SOME PERSONAL IDENTIFIERS HAVE BEEN REDACTED FOR PRIVACY PURPOSES

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. PENNEY'S CONSTRUCTION COMPANY, LLC, Respondent.	:	OSHRC DOCKET NO. 12-0596

Appearances: Celeste C. Moran, Esq., U.S. Department of Labor, Office of the Solicitor
Boston, Massachusetts
For the Secretary.

[redacted]
Hartford, Connecticut
For the Respondent, *pro se*.[1]

Before: Carol A. Baumerich
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") conducted an inspection of a worksite of Respondent, Penney's Construction Company, LLC ("Respondent" or "Penney's"), on July 26, 2011. The jobsite was located in Hartford, Connecticut. The work involved digging a trench in order to remove and replace a sewer line. As a result of the inspection, OSHA issued to Respondent a Citation and Notification of Penalty

[1] Respondent initially had counsel in this matter. Respondent's counsel filed a motion to withdraw on September 7, 2012. The motion was granted on September 24, 2012.

("Citation") alleging various serious violations and two willful violations of the Act. Respondent filed a timely notice of contest, and the hearing in this matter was held in Hartford, Connecticut, on December 18, 2012. Both parties have filed post-hearing briefs.

Background

Daniel Gagnon is the OSHA compliance officer ("CO") who inspected the worksite on July 26, 2011. He was assigned to inspect the site by Paul Mangiafico, the Area Director ("AD") of the Hartford OSHA Office due to OSHA's National Emphasis Program for trenching.[2] As CO Gagnon drove by the site, he was able to see an open trench that had no sloping or other cave-in protection. He also saw a Caterpillar backhoe nearby, as well as a large Camel vacuum truck and a GMC pickup truck containing a green PVC pipe. After parking his vehicle, the CO got his equipment and walked to the trench. It was about 11:15 a.m. He looked down into the trench and saw an employee, who he later learned was [redacted], using a Stihl cut saw to smooth the jagged edges of the existing concrete pipe at the west end of the trench. He also saw sewage flowing from the pipe. He asked [redacted] to exit the trench, and [redacted] did so. The CO asked who was in charge. [redacted] pointed to [redacted], who walked over to the trench and introduced himself as Penney's owner. The CO presented his credentials and began an opening conference. [redacted] interrupted the CO, stating that he knew he needed cave-in protection for a trench deeper than five feet, that he knew the OSHA regulations as he had taken the OSHA 10 training, and that he had no excuses. The CO then continued his opening conference, explaining the hazards he had seen, and he asked [redacted] to accompany him during the inspection. (Tr. 24-29).

As the CO walked the site, he pointed out the hazards to [redacted]. The most evident was the lack of cave-in protection; the walls were vertical, heavily fissured, and undermined in some areas. The heavy traffic on nearby Broad Street created vibrations, and the backhoe and vacuum truck, when they were in use, created more vibrations and increased the potential for a cave-in. There was a large spoil pile near the edge of the trench.[3] There was constant sewage pouring into the trench, the Stihl saw was producing sparks and small pieces of shrapnel from the concrete pipe being smoothed, and there was no personal protective equipment ("PPE") in use.

[2] The AD had driven by the site earlier that day and had seen an employee exiting a deep hole. (Tr. 133).
[3] The CO noted the soil in the pile was very wet, as the sewer pipe had been leaking for months. (Tr. 80).

When the CO pointed out the hazards, [redacted] agreed, but stated that he had to do the work as he was in dire financial straits and needed the money. The CO took measurements of the trench, with [redacted]'s help. The CO found the trench to be ten feet deep, nine feet long, and five feet wide. The CO also took samples of the soil at the site, which he later sent to OSHA's lab in Salt Lake City for testing. In addition, the CO took photographs of his observations at the site. (Tr. 28-30, 36, 46-49, 53-69, 77, 81-85, 90-93, 96-100; Exhs. C-2-3, C-5-17, C-19-27).

After finishing the inspection, CO Gagnon discussed the hazards he had seen with [redacted]. He told [redacted] that he would recommend that citations issue. CO Gagnon advised [redacted] of his rights regarding the citation process. [redacted] repeated that he knew the OSHA regulations and had no excuses. [redacted] asked the CO if he could finish the project. The CO told [redacted] that OSHA did not have the legal authority to stop the project, but that OSHA did not want him in the trench at all, as it was very dangerous and life-threatening. The CO described the trench as "a grave." [redacted] said that he understood. (Tr. 30-31).

CO Gagnon went to lunch with AD Mangiafico. After lunch, when the AD drove the CO back to the site so the CO could get his car, they saw [redacted] exiting the trench. The AD and the CO went to their office, where they obtained an "imminent danger" notice, and then drove back to the site. The AD told the CO to post the notice and to stay at the site to document the continuing employee exposure.[4] The CO met with [redacted], showed him the imminent danger notice, and explained what it meant. [redacted] said that he understood and did not want to go back in the trench, but he felt like he had no choice and had to finish the job. At this point, [redacted] arrived at the site. The CO showed [redacted] the notice and read it to him. [redacted] said he understood the notice, but that he had no choice and had to finish the job. The CO responded that he had to stay at the site as long as the employees were exposed. [redacted] again said that he understood, and the work continued. (Tr. 31-34).

When the CO was at the site the second time, he saw that the northwest corner of the trench, where the asphalt and concrete were undermined, had fallen into the trench; he also saw that the

[4] The AD called the Building Department, the State Police and the Hartford Police Department about the hazard, as he did not think that OSHA could get the employees out of the trench fast enough. The AD then left the site and went to his office. A City of Hartford building inspector went to the site and issued Respondent a citation for creating an unsafe condition; the CO saw the inspector issue the citation at the site. (Tr. 50-51, 135-36; Exh. C-4).

spoil pile was larger and right on the edge of the trench. Later, at 3:19 p.m., the CO saw soil from the northwest corner fall into the trench. Just a few minutes before, at 3:15 p.m., the CO had seen [redacted] exit the trench. The CO then watched [redacted] using the vacuum truck to suck out the soil that had fallen into the trench. The CO watched [redacted], another employee at the site, use the backhoe to clean out that part of the trench. The CO also saw [redacted] and [redacted] working in the trench during the time he was at the site. They were consequently exposed to the same hazards as [redacted], *i.e.*, the trench caving in and the sewage coming out of the concrete pipe. The employees made the final connection to the sewer pipe around 4:15 or 4:20 p.m., after which they exited the trench. Then, about the time that rush hour started, [redacted] had [redacted] stand in the street to stop traffic, when [redacted] backed into the street with a Scat Cat to fill in the trench. Traffic was heavy, it was raining, and visibility was poor. [redacted], who was not wearing a safety vest, was almost hit by traffic at least twice.[5] The CO left the site at about 5:30 p.m. (Tr. 35, 46-49, 54-58, 69-70, 73-74, 77-83, 93; Exhs. C-2-6, C-15, C-21-22).

CO Gagnon interviewed [redacted] in his office on July 29, 2012, to discuss the project and the hazards at the site. [redacted] stated that once he dug the trench, he knew how deep he had to go. He had no shields or bracing. [redacted] contacted a company to get plates for the trench. The company could not deliver them. [redacted] had to make a decision. He knew of the cave-in hazard, and he agreed it was a very dangerous hole; however, he believed he could complete the job quickly without anyone getting hurt, and he did not think the hole was life-threatening. [redacted] did not have a time frame for finishing the job, but he needed the job and the money it would provide. The AD held two informal conferences with [redacted]. The first was with [redacted] by himself; the second was with [redacted] and his counsel. (Tr. 102-06, 136).

Jurisdiction

Respondent admitted that the Commission has jurisdiction in this matter pursuant to section 10(c) of the Act. Respondent also admitted that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act. *See* Answer, p. 1, ¶¶ 3, 4. *See also* Tr. 9-11. I find, therefore, that Respondent is an employer within the meaning of the Act and that the Commission has jurisdiction of the parties and the subject matter in this case.

[5] A Scat Cat is similar to a Bob Cat. The Scat Cat is shown on the right-hand side of Exhibit C-15. (Tr. 78-79).

Preliminary Matters

On January 29, 2013, Respondent filed its post-hearing brief. With its brief, Respondent included a new exhibit that was not offered into evidence at the hearing. Respondent also alleged certain facts in its brief that were not offered into evidence at the hearing. The Secretary filed his post-hearing brief on February 4, 2013. The Secretary also filed a request to reply to Respondent's brief. The request was granted, and the Secretary filed a reply on February 27, 2013. In the reply, the Secretary contends that Respondent's brief is an attempt to introduce evidence and refute sworn testimony, contrary to my instructions during the hearing in this matter. The Secretary's contention is correct.

I advised [redacted] after his opening statement that his remarks were argument, not testimony, and that he would need to actually testify under oath to his statements when he was a witness. (Tr. 17-18). I also advised [redacted], after the Secretary rested its case, that it was now his turn to offer into evidence any exhibits or any testimony, including his own. I advised [redacted] that statements made from counsel table would not be considered. [redacted] was told that this was his chance to present the company's case and to say if he had a different recollection from what the Secretary's witnesses had testified. He was instructed that any exhibits or evidence he wanted considered had to be presented during the hearing and that anything offered after the record was closed, such as an exhibit attached to a brief, would not be received. (Tr. 155-58). I suggested to [redacted] that, to organize what he wanted to say, he might want to proceed citation by citation. [redacted] declined to do so. (Tr. 161, 168). After testifying very briefly, [redacted] was asked if he had any other witnesses, any exhibits, or anything else that he wanted to offer into evidence. [redacted] said he did not and that he was ready to rest his case. (Tr. 161-68). One potential Respondent witness, [redacted], was Respondent's representative at the hearing. [redacted] was present throughout the hearing. (Tr. 8) [redacted] was not called as a witness and, therefore, did not dispute any of the testimony or representations made by the Secretary's witnesses regarding inspection photographs in which [redacted] appears.

The parties were asked if they wanted to make closing arguments. Both parties stated that they preferred to submit written post-hearing briefs. [redacted] was reminded that no exhibits could be offered after the hearing closed and that no exhibits could be attached to his brief. (Tr. 170-71). I then offered [redacted] a short break, if he wanted to gather his thoughts and make an oral argument, but he declined. (Tr. 171).

It is clear that [redacted] was advised not once but several times that any testimony or exhibits he wanted considered had to be presented during the hearing. He also was advised that anything offered after the hearing was closed, such as an exhibit attached to a brief, would not be received into evidence. [redacted] had adequate notice that evidence offered after the hearing ended would not be accepted. Therefore, the exhibit [redacted] included with his brief will not be considered, as it is not part of the record. Likewise, any factual allegations in his brief that were not offered into evidence at the hearing will not be considered, as they are outside of the record.

On February 18, 2013, Respondent made a written request that the record be reopened for a "full court hearing" due to information it had been unaware of at the hearing. In an order dated February 25, 2013, Respondent was directed to submit a written motion regarding its request to reopen the record by March 22, 2013. Respondent's motion was to contain a detailed statement explaining why the record should be reopened and include a detailed outline of the additional facts Respondent would offer, through testimony, documents or exhibits, if the record was reopened. On March 11, 2013, Respondent filed a motion to withdraw its request to reopen the record. Respondent's motion to withdraw its request to reopen the record was granted on March 12, 2013.

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary has the burden of establishing that the cited standard applies, that its terms were not met, that employees had access to the violative condition, and that the employer either knew, or could have known with the exercise of reasonable diligence, of the violative condition. *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).

Serious Citation 1, Item 1

Item 1 alleges a violation of 29 C.F.R. § 1926.21(b)(2), which states that:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.
>
> The Citation alleges a violation of the cited standard as follows:
>
> 617-643 Park Street Sewer Pipe Repair Project: The employer did not adequately train the employees on the hazards associated with exposures to human waste, methane gas, and asphyxiates from the exhaust of the Stihl cut saw in use.

CO Gagnon testified that [redacted], [redacted] and [redacted] worked in the trench and were exposed to the human waste, including fecal matter, that was coming out of the sewer pipe in the trench.[6] He said that working around fecal matter can expose employees to serious diseases such as E. Coli and Hepatitis A and C. Also, human waste creates methane gas, which is flammable and an asphyxiate. The CO further testified that [redacted] was exposed to the exhaust from the Stihl cut saw he was using. The exhaust was an asphyxiate. Also, the saw was producing sparks. (Tr. 29, 60-61, 70-72). [redacted] told the CO that while he knew about sewer hazards he was not aware of the specifics and that this was his first sewer line job. (Tr. 71-72). [redacted] told the CO that he knew that working with sewer water and exhaust was "not good for you," but he had no idea he was exposed to E. Coli and hepatitis. He also was not aware that methane gas is flammable and an asphyxiate. *Id.* When the CO asked about training, [redacted] stated that he and [redacted] had taken the OSHA 10 course. However, Penney's had no written safety programs. *Id.*

[redacted] offered no specific testimony in regard to this item; he stated during his testimony, however, that "most of the things that the [CO] said is true."[7] (Tr. 164). He also stated, at the end of his testimony, that he did not "have anything else other than what I told you."[8] (Tr. 169). I found [redacted] to be a candid and truthful witness. I also found CO Gagnon to be a candid and credible witness. Based on CO Gagnon's testimony, which

[6] The CO said sewer water constantly flowed from the pipe the whole time he was at the site, until about 4:30 p.m., when the final connection to the pipe was made. [redacted] told the CO that the sewage was coming from a 40-unit apartment complex. (Tr. 24-26, 29). Several photographs received in evidence show the sewage water and fecal matter in the trench. (Tr. 63-70; Exhs. 10-14).

[7] [redacted] did testify that he believed the citation items were based on how the AD "felt," rather than on what really happened. (Tr. 162). The AD, however, testified that the citation items were based on the evidence presented to him. He also explained the basis for each item's classification and the penalties proposed. (Tr. 137-50).

[8] As noted above, Respondent's brief contains certain factual allegations with respect to all of the citation items; because these factual allegations were not offered in evidence at the hearing, they will not be considered.

Respondent did not rebut, I find that the cited standard applies, that its terms were not met, and that [redacted] and his employees were not adequately trained in the hazards to which they were exposed at the site, as described above. [redacted] worked in the trench himself, and he should have known, with the exercise of reasonable diligence, of the hazards presented and that he and his employees required training in those hazards. I found AD Mangiafico to be a credible and convincing witness. He testified that not being trained in the hazards of working in human waste can result in exposure to serious diseases like E. Coli and hepatitis.[9] (Tr. 137). The Secretary has met his burden of proving the alleged violation. Item 1 is affirmed as a serious violation.

The Secretary has proposed a penalty of $5,000.00 for this item. In determining an appropriate penalty, the Commission must give due consideration to the gravity of the violation and to the employer's size, history, and good faith. *See* section 17(j) of the Act. The OSHA AD issued the Citation, and he testified about the penalties in this case. He testified that the maximum fine for a serious violation is $7,000.00 and that OSHA, when it proposes a penalty, looks at the severity of the hazard and the probability of it occurring. The AD considered Item 1 to have higher severity, due to potential exposure to serious disease, and lesser probability, due to the length of time employees were exposed. He indicated that while OSHA can reduce a penalty for the employer's size, history, and good faith, no reductions were given in this case as a deterrent. (Tr. 141-44).

I agree with the AD's determination regarding the severity and probability of the violation. I also agree that Respondent should not receive a reduction for history or good faith, in light of its having received a previous citation and the fact that it continued working at the site even after the CO posted the imminent danger notice. (Tr. 106-12, 139). I disagree, however, that Respondent should not receive a reduction for size. Respondent is a very small employer; it had a total of six to seven employees at the time of the inspection. (Tr. 160). OSHA's Field Operations Manual ("FOM") provides for a 60 percent reduction for penalties proposed for

[9] Respondent asserted in its Answer that: (1) the cited standards were "so vague as to be unenforceable," and (2) certain items were duplicative. *See* Answer, pp. 2-3. Respondent offered nothing in support of its asserted defenses. At the hearing, the Secretary withdrew serious Citation 1, Item 5(a) and willful Citation 2, Item 2(a), without altering the proposed penalties. (Tr. 4; See Exh. J-1, p.7). I agree with the Secretary that the citation items are not duplicative; they address different hazards and require different abatement methods. (S. Brief, p. 2.) Penney's affirmative defenses are rejected.

employers of this size.[10] Applying that reduction to the proposed penalty for this item results in a penalty of $2,000.00. I find this penalty to be appropriate. In the circumstances of this case, I find that the reduced penalty achieves the necessary deterrent effect for this very small employer. Therefore, a penalty of $2,000.00 is assessed.

Serious Citation 1, Item 2a

This item alleges a violation of 29 C.F.R. § 1926.95(a), which provides that:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.
>
> The Citation alleges a violation of the cited standard as follows:
>
> Employees were exposed to the hazards of communicable diseases associated with exposure to Hepatitis A and C and fecal Coliform bacteria such as E. Coli resulting from working in a trench removing and installing a sewer pipe while human waste including human feces [was] constantly pouring into the trench. No personal protective equipment such as face shields, disposable coveralls, or gloves were in use.

The discussion above establishes that [redacted], [redacted] and [redacted] all worked in the trench and were exposed to the human waste, including fecal matter, that was flowing out of the sewer pipe. (Tr. 29, 60-74). Both the CO and the AD testified that working in such conditions can result in exposure to serious diseases like E. Coli and Hepatitis A and C. They also testified the employees were not wearing any PPE when they were in the trench. (Tr. 69-73, 137). The CO noted that [redacted] initially had on boots and gloves, but later wore no PPE while working in the trench. (Tr. 73-74). In view of the record, the Secretary has shown that the cited standard applies, that its terms were not met, and that employees were exposed to the violative condition. The Secretary has also demonstrated knowledge, in that [redacted] himself worked in the trench and, with the exercise of reasonable diligence, should have known the hazards presented and that

[10] Based on the FOM, which is available on OSHA's website, a 60 percent reduction for size is applied to all of the penalties for serious violations in this case. *See* FOM, Chapter 6, p. 10. Other reasons for giving a penalty reduction in this matter are set out in the discussion relating to Citation 2, Item 1, *infra*.

PPE was required. This item is affirmed as a serious violation, in light of employee exposure to serious disease.

The Secretary has proposed a penalty of $5,000.00 for this item. The AD considered this item to have higher severity and lesser probability. (Tr. 144). I agree with the AD's determination regarding severity and probability. I find a penalty of $2,000.00 for this item to be appropriate, based on the above discussion. A penalty of $2,000.00 is assessed.

Serious Citation 1, Item 2b

This item alleges a violation of 29 C.F.R. § 1926.102(a)(1), which states:

> Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

The Citation alleges a violation of the standard as follows:

> An employee was using a Stihl cut saw in the trench to cut the clay pipe which created sparks and sent soil flying around the trench. No personal protective equipment such as face shields or eye protection [was] in use.

CO Gagnon testified that he saw [redacted] using a Stihl cut saw in the trench to smooth the edges of the concrete pipe; the Stihl saw was producing sparks and small pieces of shrapnel from the concrete pipe, and [redacted] did not have on a face shield for eye and face protection. (Tr. 26, 29, 60-61, 74-75; Exhs. C-7 through C-9). The CO stated, and the AD agreed, that not using protection could cause serious facial lacerations or serious eye injury. (Tr. 74, 137-38). Further, Respondent stipulated that it did not provide face protection. (Exh. J-1, p. 5).

Based on the record, the Secretary has shown that the cited standard applies, that its terms were not met, and that an employee was exposed to the violative condition. He has also shown knowledge, in that [redacted] was working at the site and had to have known that [redacted] was using the Stihl saw in the trench. [redacted] also should have known, with the exercise of reasonable diligence, that eye and face protection was required. This item is affirmed as a serious violation in view of the serious injuries that could have resulted. The AD considered this item to have higher severity and lesser probability. (Tr. 144-45). I agree with the AD's determination regarding severity and probability. Items 2a and 2b have been grouped for penalty purposes. No separate penalty was proposed for Item 2b, and none is assessed.

Serious Citation 1, Item 3

Item 3 alleges a violation of 29 C.F.R. § 1926.651(d), which provides that:

> Employees exposed to public vehicular traffic shall be provided with, and shall wear, warning vests or other suitable garments marked with or made of reflectorized or high-visibility material.

The Citation alleges a violation as follows:

> An employee was exposed to struck-by hazards from vehicle traffic while starting and stopping two way heavily congested traffic in a heavy rain downpour without any safety vest or other reflectorized or high-visibility material.

The CO testified that in the afternoon, at the start of rush hour, [redacted] had [redacted] stand in the street to stop traffic, while [redacted] backed into the street, with a Scat Cat, to fill in the trench. Traffic was heavy, it had begun raining, and visibility was poor. [redacted], who was not wearing a safety vest, was almost hit by traffic at least twice. (Tr. 57-58, 77-79). A photograph, taken during the inspection, shows [redacted] exposed to the traffic in the street. (Tr. 77; Exh. C-15). Respondent stipulated that its employee was not wearing a warning vest. (Exh. J-1, p. 5). It is clear that being exposed to vehicular traffic under these conditions could have resulted in [redacted] being struck and seriously or fatally injured. (Tr. 138).

The record shows that the cited standard applies, that its terms were not met, and that an employee was exposed to the violative condition. It also shows knowledge, in that [redacted] directed [redacted] to stand in the street to stop traffic. [redacted] also should have known, with the exercise of reasonable diligence, that a warning vest was required in these circumstances. This item is affirmed as a serious violation, due to the serious or fatal injuries that could have occurred.

A penalty of $7,000.00 has been proposed for this item. The AD considered this violation to have higher severity and greater probability, due to the potential for the employee to be struck by traffic and seriously or fatally injured. (Tr. 145-46). I agree with the severity and probability assessed by the AD. I conclude that a penalty of $2,800.00 is appropriate, for the reasons stated above. A penalty of $2,800.00 is assessed for this item.

Serious Citation 1, Item 4

This item alleges a violation of 29 C.F.R. § 1926.651(g)(1)(i), which states:

> Where oxygen deficiency (atmospheres containing less than 19.5 percent oxygen) or a hazardous atmosphere exists or could reasonably be expected to exist, such as in excavations in landfill areas or excavations in areas where hazardous substances are stored nearby, the atmospheres in the excavation shall be tested before employees enter excavations greater than 4 feet (1.22 m) in depth.
>
> The Citation alleges a violation as follows:
>
> Employees including the employer were exposed to potential hazardous atmospheric conditions while working in a trench with no testing done before employees entered the trench.

CO Gagnon testified that methane gas was being emitted from the sewer water and that there was exhaust from use of the Stihl saw. There was also exhaust from the equipment being used (the backhoe and the vacuum truck), and more exhaust from the heavy traffic on nearby Broad Street. All of this exhaust could have entered the trench. The CO said that the methane gas and the exhaust were asphyxiates, that methane gas was also flammable, and that the Stihl saw produced sparks when used by [redacted]. For these reasons, the employer was required to test the atmosphere in the trench before employee entry. When the CO asked [redacted] if he had done so, [redacted] stated that he was not aware of that requirement. (Tr. 24-26, 29, 61, 69, 72, 75-76).

The cited standard requires the atmosphere in an excavation over four feet deep to be tested before employee entry if an oxygen deficiency or a hazardous atmosphere exists or could reasonably be expected to exist. The standard gives examples of when such an atmosphere could exist, *i.e.*, in excavations in landfill areas or excavations in areas where hazardous substances are stored nearby. These examples do not address the conditions at the subject site. The preamble to the excavations standard, however, states as follows in regard to the cited standard:

> The existing language requiring that tests be performed "where oxygen deficiency or gaseous conditions are possible" was changed to a requirement that OSHA believes is more reasonable, but still provides appropriate employee protection. Taken literally, the conditions listed in the existing rule are possible in any given excavation if the proper circumstances are present. However, hazardous atmospheric conditions are more likely to exist or occur in some circumstances than in other circumstances. For example, *work involving the extension or maintenance of sewer utility or gas utility systems*, work near refineries or near areas where petroleum distillates are handled or stored, and work near landfills or hazardous waste dumps are situations where hazardous

> atmospheric conditions are likely to occur….Atmospheres in excavations in these types of situations must be tested.
>
> However, it is OSHA's opinion that it is not reasonable to require that all excavations be tested routinely since there is limited potential for oxygen deficiency or gaseous conditions in the vast majority of situations. Where the conditions are such that these hazards could not reasonably be expected to occur, OSHA believes that routine testing should not be required. Accordingly, the final requirement is written to reflect what OSHA believes to be a more reasonable approach to testing

54 Fed. Reg. 45894, 45919-20 (1989) (emphasis added).

Based on the foregoing, I find that the work at the subject site, *i.e.*, replacing a sewer pipe, is one that the cited standard is intended to cover. This is especially true here because, as the CO testified, sewer water flowed continuously from the sewer pipe the entire time he was at the site. (Tr. 24-26, 29). Further, as set out above, there was exhaust from the Stihl saw, exhaust from the equipment Penney's was using, and exhaust from the nearby heavy traffic, which could have entered the trench. Methane gas and exhaust are asphyxiates. Methane gas is also flammable and the Stihl saw created sparks. Under these circumstances, oxygen deficiency or a hazardous atmosphere could reasonably be expected to exist. Respondent was therefore required to test the atmosphere in the trench before employees entered.[11]

In view of the above, the Secretary has established that the cited standard applies, that its terms were not met, that employees were exposed to the violative condition, and that the employer could have known of the condition with the exercise of reasonable diligence. As discussed, [redacted] worked at this sewer line job site, in the trench that contained sewage. The Secretary has also established that the violation was serious. The AD testified that if the oxygen level went below 19.5 percent, which would represent an oxygen deficiency, or into the 20's, which could be an explosive atmosphere, injuries could be fatal or serious, including permanent disability. (Tr. 138, 146). Item 4 is affirmed as a serious violation.

[11] [redacted] asserted in his opening statement, and repeated in his brief, that the vacuum truck removed any gases that were in the trench. (Tr. 16; R. Brief, p. 2). He attached to his brief information about the truck. As stated above, this information will not be considered as it was not offered in evidence at the hearing. Further, the CO testified he saw the vacuum truck used only "a couple of times," that it was not used when employees were in the trench, and that [redacted] indicated he used it to remove soil from hard-to-reach areas, *i.e.*, under the storm drain. (Tr. 33, 62).

The Secretary has proposed a penalty of $5,000.00 for this item. I agree with the AD's determination that the severity of the condition was higher and the probability lesser. (Tr. 146-47). Based on my findings above, I conclude that a penalty of $2,000.00 is appropriate for this item. A penalty of $2,000.00 is assessed.

Serious Citation 1, Item 5b[12]

Item 5b alleges a violation of 29 C.F.R. § 1926.651(j)(2), which provides:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.
>
> Employees were exposed to struck-by and crushing hazards while working in a 10 foot deep trench with the 5 foot high by 9 feet long by 6 feet wide spoil pile located at and along the north edge of the 9 foot long trench.

CO Gagnon testified that when he first went to the site, there was a spoil pile about 18 inches from the northwest edge of the trench; the pile was approximately nine feet long, six feet wide and five feet high. When he returned in the afternoon, he saw that the spoil pile was right at the edge of the northwest corner of the trench; it hung slightly over the edge in some areas and looked like it was "getting ready to roll into the trench," especially due to the vibrations in the area. Photographs of the spoil pile were received into evidence. (Exhs. C-2-3 and C-16-17. Exh. C-2 shows how the spoil pile looked in the morning. Exhs. C-3 and C-16-17 show how the spoil pile looked in the afternoon.) [redacted] is shown in the trench and [redacted] (in the white T-shirt and yellow hardhat) is shown looking down into the trench. (Tr. 46-49, 80-84; Exhs. C-16-17). [redacted] told the CO he had intended to remove the pile, but had not done so because he only had one truck and the truck contained a load of stone needed to fill in the trench. (Tr. 84). Respondent stipulated that it did not protect employees from loose rock or soil that could have fallen or rolled into the trench. (Exh. J-1, p. 5).

[12] The Secretary withdrew Item 5a of Citation 1 at the beginning of the hearing; however, in withdrawing Item 5a, the proposed penalty was not altered. (Tr. 4).

The AD testified that the condition was a serious violation because if the spoil pile had fallen into the trench and struck an employee, the result could have been a fatal or serious injury. (Tr. 138). The record establishes the cited standard applies, that its terms were not met, and that employees were exposed to the violative condition. It also establishes knowledge, as [redacted] was aware of the condition and worked in the trench himself. This item is affirmed as serious.

A $7,000.00 penalty has been proposed for this item. The AD considered this item to have higher severity and greater probability, due to the potential for a fatal or serious physical injury. (Tr. 147). I agree. I find a penalty of $2,800.00 to be appropriate, for the reasons stated above. A penalty of $2,800.00 is assessed.

Willful Citation 2, Item 1

This item alleges a violation of 29 C.F.R. § 1926.651(i)(3), which states:

> Sidewalks, pavements and appurtenant structure shall not be undermined unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures.

The Citation alleges a violation as follows:

> The employer does not protect employees working under an undermined sidewalk, asphalt pavement, and a storm drain from struck-by and crushing hazards. Three instances of this violation were observed most recently on July 26 where a support system or any [other] method of protection was not provided:
>
> 1. The south edge of the trench undermined the sidewalk;
> 2. The storm drain (catch basin) system [overhung] the trench on the north side;
> 3. The storm drain concrete top and the asphalt pavement were undermined on the north side of the trench.

CO Gagnon took measurements of the trench and found it to be ten feet deep, nine feet long and five feet wide. He observed that the trench had no cave-in protection and that the walls were vertical, heavily fissured, and undermined in some areas. In particular, the sidewalk on the trench's south side was undermined, as was the storm drain on the north side. Also the asphalt and concrete at the trench's northwest corner was also undermined, until it later caved in.[13] The

[13] The CO noted that the sidewalk on the trench's south side was undermined six to eight inches; it was also cracked in places. Photographs taken by the CO during the inspection show individuals standing on the sidewalk, adding further weight to the sidewalk. In addition, the storm drain on the trench's north side was undermined six or seven

CO noted that the heavy traffic on nearby Broad Street created vibrations, as did the backhoe and the vacuum truck when they were in use, which made the trench more susceptible to a cave-in. He also noted that the soil had been previously disturbed, as the sewer line and the storm drain had been installed at some time in the past. Further, [redacted] told the CO that another contractor had excavated the site about six months before and had filled it back in upon declining the job. The CO manually tested the soil to determine its classification; the soil crumbled when dry and lacked cohesion when wet. A test with a penetrometer indicated the soil was Type C, the least stable soil type. The CO also took samples of the soil at the site and sent them to OSHA's lab in Salt Lake City for testing; the results of that testing revealed the soil to be a "layered system," with Type C soil on top of Type B soil. (Tr. 29-30, 35, 46-49, 59-60, 85-102; Exh. C-18). Photographs taken by the CO during the inspection show the undermined areas. (Exhs C-2-3, C-7(a), C-17 and C-20-27).

Based on the foregoing, the Secretary has shown that the cited standard applies, that its terms were not met, and that employees were exposed to the cited hazard.[14] Employee exposure is graphically demonstrated by certain photographs in the record, *i.e.*, Exhibits C-7(a), C-20-22 and C-24, which depict employees in the trench with undermined areas above them. The Secretary also has shown knowledge. [redacted] worked in the trench himself, and he told CO Gagnon that he was aware of the undermining, that he knew the OSHA regulations, and that he knew a trench over five feet deep needed protection. (Tr. 27-28, 70). Further, the record shows that Penney's was previously cited in 2006 for allowing employees to work in a trench without cave-in protection, and [redacted] signed the agreement that settled that citation on June 14, 2006. (Tr. 108-12; Exhs. C-28-29). The serious nature of the condition in this case is demonstrated by the fact that the undermined asphalt and concrete at the northwest corner had fallen into the trench by the time the CO returned to the site in the afternoon. (Tr. 35). When he spoke to [redacted], the CO described the trench as "very dangerous," "life-threatening," and "a grave." (Tr. 31). The AD testified the trench was "possibly the worst hole that [he had] ever seen" in his OSHA career and that if the undermined sidewalk or storm drain had fallen on an

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feet. (Tr. 96-102).

[14] Respondent has admitted that it did not provide a support system or any other method of protection to employees working under the storm drain on the north side of the trench. (Exh. J-1, p. 4).

employee the injury could have been fatal. (Tr. 139-40). He also testified that this was only the second time in his OSHA career that he had posted an imminent danger notice. (Tr. 141).

The Secretary has classified this item as a willful violation. The Second Circuit, where this case arose, has held that a willful violation is "one done either with an intentional disregard of, or plain indifference to, the statute." *A. Schonbek & Co., Inc. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981). Similarly, the Commission has held that to prove a violation was willful, the Secretary must show that the violation was committed "with intentional, knowing or voluntary disregard of the requirements of the Act or with plain indifference to employee safety." *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). In addition, the Commission has elaborated on what must be established to prove a violation was willful, as follows:

> 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.

Williams Enter., Inc., 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987).

I find that the violation was properly classified as willful. As set out above, [redacted] told the CO that he was aware of the undermining, that he knew the OSHA regulations, and that he knew that a trench over five feet deep needed cave-in protection. (Tr. 27-28). After the inspection, and after being told that citations would be recommended, [redacted] asked the CO if he could finish the job. The CO told [redacted] the trench was "very dangerous," "life-threatening," and "a grave," and that while OSHA did not have the legal authority to stop the job; it did not want him in the trench at all. [redacted] said he understood. (Tr. 30-31). When the CO returned to the site with the AD after lunch, however, they saw [redacted] exiting the trench. (Tr. 31). Further, even after the CO came back and posted the imminent danger notice, and spoke to both [redacted] and [redacted] about the notice, [redacted] told the CO that he had no choice and had to finish the job. (Tr. 32-33). Thereafter, the work continued until the project was completed, with the CO present to observe employee exposure. (Tr. 33-34). Under these circumstances, and given the previous citation Penney's received in 2006 for not providing cave-in protection to employees working in a trench, the Secretary has demonstrated that the violation was willful. (Exhs. C-28-29). The Secretary has shown [redacted] had a heightened awareness

of the illegality of the conditions at the site; despite that awareness, and despite his knowledge of OSHA's trenching requirements, he consciously disregarded those requirements. Item 1 is affirmed as a willful violation.

The Secretary has proposed a penalty of $70,000.00 for this item. The AD testified that the violation had higher severity, in that if the sidewalk, storm drain or pavement had fallen on an employee, the result could have been a fatal or a severely disabling injury. He also testified that the probability was greater, as the vibrations from traffic and equipment could have caused the cited items to fall in the trench. He noted that some of the asphalt did fall in and that luckily no one was underneath it at that time. (Tr. 148-49). I agree with the AD regarding the gravity of the violation, and, as found above, no reductions for good faith or history are appropriate. I nonetheless find it appropriate to apply the 80 percent penalty reduction to this item due to Respondent's very small size.[15] [redacted] clearly exercised very poor judgment in continuing the work at the site after being advised not to and even after the imminent danger notice was posted. He clearly endangered employees in doing so. That said, [redacted] testified that he now understands that what he did was wrong. He testified that after the inspection, he hired a retired OSHA inspector to train him and his employees in what they needed to do in the field. He said that knowing what he knows now, he would not have disobeyed the CO and sent the employees back into the trench. He also said that now that he knows better, he would not send anyone into a hole over five feet deep. [redacted] stated that he currently has no employees and is completely out of business, having lost a number of contracts as a result of the citations he received. (Tr.160-66). In view of this testimony, and applying a 80 percent reduction to the proposed penalty in light of the small size of this employer, I find that a penalty of $14,000.00 is appropriate for this item. A penalty of $14,000.00 is therefore assessed.

Willful Citation 2, Item 2b[16]

This item alleges a violation of 29 C.F.R. § 1926.652(a)(1), which provides:

> 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

[15] Based on the FOM, an 80 percent reduction for size is applied to the penalties for the serious willful violations in this case, in light of the employer's very small size. *See* FOM, Chapter 6, p. 18-19.

[16] The Secretary withdrew Item 2a of Citation 2 at the beginning of the hearing; however, in withdrawing Item 2a, the proposed penalty was not altered. (Tr. 4).

> are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.
>
> The Citation alleges a violation as follows:
>
> The employer does not protect employees working in a trench without any cave-in protection in use. An instance of this violation was observed most recently on July 26 where neither sloping and benching systems nor support systems, shield systems, or other protection systems were in use.

The foregoing discussion in Citation 2, Item 1, describes the condition of the trench at the site and the hazards it posed for the employees who worked in it. In sum, the trench was ten feet deep, nine feet long and five feet wide. The sides of the trench were vertical and heavily fissured, several areas of the trench were undermined, and there was no cave-in protection in the trench. The trench was a layered system, with Type C soil on top of Type B soil, and vibrations from traffic and equipment made the trench more susceptible to a cave-in. The foregoing discussion shows that, by the time the CO returned to the site after lunch, some of the concrete and asphalt at the northwest corner had fallen into the trench. Further, at 3:19 p.m., the CO observed soil from that same corner fall into the trench. The CO had seen [redacted] exit the trench just minutes before, at 3:15 p.m. The CO testified that the soil that had caved in was about three by three by three feet. (Tr. 54-57; Exhs. C-5-6). Based on the record, the Secretary has shown that the cited standard applies, that its terms were not met, that employees were exposed to the violative condition, and that the employer had knowledge of the condition. The Secretary has also shown the condition was serious, in that a cave-in could have resulted in serious injury or death. Finally, the Secretary has shown that Item 2 is a willful violation. The discussion in Citation 2, Item 1 above relating to the willful classification applies equally to this discussion. For the reasons discussed above regarding Citation 2, Item 1, Citation 2, Item 2 is affirmed as a willful violation.

A penalty of $70,000.00 has been proposed for this item. The AD considered this item to have higher severity and greater probability, because if the trench had caved in on top of an employee, the employee could have been fatally injured or permanently disabled. Also, a partial cave-in had already occurred. (Tr. 149-50). I agree with the AD's testimony in this regard, and,

for all of the reasons set out above as to an appropriate penalty for Citation 2, Item 1, I find that an appropriate penalty for Item 2 is $14,000.00. That penalty is assessed.

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. Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.21(b)(2), is affirmed as a serious violation, and a penalty of $2,000.00 is assessed.
2. Citation 1, Items 2a and 2b, alleging violations of 29 C.F.R. §§ 1926.95(a) and 1926.102(a)(1), respectively, are affirmed as serious violations, and a penalty of $2,000.00 is assessed.
3. Citation 1, Item 3, alleging a violation of 29 C.F.R. § 1926.651(d), is affirmed as a serious violation, and a penalty of $2,800.00 is assessed.
4. Citation 1, Item 4, alleging a violation of 29 C.F.R. § 1926.651(g)(1)(i), is affirmed as a serious violation, and a penalty of $2,000.00 is assessed.
5. Citation 1, Item 5a, alleging a violation of 29 C.F.R. § 1926.651(j)(1), is vacated.
6. Citation 1, Item 5b, alleging a violation of 29 C.F.R. § 1926.651(j)(2), is affirmed as a serious violation, and a penalty $2,800.00 is assessed.
7. Citation 2, Item 1, alleging a violation of 29 C.F.R. § 1926.651(i)(3), is affirmed as a willful violation, and a penalty of $14,000.00 is assessed.
8. Citation 2, Item 2a, alleging a violation of 29 C.F.R. § 1926.651(k)(2), is vacated.
9. Citation 2 Item 2b, alleging a violation of 29 C.F.R. § 1926.652(a)(1), is affirmed as a willful violation, and a penalty of $14,000.00 is assessed.

/s/ *Carol A. Baumerich*
Carol A. Baumerich
Judge, OSHRC

Date: July 15, 2013
Washington, D.C.