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. AMERICAN ENGINEERING & DEVELOPMENT CORP., Respondent.	OSHRC Docket No. 10-0359

ON BRIEFS:

Louise McGauley Betts, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Kenneth A. Knox, Esq.; Fisher & Phillips, LLP, Fort Lauderdale, FL
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

American Engineering & Development Corporation ("AEDC" or "the Company") was replacing underground utilities at a worksite in Miami, Florida. During an inspection of the worksite by the Occupational Safety and Health Administration ("OSHA"), two AEDC employees were observed working in an excavation without cave-in protection. As a result, OSHA issued the Company a citation alleging a repeat violation of 29 C.F.R. § 1926.652(a)(1),[1]

[1] The standard provides, in pertinent part:

> (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

for failing to provide the required protection. Following a hearing, Administrative Law Judge Sharon D. Calhoun issued a decision affirming the citation and assessing the $25,000 proposed penalty.

On review, AEDC argues that the judge erred in concluding that the Company had knowledge of the violative condition. AEDC also argues that, even if it had such knowledge, it proved the affirmative defense of unpreventable employee misconduct ("UEM"). For the reasons that follow, we conclude that the Company had knowledge but vacate the citation based on its UEM defense.

BACKGROUND

AEDC, a Florida company specializing in infrastructure work, was replacing underground utilities as part of the Florida Department of Transportation's Biscayne Boulevard project in Miami. AEDC Assistant General Superintendent Eric Garcia was in charge of this project and several other ongoing AEDC projects. Typically, each of the projects was staffed by an AEDC foreman who reported to Garcia and supervised the other workers onsite. However, several backhoe operators at AEDC worksites were not supervised by any AEDC foremen and instead reported directly to Garcia. Guspar Coll-Gonzales was one of these operators.

Garcia testified that on November 18, 2009, he instructed Coll-Gonzales not to access three trenches at the worksite that Garcia considered unsafe. At the hearing, Coll-Gonzales confirmed that Garcia told him not to enter these trenches. Nonetheless, after Garcia left the worksite, Coll-Gonzales admitted that he directed two AEDC employees, Carlos Prieto and Eric Guzman, to enter one of the three trenches because Coll-Gonzales "felt that the slope was okay." Shortly thereafter, in response to a complaint from the Miami Fire Department regarding unsafe excavations, two OSHA compliance officers ("COs") visited the worksite and observed Prieto and Guzman in the trench, which was more than five feet deep with no cave-in protection. The COs approached Coll-Gonzales, who was operating an excavator, and asked who was in charge. Coll-Gonzales responded that Garcia was in charge of the worksite, but he was not there. One of the COs asked, "If . . . Garcia is not at the site, who is in charge?" Coll-Gonzales responded,

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> (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.

29 C.F.R. § 1926.652(a)(1).

"That was me." And when the COs asked Guzman who his supervisor was, Guzman identified Coll-Gonzales.

Ten to fifteen minutes later, Garcia arrived at the worksite and identified himself to the COs as the assistant general superintendent. He told them that he was in charge of the employees at the worksite, and then clarified that he was not in charge while he was gone. Rather, Garcia said he left Coll-Gonzales in charge of Prieto and Guzman, and Coll-Gonzales had the authority to direct their work. Garcia later testified that Coll-Gonzales was only authorized to relay orders from Garcia. As he explained, Prieto and Guzman "would take the orders from [Coll-Gonzales] because I've given the orders and I've already determined where they're working," and so "those guys worked with [Coll-Gonzales] . . . to make sure that that task gets done."

DISCUSSION

I. Knowledge

It is well-established that "[t]o meet her burden of establishing employer knowledge, the Secretary must show that the cited employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2122, 2000 CCH OSHD ¶ 32,101, p. 48,239 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001). And "knowledge can be imputed to the cited employer through its supervisory employee." *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999). "Therefore, the Secretary establishes a prima facie showing of knowledge by proving that a supervisory employee was responsible for the violation." *Aquatek Sys., Inc.*, 21 BNA OSHC 1400, 1401, 2006 CCH OSHD ¶ 32,794, p. 52,442 (No. 03-1351, 2006). Here, the judge found that the Company knew of the unprotected excavation through Coll-Gonzales, whom the judge determined was a supervisor whose knowledge could be imputed to AEDC.[2] On review, the Company argues that Coll-Gonzales's

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[2] The judge concluded that the remaining elements of the Secretary's *prima facie* case were established and those findings are not at issue here. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (stating that, in addition to employer knowledge, the Secretary must establish "(1) the cited standard applies, (2) there was a failure to comply with the cited standard, [and] (3) employees had access to the violative condition"), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

knowledge cannot be imputed because he was just a backhoe operator who merely relayed instructions from Garcia.

The Commission has long recognized that "an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor" for the purpose of establishing knowledge. *Access Equip. Sys.*, 18 BNA OSHC at 1726, 1999 CCH OSHD at p. 46,782. In deciding whether an employee qualifies as a supervisor, "[i]t is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993). Although the record shows that Coll-Gonzales was not authorized to give orders other than those given to him by Garcia, and could not hire, fire, or discipline employees, we find that the testimony of both Garcia and Coll-Gonzales supports the judge's conclusion regarding Coll-Gonzales's supervisory status.

Garcia acknowledged that Coll-Gonzales was expected to instruct Prieto and Guzman about "[w]hat the task at hand was and what they should be doing," and Garcia "expected that [Prieto and Guzman] would adhere to [Coll-Gonzales's] direction." And Coll-Gonzales admitted that he was in charge of the workers in Garcia's absence, stating that "[w]henever I tell [Prieto and Guzman] to do this or that, they do that," because "I have more experience working than them," so "they go wherever I am to ask." This testimony corroborates that of one of the COs, who stated that Garcia told him during the inspection that Coll-Gonzales was in charge of Prieto and Guzman, and it is consistent with Guzman's identification of Coll-Gonzales as his supervisor when questioned by the CO.

Taken together, we find that these facts establish that Garcia delegated authority to Coll-Gonzales to direct the work of Prieto and Guzman in his absence and, thus, conclude that Coll-Gonzales was a supervisor whose knowledge can be imputed to AEDC.[3] *See Access Equip. Sys.*,

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[3] Contrary to AEDC's claims, case law from the Eleventh Circuit—to which this case could be appealed as AEDC's offices and the cited worksite are located in Florida—does not require a different result. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent."). In *Daniel International Corp. v. OSHRC*, 683 F.2d 361 (11th Cir. 1982), the court held, in considering a UEM defense, that an employee's "position as leadman did not place him in a supervisory role," such that his noncompliance with a safety rule suggested lax enforcement

18 BNA OSHC at 1726, 1999 CCH OSHD at p. 46,782 (knowledge imputed from "a leadman . . . 'in charge of' . . . two [other] employees," whom the employer's general manager "considered . . . to be 'like the lead person for' [those two employees]"); *Iowa S. Utils. Co.*, 5 BNA OSHC 1138, 1139, 1977-78 CCH OSHD ¶ 21,162, p. 25,945 (No. 9295, 1977) (knowledge imputed from a "temporary working foreman . . . vested with some degree of authority over the other crew members assigned to carry out the specific job involved"); *Mercer Well Serv., Inc.*, 5 BNA OSHC 1893, 1894, 1977-78 CCH OSHD ¶ 22,210, p. 26,722 (No. 76-2337, 1977) (imputing knowledge of employee "considered to be in charge of the crew when [his supervisor] was not present").

II. Unpreventable Employee Misconduct

AEDC contends that if it is found to have had knowledge of the violative condition, the violation was the result of UEM on the part of Coll-Gonzales, who disregarded Garcia's instruction to stay out of the trench at issue here. To establish this affirmative defense, an employer must show that it "(1) has established work rules designed to prevent the violation; (2) has adequately communicated the rules to its employees; (3) has taken steps to discover violations of the rules; and (4) has effectively enforced the rules when violations were detected." *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081, 2002-04 CCH OSHD ¶ 32,657, p. 51,326 (No. 99-0018, 2003).[4]

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of such rules. 683 F.2d at 365. But *Daniel* is factually distinguishable from the present matter. Unlike Assistant General Superintendent Garcia's actions here, the supervisor in *Daniel* did not delegate his authority to the "leadman" while he was away from the worksite, nor did the crew consider the leadman to be in charge. Rather, the supervisor in *Daniel* gave detailed instructions directly to the crew, personally oversaw the first part of the task he had assigned, and then remained onsite, sitting at a desk located only about ninety feet away from the work area. *Id.* at 362-63, 365. In these circumstances, we conclude that Eleventh Circuit precedent does not preclude us from imputing Coll-Gonzales's knowledge here.

[4] AEDC argues that Fifth Circuit precedent holding that the "Secretary, not [the employer], bears the burden to establish that the supervisor's violative conduct was foreseeable," *W.G. Yates & Sons Construction Co. v. OSHRC*, 459 F.3d 604, 607, 609 (5th Cir. 2006), is controlling here because that circuit had jurisdiction over cases arising in Florida before the circuit split. And AEDC contends that the Fifth Circuit's reliance in *Yates* on a prior Fifth Circuit case decided before the advent of the Eleventh Circuit—*Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976)—means that the Eleventh Circuit would interpret *Horne*, which is binding precedent in that circuit, in the same manner the Fifth Circuit did in *Yates*. But the Commission has recognized that where "[t]he Eleventh Circuit has neither decided nor directly addressed [an] issue[,] . . . Fifth Circuit cases . . . do not preclude us from following Commission precedent."

Here, the judge concluded that AEDC established the first three UEM elements, but she rejected the defense based on her finding that the Company did not effectively enforce its safety rules, as evidenced primarily by AEDC's decision to delay disciplining Coll-Gonzales, Prieto, and Guzman for their November 18, 2009, violation until January 25, 2010, approximately two months later. On review, the Secretary does not challenge the judge's factual findings relating to the first three elements of AEDC's UEM defense. Therefore, we do not revisit those findings here. At issue, then, is only the judge's ruling on the fourth element of the UEM defense—effective enforcement of work rules. In that regard, we agree with AEDC that the judge erred in concluding that the evidence here established that the Company failed to effectively enforce its safety rules.

As we recently observed in *Thomas Industrial Coatings, Inc.*, No. 06-1542, 2012 WL 1777086 (OSHRC Feb. 28, 2012), post-inspection discipline alone is not necessarily determinative of the adequacy of an employer's enforcement efforts. In *Thomas*, against a backdrop of evidence that the employer's pre-inspection enforcement efforts were extensive, we rejected the judge's conclusion that the employer's "decision to forgo discipline . . . in this one instance" established that "discipline was not universally administered." *Id.* at *7.; *see Precast Serv., Inc.*, 17 BNA OSHC 1454, 1456, 1995-97 CCH OSHD ¶ 30,910, p. 43,036 (No. 93-2971, 1995) (evaluating employer's disciplinary measures in context of UEM defense and noting that "Commission precedent does not rule out consideration of *post*-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline"), *aff'd per curiam*, 106 F.3d 401 (6th Cir. 1997) (unpublished table decision).

Here the judge found, and the Secretary does not dispute on review, that: (1) AEDC had a progressive disciplinary program; (2) AEDC issued fifty to seventy written warnings, suspensions, and terminations to employees who had violated safety rules in the year prior to the incident at issue; and (3) seventeen employee warning notices for trenching violations covering the period from April 2008 through August 2009 resulted in oral and written warnings, counseling, and a suspension. And although AEDC waited until two months after the inspection,

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McDevitt Street Bovis, Inc., 19 BNA OSHC 1108, 1110-12, 2000 CCH OSHD ¶ 32,204, p. 48,781 (No. 97-1918, 2000). The Eleventh Circuit has not decided whether, in cases in which a supervisor's conduct is the basis of a violation, UEM is an affirmative defense or the Secretary must show that the conduct was foreseeable. As a result, we follow our own precedent here, which treats UEM as an affirmative defense that must be established by AEDC.

it eventually disciplined all three employees involved in the violation at issue for "entering a trench after being told not to by a supervisor." There is no evidence that any of these employees had ever before violated a Company work rule or disobeyed a safety instruction. Moreover, there is nothing in the record to suggest that AEDC had previously forgone imposing discipline following such an infraction. Under these circumstances, we conclude that the judge erred in relying on AEDC's single instance of delayed discipline to find that the Company failed to adequately enforce its safety rules. *See Thomas,* 2012 WL 1777086, at *7 ("Given the record as a whole, we find that [Thomas's] decision to forgo discipline for these particular employees in this one instance does not support a finding that it failed to exercise reasonable diligence . . . .").

The judge also noted that "the number of employees who felt comfortable violating" AEDC's rules evidenced lax enforcement. And the Secretary echoes that point, contending that the fact that Coll-Gonzales, Prieto, and Guzman violated AEDC's safety rule together shows they did not fear discipline from the Company, and Coll-Gonzales's participation in the violation, as a supervisor, suggests ineffective enforcement of safety rules. *See GEM Indus., Inc.*, 17 BNA OSHC 1861, 1865, 1995-97 CCH OSHD ¶ 31,197, p. 43,690 (No. 93-1122, 1996) ("Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule."), *aff'd*, 149 F.3d 1183 (6th Cir. 1998); *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1480, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979) ("[A] supervisor's breach [of] a company safety policy is strong evidence that the implementation of the policy is lax."). But here, Coll-Gonzales had a clean safety record with AEDC for three years before this violation, and he was supervising two employees, Prieto and Guzman, who had been working for AEDC for only fifteen days and who would "go wherever [Coll-Gonzales] ask[ed]." In these circumstances, we find that their conduct on this one occasion is not sufficient to undermine the Company's evidence that it consistently enforced its safety program.

Therefore, we find that the judge erred in rejecting the UEM defense for lack of enforcement. Accordingly, we vacate the citation.

SO ORDERED.

__/s/___________________________
Thomasina V. Rogers
Chairman

_/s/____________________________
Cynthia L. Attwood
Commissioner

Dated: August 27, 2012

ATTWOOD, Commissioner, concurring:

Based on evidence that AEDC employee Guspar Coll-Gonzales disobeyed explicit instructions when he directed two laborers to work in an unsafe trench, I join in the decision. But there are a number of unanswered questions about these instructions and AEDC's enforcement of its safety policy that I find troubling. AEDC had twelve open trenches on the morning of the OSHA inspection, three of which AEDC Assistant General Superintendent Eric Garcia deemed unsafe and declared off-limits. Around noon that day, Lieutenant Frank Mainade of the Miami Fire Department responded to a complaint about unsafe trenching practices at the AEDC worksite. Upon his arrival at the site, Mainade observed an individual working in an 8-foot deep unprotected trench. Although it is undisputed that this was one of the trenches that Garcia had declared off-limits, two individuals—one of whom Mainade believed to be a supervisor and the other a site engineer—stated that they had an engineer's letter certifying the trench and did not need a trench box. And one of the individuals Mainade met with was AEDC Grading Superintendent Brian Burkhalter.

Following Lieutenant Mainade's warning that he planned to contact OSHA, the trench was covered and, based on instructions from AEDC's safety manager, Burkhalter declared *all* trenches off-limits until a safety assessment could be performed later in the day. Yet soon thereafter, and not long before OSHA arrived around one o'clock to inspect the worksite, Coll-Gonzalez directed the two laborers he supervised to work in another of the three trenches originally deemed unsafe.

During the OSHA inspection of this other trench, Garcia—who returned to the site shortly after OSHA arrived—provided differing explanations when asked by the CO about the absence of any trench protection. First, he stated that it was Coll-Gonzales's responsibility to install cave-in protection. Then he asserted, as others had earlier that morning, that the Company could "go up to 15 feet without cave-in protection because an engineer signed a letter [to that effect]," a statement Burkhalter echoed when the CO spoke with him. There is no evidence, however, that during the inspection Garcia ever attributed the non-complying condition to disobedience of an instruction not to enter the trench.

At the hearing, Garcia never mentioned that an engineer had approved the trench, but neither did he indicate that he had not said so to the CO. Instead, he testified that he was angry

to learn that someone disobeyed his order by entering “an illegal trench,” and acknowledged that he approved of the disciplinary measures that AEDC ultimately imposed.

In these circumstances, I question whether Coll-Gonzales really disobeyed any instructions, or whether AEDC consistently enforced its safety rules. The judge found the Company’s explanation for its delay in disciplining Coll-Gonzales and the two laborers incredible. But she did not find, and the Secretary has not argued, that testimony concerning Garcia’s admonition against entering the three trenches was not credible, or that the presence of a worker in one of the unsafe trenches a short time earlier in the day—which purportedly led AEDC to *again* direct employees to stay out of the trenches—showed lax enforcement. In the absence of certain vital details regarding that earlier incident—such as the identity of the worker in the trench and his supervisor—and other credibility determinations by the judge, the evidence that Coll-Gonzales engaged in misconduct stands unrebutted.

/s/
Cynthia L. Attwood
Commissioner

Dated: August 27, 2012

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. American Engineering & Development Corporation, Respondent.	OSHRC Docket No. **10-0359**

Appearances:

Yasmin K. Yanthis-Bailey, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Kenneth A. Knox, Esq., Fisher & Phillips, LLP, Ft. Lauderdale, Florida
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

American Engineering & Development Corporation (American Engineering), is a construction contractor specializing in infrastructure work, including water, sewer, paving and drainage work (Tr. 173). For more than a year, American Engineering was working on the FDOT Biscayne Boulevard project at the jobsite located at US1 and SW 30 Street in Miami, Florida, putting in new infrastructure, taking out existing utilities and replacing them with new utilities (Tr. 204). On November 18, 2009, Occupational Safety and Health Administration (OSHA) compliance officers Hernaldo Carpio and Angel Diaz conducted an inspection of the jobsite in response to a complaint from the City of Miami Fire Department. As a result of the inspection conducted by Carpio and Diaz, the Secretary of Labor on January 26, 2010, issued a citation to American Engineering alleging one repeat violation of the Occupational Safety and Health Act of 1970 (Act) asserting a violation of § 1926.652(a)(1) for failing to provide an

adequate protective system to protect employees working in the excavation from cave-in.

The undersigned held a hearing in this matter on July30, 2010, in Miami, Florida. The parties have submitted post-hearing briefs. American Engineering contests the citation and proposed penalty asserting it had no knowledge of the violation and that the violation was as a result of an isolated incident of employee misconduct. For the reasons that follow, Citation 1, item 1 is affirmed.

Jurisdiction

At the hearing, the parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act. The parties also stipulated that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 7).

Background

On the morning of November 18, 2009, Frank Mainade, Lieutenant Paramedic, City of Miami Fire Department went to the jobsite located at US 1and SW 30 Street in Miami, Florida, in response to a phone call from the Fire Department's hazardous materials team regarding concerns about a trench they had seen on the jobsite (Tr. 17-18). Once on the site, Mainade observed an employee in a trench. He was concerned about the depth of the trench, as there was no sheeting or protection for the worker (Tr. 18-19). Mainade estimated the depth of the trench to be approximately 8 feet, a little deeper where the back hoe was operating (Tr. 15, 18-19). Mainade told the men he felt that they were operating unsafely and he would have to forward this to OSHA. At that time, the men began closing down the trench by removing the employees and covering it with steel plates (Tr. 24). Mainade telephoned OSHA regarding the conditions he observed in the trench. Following Mainade's telephone complaint to OSHA, Assistant Area Director Jaime Lopez assigned compliance officer Hernaldo Carpio to investigate the complaint (Tr. 53, 80, 112). Compliance Officer Angel Diaz assisted with the inspection[1] (Tr. 112).

[1] Compliance Officer Angel Diaz was at lunch with Carpio when Carpio received the call to conduct the inspection relating to American Engineering and accompanied him to assist with the inspection (Tr. 112).

Both compliance officers arrived at the site on the morning of November 18, 2009, and observed two employees working in an excavation (Tr. 54, 113). The trench was not the same trench inspected by Mainade (Tr. 205, 292). There were three trenches open at the time of the inspection. The trench inspected by Mainade was identified by Eric Garcia, Assistant Superintendent of American Engineering, as a deep trench and had water accumulating in it (Tr. 293). On the day of the inspection American Engineering was performing backfilling and compaction work at the site. Its employees were laying a felt fabric in the trench which was inspected by OSHA (Tr. 57).

Once on the jobsite, Carpio approached Guspar Coll-[Gonzales][2] who was operating the excavator. Carpio asked him who was in charge and Coll-Gonzales said Eric Garcia, but he was not at the site, and if Garcia was not there, then he was in charge (Tr. 54). In response to inquiries from Carpio regarding cave-in protection, Coll-Gonzales said they did not have cave-in protection because his job was to backfill the trench and he did not need the trench box to backfill. Further, Coll-Gonzales said he did not measure the depth of the trench, did not take a soil sample, and did not slope because they were working on solid rock and since the employees were inside for only 20 to 30 minutes to lay the felt fabric, sloping the trench was not needed (Tr. 57).

While Carpio was conducting his inspection, Garcia arrived at the site. He told Carpio he was in charge of the employees but he had left Coll-Gonzales in charge while he was away from the jobsite (Tr. 67-68). Further, Garcia told Carpio that Coll-Gonzales had authority to direct the work of the individuals at the worksite and was responsible for putting cave-in protection in the trench (Tr. 68). Garcia also advised that he last inspected the trench on Thursday, the day before the OSHA inspection (Tr. 70).

During the inspection, Carpio took several measurements of the trench in several areas and found it to be10-feet deep in some areas and 5-feet deep in other areas. The width was 24

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[2] Guspar Coll also was referred to as Gonzales during the hearing. The testimony revealed American Engineering records identify him as Mr. Guspar Coll. During the hearing, Mr. Gonzales identified himself as Guspar Coll Gonzales. Mr. Guspar Coll Gonzales will be identified herein as Coll-Gonzales.

feet and the length was 41 feet. He did not measure the slope. Carpio stated the trench was required to have a 45-degree slope, which it did not have (Tr. 65-66).

As a result of Carpio's and Diaz's inspection, the Secretary issued the citation that gave rise to the instant case.

DISCUSSION

Citation No. 1

The Secretary alleges that American Engineering violated one of OSHA's construction standards on excavations.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees had access to the violative conditions; and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Item 1: Alleged Violation of § 1926.651(c)(2)

The Secretary charges American Engineering with violating § 1926.652(a)(1). The

citation

alleges:

> 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 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):
>
> On or about 11/18/2009, at the intersection of Biscayne Blvd. and 30th St. in the city of Miami Beach, FL two employees were working inside an excavation at approximately 10 feet deep without cave-in protection. American Engineering & Development Corp. was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent standard 1926.652(a)(1), which was contained in OSHA inspection number 311086177, citation number 1, item number 3, and was affirmed as final order on 03//21/2008, with respect to a workplace located at 4855 Technology Way, in Boca Raton, FL 33431.

Section 1926.652(a)(1) 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 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.

Applicability of the Standard

In proving whether there is a violation, first it must be determined whether the cited standard applies. The Secretary cited American Engineering for a violation of § 1926.652(a)(1), a construction standard which addresses the protection of employees working in excavations. Applicability of the standard is not disputed. American Engineering created the trench and at the time of the inspection was laying felt fabric in the trench (Tr. 117). This work activity establishes American Engineering was engaged in construction work involving trenches on the jobsite. Therefore, the excavation standard applies to the work performed by American Engineering at the jobsite.

Noncompliance with the Terms of the Standard

The Secretary also must prove there was noncompliance with the terms of cited standard, § 1926.652(a)(1). There is no real dispute that the terms of the standard were violated. Coll-Gonzales advised Carpio they did not have cave-in protection. Further, he advised he did not slope because they were working on solid rock and since the employees were inside for only 20 to 30 minutes to lay the felt fabric, sloping the trench was not needed (Tr. 57).

Carpio measured the trench in several areas and found it to be 10-feet deep in some areas with 5 feet being the smallest depth measurement. The width was 24 feet and the length was 41 feet. Although he did not measure the slope, Carpio testified the trench was required to have a 45-degree slope (Tr. 65-66). Because the excavation was at least 5 feet in depth, a protective system is required for employees working in the excavation, unless the entire excavation consisted of stable rock. This trench was not entirely in stable rock, as the soil analysis from OSHA's laboratory in Salt Lake City revealed the soil in the trench was Type B soil (Tr. 78). Because the trench was greater than 5-feet deep and not in solid rock, neither of the exceptions to the standard apply. The evidence shows Respondent did not use a trench box in the excavation. Since the excavation was not properly sloped and there was no trench box in use, the undersigned finds the Secretary has established that American Engineering failed to provide an

adequate protective system for employees working in an excavation as provided for by the standard.

Exposure or Access

As an element of the Secretary's burden of proof, the record must show that employees were exposed or had access to the violative condition. *Walker Towing Corp*., 14 BNA OSHC 2072 (No. 87-1359, 1991). Carpio and Diaz testified that they observed employees working in the excavation (Tr. 54, 113; Exhs. C-1, C-2, C-8). This fact too is not disputed by Respondent. Employees Carlos Prieto and Eddie Guzman were working in the unprotected trench in the presence of the excavator operator Coll-Gonzales, who had been left in charge at the time of the inspection (Tr. 54). Coll-Gonzales testified that employees were in the trench no more than five minutes when OSHA showed up. They had just started after lunch (Tr. 151). The Secretary has established exposure.

Knowledge

Finally, the Secretary must establish actual or constructive knowledge of the violative conditions by American Engineering. In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*.,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See* also *Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the employer).

Coll-Gonzales was left in charge when Garcia left the jobsite on the morning of November 18, 2009. However, Respondent asserts that Coll-Gonzales is not a supervisor for American Engineering and his knowledge of the violative conditions of the trench cannot be

imputed to it (Respondent's Brief, pp. 15-16). Coll-Gonzales testified at the hearing. Spanish is his native language and he is not fluent in English, therefore, Coll-Gonzales testified in Spanish with the aid of a translator, who posed counsels' and the undersigned's questions to him in Spanish, and who then translated his Spanish responses into English. Coll-Gonzales testified he is an operator and he has been employed by American Engineering for three years and was rehired in October 2009. He is not a supervisor or a foreman and he does not have the authority to hire, fire, or discipline employees (Tr. 140-142). Further, Coll-Gonzales testified Eric Garcia, his supervisor, told him on the morning of November 18, 2009, "there were some trenches that could not be accessed, you know, we couldn't go into them." The trench that the laborers were working in when OSHA got there was one that was not to be accessed (Tr. 148-149). Garcia testified that he left the jobsite at 7:00 a.m. and gave instructions to Coll-Gonzales regarding not entering the trench at issue and other trenches that Garcia felt were problematic (Tr. 265-266). He did not assign a foreman to the crew in which Coll-Gonzales was working, but testified that Coll-Gonzales had the authority to give instructions to the laborers who were working with him (Tr. 264, 281-283). Coll-Gonzales testified that he directed the two laborers to work in the trench (Tr. 149).

Although, Respondent disputes Coll-Gonzales was a supervisor, it cannot be disputed that he was left in charge when Garcia left the jobsite on November 18, 2009. Carpio testified that Coll-Gonzales told him he was in charge when Garcia was not onsite (Tr. 54). Whether Respondent considered Coll-Gonzales to be a supervisor or not, he was under the impression that he was in charge when Garcia was not onsite. Garcia testified that Coll-Gonzales did not have a foreman on site to report to and that he reported directly to him (Tr. 264). Further, Coll-Gonzales testified the two men in the trench are his helpers when he is the operator. "Whenever I tell them to do this or that, they do that . . . I can ask for help from them and they obey me and they do what I tell them to do." (Tr. 160-161). An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992). The undersigned finds that Coll-Gonzales was a supervisor for purposes of imputing knowledge to American Engineering. Accordingly, the undersigned finds that the

Secretary has met her burden of employer knowlege and has established a prima facie case as to the cited standard.

An employer may rebut the Secretary's prima facie showing of knowledge with evidence that it took reasonable measures to prevent the occurrence of the violation. In particular, the employer must show that it had a work rule that satisfied the requirements of the standard, which it adequately communicated and enforced. *Aquatek Systems, Inc.*, 21 BNA OSHC 1400, 1401-1402 (No. 03-1351, 2006). Moreover, "[w]hen the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991). As set forth below, American Engineering has not put forth sufficient evidence to show that it had a work rule which was adequately communicated and enforced and, therefore, has not made the requisite showing to rebut the Secretary's prima facie case.

Employee Misconduct (Isolated Incident)

Respondent contends that the violation was the result of an isolated incident of employee misconduct.[3] In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove that it has: (1) established work rules designed to prevent the violation; (2) adequately communicated these rules to its employees; (3) taken steps to discover violations; and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997); *e.g.*, *Danis Shook*

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[3] As the Secretary argues in her brief, Respondent did not allege the defense of an isolated incident of employee misconduct in its Answer. Commission rules require that all affirmative defenses are to be pled in the Answer. § 2200.34. At the hearing, Respondent moved to amend its Answer to allege the affirmative defense of unpreventable employee misconduct. The undersigned permitted the Secretary an opportunity to respond at the hearing. In her response the Secretary stated that "the Secretary has been informed of this affirmative defense they planned to assert for a significant amount of time" (Tr. 12). Based on the Secretary's representation, the undersigned determined Respondent's failure initially to plead unpreventable employee misconduct in its Answer did not result in any prejudice to the Secretary. Accordingly, the undersigned granted Respondent's Motion to Amend its Answer. The undersigned rejects the Secretary's argument in her brief that the Secretary was prejudiced by Respondent's presentation of evidence on the defense at trial.

Joint Venture XXV, 19 BNA OSHC 1497, 1502 (No. 98-1192, 2001)*, aff'd* 319 F3d 805 (6th Cir. 2003)*; Precast Services, Inc*., 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). *Oil Well Serv.,* 15 BNA OSHC 1809, 1816 (No 87-692, 1992). Also *see Nooter Construction Co.* 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). An employer may defend on the basis that the employee's misconduct was unpreventable. In order to establish the defense, the employer must show that the action of its employee represented a departure from a work rule that the employer has uniformly and effectively communicated and enforced. *Frank Swidzinski Co.,* 9 BNA OSHC 1230, (No. 76-4627, 1981); *Merritt Electric Co.*, 9 BNA OSHC 2088 (No. 77-3772, 1981); *Wander Iron Work*, 8 BNA OSHC 1354 (No. 76-3105, 1980), *Mosser Construction Co.* 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991) .

Work Rule

The Secretary does not dispute that American Engineering had an applicable work rule (Secretary's Brief, p.11). American Engineering has a Safety Manual which contains safety rules specific to excavation, trenching and shoring (Exh. R-6). Those rules are supplemented periodically by Safety Memos and Construction Tool Box Talks on a regular basis (Exh. R-6, pp. 17, 23-25). Paragraphs 14, 15, and 21of Respondent's Excavation, Trenching and Shoring Rules provide:

> 14. A competent person shall conduct daily inspections on excavatins and on an 'as needed basis' throughout the shift. If unsafe situation exists (cave-ins, slides, etc.), all work shall cease until required safeguards have been taken . . . If there are indications of water accumulation, sloughing, cave-ins, water seepage, soil cracks, hazardous atmospheres, or protective system failure, work shall stop immediately until the necessary control measures are in place to safeguard workers.
>
> 15. All soil in Florida is the least stable - Type C. All trenches of 5 feet or deeper and must be appropriately sloped.
>
> 21. A protective system shall be used to protect worker in excavations from cave-ins. All vertical cut walls greater than 5 feet deep shall be sloped, braced, (timber, shoring, aluminum shoring, or trench boxes) or protected by a system designed by a professional engineer.

(Exh. R-6, pp. 23-24).

A work rule is defined as "an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J.K. Butler Builders, Inc*., 5 BNA OSHC 1075, 1076 (No. 12354, 1977). An employer's work rule must be clear enough to eliminate the employees's exposure to the hazard covered by the standard and must be designed to prevent the cited violation. *Beta Construction Co.*, 16 BNA OSHC 1434, 1444 (No. 91-102, 1993). The undersigned finds that Respondent had a work rule designed to prevent the cited violation.

Adequately Communicated

The second element of the misconduct defense is met when the employees were well-trained, experienced and knew the work rules. *Texland Drilling Corp*., 9 BNA OSHC 1023, 1026 (No. 76-5037, 1980). The employer must show that it has communicated the specific rule or rules that are in issue. *Hamilton Fixtures*, 16 BNA OSHC 1073, 1090 (No. 88-1722, 1994); *New York State Electric & Gas Corp*., 17 BNA OSHC 1129, 1134 (No. 91-2897, 1995). *See Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999) (although the record shows that the employees received training on general safety matters and procedures, the evidence is insufficient to establish that the specific rule was communicated to employees).

American Engineering communicates its work rules to employees in several ways including mandatory training which includes safety orientation, weekly safety talks and specific training on issues such as confined space, etc. (Tr. 184). Initially when hired, employees must go through a new employee safety orientation (Tr. 185). As to trenches, the new employee orientation provides "trench walls must be sloped in accordance with OSHA regulations, or you must be working in a trench box." (Exhs. R-1, R-4 and R-5). As reflected by their signatures on the New Employee Safety Orientation forms, Coll-Gonzales and laborers Prieto and Guzman each received the new employee safety orientation (Exhs. R-1, R-4 and R-5). Daniel Westbrook, Safety Manager for American Engineering, testified that during safety orientations, employees review the safety manual and go through certain topics in it (Tr. 189). Because American Engineering has a large number of Spanish speaking employees, its safety classes are taught in Spanish and documents are translated into Spanish for those employees who do not speak

English (Tr. 171-172, 187). Tool Box Talks, also mandatory, are held weekly on Mondays or Fridays and cover topics that need to be addressed and also are translated into Spanish (Tr. 192-194; Exh. R-7).

The evidence shows that the employees involved with the trench at issue here received training. The employee left in charge, Coll-Gonzales, testified he received safety training, attended tool box talks and he is familiar with the company's trenching safety policy (Tr. 144-146). Further, in addition to new employee safety orientation, laborers Prieto and Guzman, although employed for only two weeks at the time of the inspection, told OSHA investigator Diaz they had received safety training (Tr. 118). Moreover, according to Garcia, both attended tool box training (Tr. 230, 257). It is noted, however, no documents were introduced reflecting their signatures for said training. The undersigned finds that American Engineering has effectively communicated its work rules in both English and Spanish to its employees.

Steps to Discover Violations

In addition to an effectively communicated work rule, an employer must take steps to discover violative conditions on the worksite. American Engineering's Safety Manager, Daniel Westbrook, testified he drives and walks the jobsites daily looking for safety violations and does inspections and audits daily (Tr. 194, 224). In addition, Assistant General Superintendent Garcia helps to enforce safety rules and trains new personnel (Tr. 241). He talks with Westbrook daily regarding safety issues (Tr. 248). When in the field and noticing safety concerns, he addresses them immediately and expects the foreman to do the same (Tr. 256). Garcia testified that he looks at trenches everyday and requests trenching reports daily to make sure the inspections are being conducted daily (Tr. 258). The main line foremen, pipe foremen and superintendents are responsible for looking at trench conditions (Tr. 259). The testimony further revealed that supervisory employees communicate by cell phone and radio regarding jobsite conditions (Tr. 255). Garcia was at the jobsite the night before OSHA's inspection and did not leave until 7:00 a.m. the morning of the inspection (Tr. 264-265). Before he left, he determined that three trenches were unsafe and gave instructions to Coll-Gonzales that those trenches were not to be entered, including the trench at issue here (Tr. 265-267).

Effective implementation of a safety program requires "a diligent effort to discover and discourage violations of safety rules by employees." *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999); *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

Based on Garcia's discovery of the conditions the night before, his and Westbrooks's frequent monitoring visits, the requirement of examination of the trenches by foremen, and the lack of a basis requiring more intensive supervision, American Engineering's safety monitoring program was adequate. *See New York State Electric & Gas Corp*., (No. 91-2897, Oct. 27, 2000); *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) (employer's duty is to take reasonably diligent measures to detect hazardous conditions through inspections of worksites; it is not obligated to detect or become aware of every instance of a hazard). The undersigned finds that American Engineering took reasonable measures to prevent the occurrence of the violation.

Effectively Enforced

American Engineering asserts that it has an effective progressive disciplinary program (Respondent's Brief, p. 23). Westbrook testified the safety policies are enforced by verbal warnings, written warnings, suspensions and terminations, and that in the past year approximately 50 to 70 written warnings, suspensions and discharges have been issued, some for violations of the trenching policy (Tr. 196, 199). Garcia testified as to the progressive nature of the policy stating that a verbal warning is given for a first violation, second offense results in a written warning, third offense results in a suspension and the fourth time you may get terminated (Tr. 261). Adequate enforcement is a critical element of the defense of employee misconduct. For instance, an employer may show a progressive disciplinary plan consisting of increasingly harsh measures taken against employees who violate the work rule. *See Asplundh Tree Expert Company*, 7 BNA OSHC 2074 (No. 16162, 179). To prove that its disciplinary system is more than a paper program an employer must show evidence of having actually administered the discipline outlined in its policy and procedures. *E.G. Connecticut Light & Pwr. Company*, 13 BNA OSHC 2214 (No. 85-1118, 1989)(reprimand letters issued).

It is not disputed that Coll-Gonzales, Prieto and Guzman were disciplined. However, they were not disciplined until January 25, 2010, more than two months after the inspection and

not until five days after Respondent's [informal] conference with OSHA (Tr. 215, 227). Westbrook testified that the delay in disciplining them was so that he could weigh all of the information, stating it takes time to investigate and he does not take these matters lightly (Tr. 215-216). Eventually, Coll-Gonzales was disciplined with a written warning and counseling (Exh. R-2). Further, he was given another orientation program after the incident which focused on safety issues relating to trenches, and he received a tool box training after the incident. (Tr. 152). Laborers Prieto and Guzman each were given a written warning and counseling (Exhs. R-9, R-10). "Commission precedent does not rule out consideration of post inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline." *Precast Services Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) *aff'd* without published opinion, 106 F.3d 401 (6th Cir. 1997).

The undersigned has reviewed and considered in conjunction both the pre-and post inspection discipline in this case. Of 17 employee warning notices for trenching violations covering the period April 2008 through August 2009 resulting in verbal and written warnings, counseling and a suspension, all but two were issued on the same date of the incident. The other two were issued the day after the incident (Exh. R-8). This indeed reflects positively on Respondent's disciplinary program prior to OSHA's inspection. However, the post inspection discipline documents in the record tell a different story.

After the inspection, the three employees were not disciplined until more than two months after the incident (Tr. 215, 227). This suggests lax enforcement and inconsistency in Respondent's discipline program. Further, such a lengthy delay adversely impacts the significance of the discipline and its relationship to safety. Since discipline was issued on the same or next day in other incidents involving similar trench violations, the undersigned finds Westbrook's testimony that the delay in disciplining the employees in the November 18, 2009 incident was so that he could weigh all of the information and investigate the incident, not credible. The testimony reveals that Respondent's managers Westbrook and Garcia were aware of the incident on the day it occurred. Moreover, issuance of the employee warning notices shortly after the informal conference with OSHA on January 20, 2010, suggests the discipline may have been issued in an effort to defend the OSHA citation in this case. Also adversely

impacting the effectiveness of Respondent's discipline program is the fact that three of its employees were involved in the incident that resulted in the issuance of the citation. The number of employees who felt comfortable violating American Engineering's work rules indicates a problem with adequate enforcement. The undersigned finds American Engineering has not demonstrated an effectively enforced discipline program, and therefore has not rebutted the Secretary's prima facie case.

Classification

The Review Commission has long considered a violation as a repeated violation under § 17 of the Act, 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 OSHRC No.1061, 1063 (No. 16183, 1979). American Engineering does not dispute and the record shows it was issued a serious citation for a violation of § 1926.652(a)(1) on February 12, 2008, at a worksite at 4855 Technology Way in Boca Raton, Florida, for employees working in an 8-foot excavation without adequate cave-in protection (Exh. C-10). According to the OSHA Worksheet, the trench was steeper than 34 degrees, employees were laying drainage and sewer pipes and the foreman was on the sideline observing the unsafe work practice (Exh. C-9). This prior citation was resolved by an Informal Settlement Agreement reflecting no changes to the issued citation and proposed penalty, which became a final order of the Review Commission on March 21, 2008 (Exh. C-9). A repeated violation of § 1926.652(a)(1) is established by the Secretary.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). The Commission must determine a reasonable and appropriate penalty in light of § 17(j) of the Act and may arrive at a different formulation than the Secretary in assessing the statutory factors. Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria when assessing penalties: (1) the size of the employer's business; (2) the gravity of the violation; (3) the good faith of the employer; and (4) the employer's prior history of violations. *29 U.S.C. § 666(j).* Gravity is the primary consideration and is determined by the number of employees exposed, the

duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J. A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993).

In arriving at the proposed penalty Carpio determined that the violation was of high severity, based on the severity of injury because the hazard of cave-in would most likely result in suffocation that could lead to death in the event of a trench collapse. Because of the presence of underground utilities, previously disturbed soil, the vibration from the excavator and vehicles on the road, Carpio determined the probability of injury to be greater (Tr.73). Carpio's testimony further reveals Respondent was not given a penalty reduction for size since it has in excess of 250 employees (Tr. 74). Nor was Respondent allowed a reduction for history because it had been issued a prior citation in October 2007 (Tr. 73). No reduction for good faith was allowed because this was a repeat citation (Tr. 74).

The undersigned finds that a high gravity is appropriate here because two employees worked in the trench for 20 to 30 minutes without an adequate protective system, exposing themselves to potential cave-in and serious injury or death. Further, American Engineering was previously cited for this same standard exposing employees to substantially similar hazards. American Engineering is not a small employer, as it has approximately 300 employees. These factors weigh against a small penalty. Although there is no evidence that American Engineering failed to cooperate with the investigation, the fact remains that it did not adequately enforce its discipline program and did not do so until the issuance of OSHA citations became imminent. This weighs negatively as to good faith. Considering these facts and the statutory elements, a proposed penalty of $25,000 is appropriate. **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1, alleging a violation of § 1926.652(a)(1), is affirmed and a penalty of $25,000 is assessed.

/s/
SHARON D. CALHOUN
Judge

Date: December 21, 2010
Atlanta, Georgia