him

[18]*See* footnote 5, *supra*, which establishes that the fencing provided no protection.

he had an engineer's report and everything was "okay." Finally, the record shows the excavation had been sloped and the spoils piles removed or set back when the CO went back on September 24; the corner where Mr. Smith was working, however, had not been corrected, exposing Mr. Smith to the cited hazard, especially since he was not wearing a hard hat. This item is affirmed as a willful violation. The proposed penalty of $21,000.00 is appropriate and is assessed.

Docket No. 10-0531 – Willful Citation 2, Item 3

Item 3 alleges a violation of 29 C.F.R. 1926.652(a)(1), which requires each employee in an excavation to be protected from cave-ins by an adequate protective system.[19] The record shows the soil in the excavation was Type B.[20] The standard requires sloping or benching for Type B soil to be 45 degrees or 1:1. *See* Appendix B, Table B-1, set out in OSHA's excavations standard. The record in this case clearly establishes that the walls of the excavation were vertical and, therefore, not in compliance with the cited standard. The record also establishes that Ocean State employees and Mr. Telsi were exposed to the cited hazard on August 24 and 25 and that Mr. Smith was exposed to the cited hazard on September 24, 2009. (Tr. 191-92, 239-40). As the CO explained it, the employees who were installing the forms were "immediately adjacent" to the wall shown in C-31and were exposed to the wall collapsing. He noted that the employee on the right in C-31 had the wall in front of him and the form work and the rebar grid behind him; that employee was also going behind the form work, and, if the wall had collapsed, that employee would have been trapped and would have been killed. The other employee, who was on the other side of the form work, could potentially have been killed if the wall had collapsed, as the form work could have been pushed over on him. The CO considered the situation extremely dangerous, and he noted that this was the first time that he had had to post an "imminent hazard" notice at a work site. (Tr. 141, 150, 191-97).

The record as set out in the previous discussion, relating to Item 2, demonstrates that this violation was also properly classified as willful. Item 3 is therefore affirmed as willful. I find the proposed penalty of $21,000.00 appropriate, and that penalty is assessed.

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[19]The exceptions to this requirement do not apply in this case.

[20]The CO took a soil sample from the site and sent it to OSHA's lab in Salt Lake City for analysis. The analysis results revealed the soil to be Type B. (Tr. 71-78, 208-09; C-32A, C-33A).

Docket No. 10-0531 – Willful Citation 2, Item 4

Item 4 alleges a violation of 29 C.F.R. 1926.701(b), which requires that all protruding reinforcing steel, onto and into which employees could fall, be guarded to eliminate the hazard of impalement. CO Shedden testified there was reinforcing steel ("rebar") protruding up through the footing; the rebar basically went around the entire perimeter of the footing in the excavation, and the condition is shown in the photos in C-13. The CO said the rebar in C-13 was about 4 feet high. He also said some of it was bent, like the rebar shown with the employee walking nearby in one of the photos, and that an employee who tripped while installing the forms could have fallen on the rebar and been impaled. The CO stated that he discussed the condition with Mr. Telsi on August 24 and explained to him that the rebar required caps to prevent the impalement hazard; he also explained to him that the square metal caps should be used, not the round plastic caps, because the plastic ones broke upon impact and would not prevent impalement. When the CO returned the next day, he saw that Mr. Telsi had purchased the round caps and put them on the rebar. When the CO asked him why, Mr. Telsi told him the square metal ones cost too much. (Tr. 199-203).

The foregoing demonstrates the alleged violation, and Respondent has presented nothing to rebut the Secretary's evidence. This item is affirmed, and it is properly classified as willful. This is so in light of Mr. Telsi's failure to buy the square metal caps and put them on the rebar after the CO told him of the hazard on August 24. Further, the CO testified that individuals who had worked as excavators at the site told him they had advised Mr. Telsi before the OSHA inspection that the rebar needed to be capped and that the plastic ones did not work. (Tr. 202). Based on the record, I find the proposed penalty of $21,000.00 appropriate. The proposed penalty is therefore assessed.

Docket No. 10-0787 - Serious Citation 1, Items 1 and 2

Item 1 alleges a violation of 29 C.F.R. 1926.20(b)(2), which requires the employer to provide for frequent and regular inspections of the job site to be made by competent persons designated by the employer. Item 2 alleges a violation of 29 C.F.R. 1926.502(b)(2), which requires midrails or equivalent intermediate structural members to be installed between the top edge of the guardrail system and the walking/working surface. CO Shedden testified he went back to the site on February 12, 2010. He saw that the building was partially completed, with the roof on and most of the framing up. He further testified that Juan Reyes, an employee of Mr. Telsi, was at the site, as was Mr. Telsi.

The CO said that Item 2 was issued as there was a ramp made of two planks without guardrails that went across an embankment to provide access to the building ; he did not recall the distance, but he said it was "a pretty good fall." Item 2 was also issued due to the same elevator shaft that was cited before; it was still unguarded. The CO said Item 1 was issued because the hazards he saw that day were "very visible," making it clear that no competent person had inspected the site. (Tr. 203-08).

I find that the Secretary has filed to demonstrate the alleged violations. The CO's testimony about the violations was very sketchy, and, in my opinion, simply did not meet the Secretary's burden of proof. First, the CO initially could not even remember his inspection of February 12, 2010. (Tr. 203-04). Second, the CO could not recall the fall distance from the ramp, which, for the standard to apply, had to have been at least 6 feet. *See* 29 C.F.R. 1926.501(b)(1). Third, despite his testimony about the ramp and the elevator shaft, he never specifically stated that he saw Mr. Reyes or anyone else use the ramp or go by the elevator shaft.[21] (Tr. 204-08). Fourth, the CO apparently took no photos of the conditions he saw that day, as no photos in this regard were discussed or offered in evidence. Finally, the subject inspection occurred over four months after the CO's last visit to the site, and conditions there were plainly very different. These facts required the CO to explain more particularly what the cited hazards were and who was exposed to them. Because he did not do so, I cannot affirm the alleged violations. They are accordingly vacated.

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 upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Items 1 through 4 of Serious Citation 1, Docket No. 10-0531, alleging violations of the construction standards set out above, are AFFIRMED. A total penalty of $7,200.00 is assessed for these items.

[21]In considering this testimony, I have also noted the CO's earlier testimony about Mr. Reyes and what he (the CO) saw at the site that day. (Tr. 144-45).

2. Items 1 through 4 of Willful Citation 2, Docket No. 10-0531, alleging violations of the construction standards set out above, are AFFIRMED. A total penalty of $84,000.00 is assessed for these items.

3. Items 1 and 2 of Serious Citation 1, Docket No. 10-0787, alleging violations of the construction standards set out above, are VACATED.

/s/

Covette Rooney
Judge, OSHRC

Date: January 11, 2011
Washington, D.C.