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.

BARDAV, INC., d/b/a MARTHA'S VINEYARD MOBILE HOME PARK,

Respondent.

OSHRC Docket No. 10-1055

ON BRIEFS:

Scott Glabman, Senior Appellate Attorney; Charles F. James, 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

Frederick J. McCutchon, Esq; Bonnie K. Kirkland, Esq.; Wood, Boykin & Wolter, Corpus Christi, TX
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

Bardav, Inc. owns and operates Martha's Vineyard Mobile Home Park in Corpus Christi, Texas, where two Bardav employees were injured when an excavation caved in. The Occupational Safety and Health Administration conducted an inspection of the worksite and issued Bardav three citations with fourteen items and a total proposed penalty of $50,250. The Secretary withdrew one citation item, and of the remaining items, Administrative Law Judge Patrick B. Augustine vacated five and affirmed eight, for which he assessed a total penalty of $20,675.

At issue on review are three of the affirmed items—an alleged willful violation of 29 C.F.R. § 1926.651(k)(2) (removal of employees from excavation where competent person finds

evidence of potential hazard), and alleged serious violations of 29 C.F.R. § 1926.651(h)(1) (water accumulation in excavation) and 29 C.F.R. § 1926.21(b)(2) (safety training). Also at issue is one of the vacated items—an alleged willful violation of 29 C.F.R. § 1926.652(a)(1) (cave-in protection). For the reasons set forth below, we vacate Citation 2, Item 1 (the competent person item); we affirm Citation 2, Item 2 (the cave-in protection item), as willful; we affirm Citation 1, Item 11, and Citation 1, Item 9 (the water accumulation and safety training items, respectively), as serious; and a total penalty of $18,500 is assessed for the three affirmed items.

BACKGROUND

After discovering that an underground water pipe at the Martha's Vineyard Mobile Home Park was leaking, David May, Bardav's owner, contracted with Jacob Morgan, a plumbing technician, to fix the leak. To reach the pipe, which was buried 31 inches underground, Morgan began digging with a small excavator and noticed that the ground was like "quicksand"—he would "get a scoop completely full, remove that, and just in the movement of doing that would cause at least three times that much to cave back in." As a result, Morgan decided that shoring was needed, so he and two Bardav maintenance employees—D.O. and M.G.—used two-by-fours and plywood they found on the property in an attempt to stabilize the excavation.

At that point, David May's son, John May, arrived at the worksite with replacement parts for the leaking pipe. According to Morgan's testimony, John May argued with Morgan about whether shoring was necessary and, in the presence of David May, told the Bardav maintenance employees to remove the two-by-fours and plywood from the hole, which they did. M.G. testified that "the idea was to create a dam," but that the workers "ended up taking [the wood] out [of the hole] because it didn't work."

Morgan was unable to fully expose the leaking pipe with his excavator on the day he arrived at the mobile home park, so David May had a backhoe brought in the following morning. The backhoe operator succeeded in exposing the pipe, and after the water was shut off, Bardav's two maintenance employees entered the excavation to install the pipe replacement parts. Once the repair was made, the two employees remained in the excavation while the water was turned back on. Almost immediately a new leak occurred that flooded the excavation, and the walls collapsed onto the two employees. The backhoe operator dug around M.G. and was able to free him, but in the process, the backhoe struck M.G.'s leg. D.O. remained stuck in the excavation

for more than an hour until the Corpus Christi Fire Department freed him with the help of a city vacuum truck, which suctioned out the wet sand around his lower body. Both employees were taken to a hospital by ambulance and treated for injuries, which included loss of blood flow, hypothermia, dehydration, and lacerations.

DISCUSSION

I. Willful Citation 2, Item 1 – 29 C.F.R. § 1926.651(k)(2) (Excavation Inspections by Competent Person)

The Secretary asserts that Bardav violated § 1926.651(k)(2), which provides that "[w]here the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety." In affirming this item, the judge agreed with the Secretary that Morgan was the competent person at the worksite, and that Bardav's employees were allowed to continue working inside the excavation without a protective system even after Morgan had specifically identified the potential cave-in hazard. On review, Bardav contends that this was error because Morgan was not a competent person as defined by the excavation standard. We agree.

By its terms, § 1926.651(k)(2) applies only when a competent person finds evidence of a potential excavation hazard. To qualify as a "competent person," the individual must have "authorization to take prompt corrective measures to eliminate" any potential hazard he/she identifies. 29 C.F.R. § 1926.650(b) (Definitions). Here, the scope of Morgan's authority was insufficient to render him a "competent person" because he lacked the authority to undertake corrective measures to cure hazards that he identified at the job site.

While David May hired Morgan to be "in charge of the [pipe repair] operations," Morgan and D.O. testified that John May—acting on behalf of his father and Bardav—overruled Morgan's attempt to shore the sides of the excavation, and that the maintenance employees complied with John May's order to remove the plywood. Morgan also testified that he "had no authority," "wasn't in charge," and "c[ould]n't override" the Mays, because "[t]hey're the customer," "[i]t's their property," and "[r]egardless of how I would like to do it, it belongs to them." The judge made a demeanor-based credibility finding, accepting Morgan's testimony

that John May ordered the shoring removed. We defer to the judge's finding in this regard.[1] Accordingly, we find that Morgan lacked "authorization to take prompt corrective measures," and conclude that the judge erred in holding that he was a competent person under the standard. 29 C.F.R. 1926.651(k)(2); *see JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 n.6, 2009-12 CCH OSHD ¶ 33,027, p. 54,336 n.6 (No. 05-1907, 2009) (concluding that employee who stated that "he lacked the authority to remove employees from exposure to a hazard" and testified that "he lacked the authority to stop the job without permission from a supervisor" did not qualify as a competent person under § 1926.650(b)). Because the Secretary has not shown that anyone else at the site was a competent person, he has failed to establish that the cited standard applies. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) ("In order to prove a violation . . . the Secretary must show . . . that . . . the cited standard applies . . . ."), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Therefore, we vacate Citation 2, Item 1.[2]

II. Willful Citation 2, Item 2 – 29 C.F.R. § 1926.652(a)(1) (Protection of Employees in Excavations)

The Secretary claims that Bardav violated § 1926.652(a)(1) because the company did not use cave-in protection during the repair of the leaking pipe. The cited standard provides as follows:

> (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

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[1] In so finding, the judge discredited M.G.'s contradictory testimony (that the shoring was removed because it was not working) due to his demeanor, as well as the fact that his testimony was internally inconsistent and conflicted with other evidence. We find no basis to disturb this credibility finding. *L&L Painting Co.*, 23 BNA OSHC 1986, 1990, 2012 CCH OSHD ¶ 32,233, p. 56,096 (No. 05-0055, 2012) ("The Commission generally accepts a judge's credibility finding where it is based on the judge's observation of a witness'[s] demeanor," and where "the judge provide[s] a sufficient basis for his rejection of [certain] testimony.") (internal quotation marks and citation omitted). In addition, we note that John May testified similarly to M.G., denying that he ordered the shoring removed and stating that its removal was due to its ineffectiveness, so the judge effectively discredited John May's testimony in this regard.

[2] While a different provision of the excavation standard requires daily inspections by a competent person at an excavation site, the Secretary did not allege a violation of that provision here. *See* 29 C.F.R. § 1926.651(k)(1) ("Daily inspections of excavations . . . shall be made by a competent person for evidence of a situation that could result in possible cave-ins . . . .").

> (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). The judge vacated this item without reaching the merits of the violation because he concluded that it was duplicative of the competent person item alleging a violation of § 1926.651(k)(2). The Secretary challenges the judge's ruling on review, but we need not address this ruling given our conclusion that § 1926.651(k)(2) is inapplicable here. We thus turn to the merits of the alleged cave-in protection violation, even though the judge did not, because "both parties were afforded a right to present fully their evidence[,] . . . the transcript is copious, the exhibits complete, and the [j]udge's findings of fact detailed." *Accu-Namics, Inc.*, 1 BNA OSHC 1751, 1756, 1973-74 CCH OSHD ¶ 17,936, p. 22,234 (No. 477, 1974), *aff'd*, 515 F.2d 828 (5th Cir. 1975).

In order to prove a violation of the cited standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharm. Prods.*, 9 BNA OSHC at 2129, 1981 CCH OSHD at pp. 31,899-900. As it did before the judge, Bardav contends that § 1926.652(a)(1) does not apply here. Specifically, Bardav claims the excavation was shallow and sloped at the proper angle, such that no hazard existed, and that no cave-in occurred in the manner contemplated by the standard. Bardav's argument fails because the applicability of § 1926.652(a)(1) does not depend on the existence of a hazard or the eventual occurrence of a cave-in. On the contrary, the provision applies to *any* excavation, unless the employer shows that the excavation meets one of two exceptions—it was "made entirely in stable rock;" or it was "less than 5 feet . . . 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); see *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2010, 1991-93 CCH OSHD ¶ 29,900, p. 40,803 (No. 90-1505, 1992) ("[T]he party claiming the benefit of an exception bears the burden of proving that its case falls within that exception."). Here, Bardav has shown neither of the facts that would entitle it to rely on these exceptions. The company stipulated that the soil at the mobile home park was sandy loam, not stable rock, and there is no evidence in the record that a competent person ever examined the ground to determine whether there was any indication of a potential cave-in. As a result, we find that § 1926.652(a)(1) applies.

In addition, we find that the record establishes noncompliance. Morgan, David May, and both maintenance employees testified that no shoring system was used in the excavation at any point during the two-day pipe repair. Although M.G. and David May both testified that the sides of the excavation were sloped, Morgan testified to the contrary, stating that he did not slope, or even try to slope, the sides because the saturation of the soil made effective sloping impossible. Unlike David May, who acknowledged that he had no "experience . . . in trenching or excavation," particularly with respect to "degrees of slope as it relates to safety of employees working in a trench," Morgan had been involved in more than 100 excavations in his work as a plumbing technician, making his asserted understanding of sloping more credible than that of David May. Moreover, as previously noted, the judge generally credited Morgan's testimony.[3]

Finally, the Secretary has established both the exposure and knowledge elements of his prima facie case. The testimony of Bardav's maintenance employees, together with that of Morgan, shows that the employees were in the unprotected excavation on both days at issue. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976) (Secretary may establish exposure by showing "that employees . . . in the course of their assigned working duties . . . have been in a zone of danger"). The record also shows that David May had knowledge of the cited conditions on both days because he was standing at the side of the excavation, observing the digging of the hole and the repair of the leaking pipe. *See*

[3] Three months after the cave-in, an OSHA compliance officer commenced what she testified was a "complaint investigation" at Bardav's mobile home park. In fact, there is a document in evidence from OSHA's investigatory file dated March 24, 2010—one day before the inspection began—that OSHA Assistant Area Director Steven McDanel testified "instituted" the inspection. Upon questioning by Bardav's counsel, McDanel responded in the affirmative when asked whether he "kn[e]w that the complainant was [D.O.]." In the document, an OSHA employee recorded what Bardav's counsel thus concedes was a complaint concerning the excavation at issue in this case. (In Commissioner Attwood's view, any thought that the document might be a first-hand account by an OSHA official is undercut by the fact that there is no evidence OSHA personnel set foot on the worksite in the three months between the time of the cave-in and the inspection.) The document states that the sides of the excavation had been "cut 4 inches up and six inches forward," a slope that would be in accordance with the standard's requirements. However, Bardav has failed to raise this document as a basis for vacating Citation 2, Item 2, on review, despite having been asked by the Commission to address the merits of this item. Indeed, Bardav's brief to the Commission makes only one reference to the document, in the context of the safety training item at issue. In any event, this piece of evidence—whose author is unknown, and which contains various measurements that conflict with other evidence in the record—is outweighed by Morgan's testimony that he did not, and did not even attempt to, slope the sides of the excavation.

Am. Wrecking Corp., 19 BNA OSHC 1703, 1710, 2001 CCH OSHD ¶ 32,504, p. 50,402 (No. 96-1330, 2001) (consolidated) (finding actual knowledge, and imputing it to employer, where supervisor "continued to work in the area [of the violative condition] through the time of the accident"), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003); *compare Prestressed Sys., Inc.*, 9 BNA OSHC 1864, 1869, 1981 CCH OSHD ¶ 25,358, p. 31,500 (No. 16147, 1981) (stating that where violative condition "may not have been visible, an inference of [actual] employer knowledge cannot be drawn from the mere presence of the . . . condition at the worksite"). Thus, we find that the Secretary has established a violation of § 1926.652(a)(1), and we affirm Citation 2, Item 2.

Regarding characterization, the Secretary urges that this is a willful violation. The Secretary argues that the company was indifferent to the safety of its employees because, despite Morgan's warnings that the excavation was not safe without shoring, and despite David and John May's direct observation of the wet and unstable soil conditions, John May ordered the removal of the attempted shoring and refused to allow the installation of a protective system. We agree with the Secretary.

"Willful violations are characterized by . . . a plain indifference to employee safety, in which the employer manifests a heightened awareness . . . that the conditions at its workplace present a hazard." *Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1868, 2004-09 CCH OSHD ¶ 32,877, p. 53,198 (No. 02-0865, 2007) (internal quotation marks and citation omitted), *aff'd*, 296 F. App'x 211 (2d Cir. 2008) (unpublished). "The state of mind of a supervisory employee . . . may be imputed to the employer for purposes of finding that the violation was willful." *Branham Sign Co.*, 18 BNA OSHC 2132, 2134, 2000 CCH OSHD ¶ 32,106, p. 48,263 (No. 98-752, 2000). Here, we find that despite Morgan's specific warning that shoring was necessary to protect the employees working in the excavation, Bardav refused to permit the installation of cave-in protection. Indeed, Bardav was aware of the need for such protection, as Bardav had been informed of a prior excavation collapse involving M.G. This prior incident, along with Morgan's warnings and the obviousness of the unsafe conditions, gave Bardav a heightened awareness of the hazard posed by the unprotected excavation, and its failure to install a protective system in this case constitutes plain indifference. *See Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2116-17, 2012 CCH OSHD ¶ 33,231, p. 28,310 (No. 07-1578, 2012) (affirming willful violation of jobsite inspection standard when supervisor knew from prior experience and

from information learned that day that carbon monoxide would be present and yet failed to monitor for it); *Adrian Constr. Co.*, 7 BNA OSHC 1172, 1175, 1979 CCH OSHD ¶ 23,390, p. 28,310 (No. 15414, 1979) ("A violation is willful if the evidence shows that the employer ignored an obvious and grave danger . . . ."). For these reasons, we conclude that a willful characterization is appropriate here.

The Secretary proposed a penalty of $21,000 for this item but states on review that "a penalty of at least $15,000 is warranted." In assessing a penalty, "section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142, 2004-09 CCH OSHD ¶ 32,922, p. 53,564 (No. 04-0475, 2007).

The Secretary gave Bardav a sixty percent reduction for size and a ten percent reduction because of its lack of prior OSHA violations. With regard to gravity, Bardav's employees were inside the excavation on two consecutive days, despite Morgan's warnings of potential hazards. Moreover, John May's refusal to permit Morgan's shoring efforts demonstrates Bardav's indifference and lack of good faith. Accordingly, Chairman Rogers and Commissioner Attwood find that a penalty of $15,000 is appropriate for this violation.

III. Serious Citation 1, Item 11 – 29 C.F.R. § 1926.651(h)(1) (Water Accumulation in Excavations)

The Secretary claims that Bardav violated § 1926.651(h)(1) because the company did not ensure that adequate precautions were taken to protect employees working in an excavation with an accumulation of water. The cited standard provides as follows:

> Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

29 C.F.R. § 1926.651(h)(1). The judge affirmed this item. On review, Bardav contends that there was no accumulation of water in the excavation until the second leak. Alternatively, Bardav contends that precautions were adequate in light of the risks and circumstances that existed immediately prior to the second leak. Both of Bardav's arguments fail.

Bardav's accumulation argument is unavailing because, as Morgan testified, water was present throughout the entire excavation and repair process and, as D.O. testified, the leaking

pipe was submerged beneath 1 to 1.5 feet of water during at least some portions of the repair. The judge credited this testimony over the conflicting testimony from M.G., who stated that any water that was in the excavation was pumped out before any repair work was done. We find that both maintenance employees were working in an excavation containing accumulated and accumulating water.[4] Bardav's adequacy argument is equally unavailing, because Bardav failed to take precautions necessary to protect employees against the hazards posed by water accumulation. Indeed, it is undisputed that any attempts at shoring and water removal had been abandoned long before the collapse occurred.

The Secretary also established that Bardav's employees were exposed to the violative condition, and that the company possessed the requisite knowledge. Regarding exposure, we agree with the judge that the maintenance employees were working in the excavation with standing water. Regarding knowledge, the accumulated water was in plain view of David May, who stood at the side of the excavation during the pipe repair. Thus, we find that the Secretary has established a violation of § 1926.651(h)(1), and we affirm Citation 1, Item 11.

The Secretary characterized this item as serious and proposed a $1,500 penalty. The judge affirmed the item as serious and assessed a penalty of $1,000. Neither the Secretary nor Bardav challenges the judge's decision on these issues. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2004-09 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (affirming judge's serious characterization and assessed penalty where parties did not dispute these findings). Moreover, Chairman Rogers and Commissioner Attwood find that the reduced penalty amount assessed by the judge is appropriate given the partial overlap between this violation and the cave-in protection violation, as presented in this case. As a result, a $1,000 penalty is assessed for this violation.

IV. Serious Citation 1, Item 9 – 29 C.F.R. § 1926.21(b)(2) (Safety Training)

The Secretary claims that Bardav violated § 1926.21(b)(2) because its employees were repairing an underground leaking water pipe without having been trained in the recognition of unsafe conditions in excavation work. The cited standard provides that "[t]he employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations

[4] We note that David May described the amount of water in the excavation during the repair as minimal, but this testimony is aligned with that of M.G., which the judge appropriately discredited.

applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." 29 C.F.R. § 1926.21(b)(2). In affirming this item, the judge found that although David and John May observed the wet and unstable soil in the excavation and were told by Morgan that the conditions were unsafe, and although M.G. testified that he had repaired ten other underground leaks at the mobile home park during his employment with Bardav, neither of Bardav's maintenance employees had ever been instructed by the company regarding the potential hazards associated with excavation work.

On review, Bardav never claims that it instructed these employees on excavation safety. It argues instead that no such instructions were required because "[w]ithout a hazard, no warning was necessary," and the Secretary "failed to prove a hazard" or that one "could reasonably be anticipated." Chairman Rogers and Commissioner Attwood find that Bardav is mistaken. It is well-settled under long-standing Commission precedent that an employer is required to provide excavation safety instructions under § 1926.21(b)(2) to employees engaged in excavation work, regardless of whether the potential hazards posed by excavations are actually present. Indeed, the Commission has "specifically reject[ed] [the] argument that a training standard violation is contingent on . . . finding that [a] trench was hazardous." *Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776, 1780 n.6, 1995-97 CCH OSHD ¶ 31,180, p. 43,606 n.6 (No. 90-0050, 1996) (consolidated). In other words, "even if [a particular] trench . . . [is] in compliance" with the excavation standards, an employer's failure to give "instruction[s] in how to recognize or avoid unsafe conditions commonly encountered in trenching operations . . . would be a violation of section 1926.21(b)." *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1049, 1981 CCH OSHD ¶ 25,712, p. 32,058 (No. 76-4765, 1981) (internal quotation marks omitted).

Here, it is undisputed that Bardav's employees were engaged in excavation activities on the days in question, and the record shows that such work was not uncommon at the mobile home park, as evidenced by M.G.'s repair of ten prior underground water leaks. Thus, Chairman Rogers and Commissioner Attwood reject Bardav's contention that its training obligation depended on proof that the excavation was hazardous (or potentially so) and, in accord with our precedent, find that the cited standard applies.[5] *See generally Mineral Indus. & Heavy Constr.*

[5] Bardav asserts that Morgan, not Bardav, was responsible for training the company's two maintenance employees. However, Morgan could not hire, discipline, or fire the employees, nor could he assign them additional projects or control their work, as we have already observed.

Grp. v. OSHRC, 639 F.2d 1289, 1294 (5th Cir. 1981) ("The goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors."); *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1030, 2004-09 CCH OSHD ¶ 32,928, p. 53,612 (No. 91-2834E, 2007) (consolidated) ("[W]ith regard to training, it would be unreasonable to require that an employee be exposed to a hazard before requiring that he be trained to recognize and avoid that hazard.").

In her concurrence, Commissioner MacDougall views the applicability of the training standard—that is, whether an obligation to instruct exists at all—as dependent upon whether a "reasonably prudent employer" would believe that any training was necessary under the circumstances. In so doing, she conflates two different legal concepts: (1) the duty to train; and (2) the adequacy of the training provided. Indeed, the plain language of the cited training provision requires an employer to provide instruction "*in . . . the regulations applicable* to [each employee's] work environment." 29 C.F.R. § 1926.21(b)(2) (emphasis added). Here, it is undisputed that the "regulation" on which training was required is the excavation standard that applied to the work performed by D.O. and M.G. Accordingly, Bardav was obligated by the training provision to instruct its employees regarding the requirements of that standard. *See O'Brien Concrete Pumping, Inc.*, 18 BNA OSHC 2059, 2061, 1999 CCH OSHD ¶ 32,026, p. 47,848 (No. 98-0471, 2000) (affirming § 1926.21(b)(2) violation where employer failed to instruct "employees about the requirements of OSHA's regulations with regard to guarding the [concrete] hopper's point of operation"). In this respect, the applicable regulations—in this case, the excavation standard—trigger the duty to instruct under the cited training provision.

Our concurring colleague further asserts that use of the reasonably prudent employer test to determine the applicability of § 1926.21(b)(2) is "well settled," but none of the Commission precedent on which she relies supports this proposition. In each of the § 1926.21(b)(2) cases cited by the concurrence, the issue before the Commission was the *adequacy* of the employers'

Additionally, the work was located at Bardav's mobile home park; the workers had been Bardav employees for two months and six years, respectively; Bardav paid both employees regularly, by check; and David May set their work hours. We agree with the judge's determination that under these facts, Bardav was responsible for training the two employees. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992).

instructions, not whether the training standard applied in the first place.[6] *See Capform, Inc.*, 19 BNA OSHC 1374, 1376, 2001 CCH OSHD ¶ 32,320, p. 49,477 (No. 99-0322, 2001) ("The question is whether those instructions adequately identified the hazards generally associated with [the work]."); *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1134, 2009-12 CCH OSHD ¶ 33,071, p. 54,639 (No. 06-1036, 2010) ("Although a Compass project engineer provided the decedent with on-the-job training, that training did not address power line hazards."), *aff'd*, 663 F.3d 1164 (10th Cir. 2011); *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1425-26, 1993-95 CCH OSHD ¶ 30,231, p. 41,623 (No. 90-1106, 1993) (vacating § 1926.21(b)(2) item because safety instructions were adequate); *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2016, 1991-93 CCH OSHD ¶ 29,202, p. 40,811 (No. 90-2668, 1992) ("Pressure Concrete claims that its employees were adequately instructed.") As such, the Commission relied upon the reasonably prudent employer test only to decide the noncompliance element of the Secretary's prima facie case—not the applicability element. For example, in *El Paso Crane & Rigging*, the Commission stated that "*to establish noncompliance,* the Secretary must establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given," and then noted that "[t]he Secretary must also establish the usual elements of a violation." 16 BNA OSHC at 1424, 1993-95 CCH OSHD at p. 41,620 (emphasis added). Similarly, in *Pressure Concrete*, the Commission set out the four prima facie elements of the Secretary's burden, found "that [§ 1926.21(b)(2)] applies to the cited working conditions," and then considered the reasonably prudent employer test in the context of the employer's failure to comply with the standard. 15 BNA OSHC at 2015-16, 1991-93 CCH OSHD at p. 40,810.

Finally, our concurring colleague makes much of the Tenth Circuit's decision in *Compass Environmental*, which Bardav cites for the proposition that an employer's duty to train depends on the conditions at the particular worksite, whether those conditions create a hazard, and whether the industry has recognized the hazard. We note at the outset that the matter before us does not arise in the Tenth Circuit and, therefore, this decision is not binding precedent. *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

[6] Two of these cases, *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2000 CCH OSHD ¶ 32,101 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001), and *Baker Tank Co.*, 17 BNA OSHC 1177, 1993-95 CCH OSHD ¶ 30,734 (No. 90-1786-S, 1995), address other training standards and are, therefore, inapt.

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 any event, we find the court's reading of our decision to be inaccurate. According to the Tenth Circuit, the Commission's decision in *Compass Environmental* applied "a training-specific test"—the reasonably prudent employer test—"to assess whether Compass violated § 1926.21(b)(2)," instead of holding the Secretary to his usual four-part, prima facie burden. 663 F.3d at 1169. But the Commission did no such thing, as evidenced by the fact that it also addressed the knowledge and exposure elements of the prima facie case. 23 BNA OSHC at 1136, 2009-12 CCH OSHD at p. 54,641. Under Commission precedent, including our decision in *Compass Environmental*, the reasonably prudent employer test is, and has consistently been, used to determine whether an employer has failed to comply with § 1926.21(b)(2)—that is, to assess the adequacy of the content of the instructions at issue. Thus, the reasonably prudent employer test is irrelevant here—Bardav's noncompliance is established by its own admission, as well as by testimony from D.O. that he received no excavation safety training at all from the company. In light of the foregoing, it is self-evident that the Commission has not, in § 1926.21(b)(2) cases, abandoned the usual four-part test for determining whether the Secretary has established a violation.

As to the remaining elements of the prima facie case, exposure is established because Bardav's employees were engaged in excavation work without first receiving required training. *See Compass Envtl.*, 23 BNA OSHC at 1136 n.5, 2009-12 CCH OSHD at p. 54,641 n.5 ("[The employer] incorrectly focused on the unforeseeability of the events that occurred on the day of the accident rather than the . . . lack of training about a known hazard."); *Gen. Motors Corp.*, 22 BNA OSHC at 1030, 2004-09 CCH OSHD at p. 53,612 (finding it unreasonable to require that employee be exposed to a hazard before requiring that he be trained to recognize and avoid that hazard). And knowledge is established, especially as Bardav does not dispute that it provided no training to the exposed employees.[7] *See generally Pressure Concrete Constr.*, 15 BNA OSHC at 2018, 1992 CCH OSHD at p. 40,813 ("[t]he fact that [the company] failed to train [employees]

[7] Our concurring colleague expresses concern that knowledge in certain § 1926.21(b)(2) cases may be established "simply by virtue of the fact" that an employer knew of its failure to train its employees. We do not share this concern. The relative ease of proving an element of the Secretary's prima facie case in certain factual scenarios does not "obliterate" the element, nor does it allow the Secretary to offer no evidence whatsoever to establish knowledge.

in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program."). Accordingly, we find that the Secretary has established a violation of § 1926.21(b)(2), and we affirm Citation 1, Item 9.

Regarding characterization, a violation is serious "if there is a substantial probability that death or serious physical harm could result." *Capform, Inc.*, 16 BNA OSHC 2040, 2042, 1993-95 CCH OSHD ¶ 30,589, p. 42,357 (No. 91-1613, 1994) (citing section 17(k) of the Act, 29 U.S.C. § 666(k)). An employer's failure to instruct its employees on potential hazards can result in serious injury. *See, e.g., Pressure Concrete*, 15 BNA OSHC at 2018, 1991-93 CCH OSHD at p. 40,813 (characterizing § 1926.21(b)(2) violation as serious because "it is abundantly clear that the consequences of [the employer's] failure to instruct its employees could result in serious harm"). Here, Bardav failed to provide training in excavation safety despite M.G. having made ten underground pipe repairs while in the company's employ, and despite his having been involved in a prior excavation collapse. As a result, we find that the record supports a serious characterization here.

As to penalty, the Secretary proposed $600, but the judge assessed a $2,500 penalty, noting that Bardav's knowledge of past incidents clearly indicated that excavation training was needed. Bardav contends that "no evidence" supports the judge's increased penalty assessment "when considering the totality of the circumstances." We disagree. In light of the company's awareness of M.G.'s experience with a prior excavation collapse and its failure to provide training over the course of several years, we find no basis to disturb the judge's determination that a higher penalty is warranted here. *See Roberts Pipeline Constr., Inc.*, 16 BNA OSHC 2029, 2030, 1993-95 CCH OSHD ¶ 30,576, p. 42,331 (No. 91-2051, 1994) ("The [OSH] Act requires us to consider the gravity of the violation, the size of the employer, its good faith and safety history when assessing a penalty.") (internal quotation marks omitted). We therefore assess a $2,500 penalty for this violation.

ORDER

We vacate Willful Citation 2, Item 1, but affirm Willful Citation 2, Item 2, and assess a $15,000 penalty for this violation. We affirm Serious Citation 1, Items 11 and 9, and assess a $1,000 penalty and a $2,500 penalty, respectively, for these violations.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

September 30, 2014

MACDOUGALL, Commissioner, concurring in part and dissenting in part:

I join the majority's opinion finding that the Secretary has established violations of Citation 2, Item 2 (29 C.F.R. § 1926.652(a)(1)—protection of employees in excavation); Citation 1, Item 11 (29 C.F.R. § 1926.651(h)(1)—water accumulation in excavation); and Citation 1, Item 9 (29 C.F.R. § 1926.21(b)(2)—safety training). I also join in the decision to vacate Citation 2, Item 1 (29 C.F.R. § 1926.651(k)(2)—excavation inspections by competent person), for the reasons stated by the majority. However, I write separately because I disagree with the total penalty assessed, based upon my opinion that the two excavation citations should be held to be a single violation, and I believe the majority's analysis of Citation 1, Item 9 does not apply the correct test applicable to citations alleging a failure to train.

I. Protection of Employees in Excavation and Water Accumulation in Excavation Citations Should Be Grouped, with a Single Penalty Assessed

Citation 2, Item 2, and Citation 1, Item 11, involve substantially the same violative conduct (e.g., same site location, same employees, and same cave-in danger) and the same abatement measures. Thus, I find it appropriate, as part of the Commission's penalty discretion, to assess a single penalty for these two overlapping violations as the Commission has done in the past. *See Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1394, 2002-04 CCH OSHD ¶ 32,690, p. 51,560 (No. 97-0755, 2003) (as part of its penalty discretion, Commission may find it appropriate to assess a single penalty for distinct but potentially overlapping violations); *Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1118, 1986-87 CCH OSHD ¶ 27,829, p. 36,430 (No. 84-696, 1987) (two citation items involving substantially the same violative conduct held to be single violation and single penalty assessed); *H.H. Hall Constr. Corp.*, 10 BNA OSHC 1042, 1049, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981) (assessing a single penalty for overlapping violations that involved allegations that the company failed to reinforce a trench to protect against "superimposed loads" and failed to protect against "moving ground"); *Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1112, 1981 CCH OSHD ¶ 25,728, p. 32,077 (No. 76-256, 1981) (where one action could abate two cited violations, single penalty assessed); *Alpha Poster Serv., Inc.*, 4 BNA OSHC 1883, 1884, 1976-77 CCH OSHD ¶ 21,354, p. 25,644 (No. 7869, 1976) (two items involving substantially the same violative conduct should merge into a single violation). *See also* OSHA's Field Operations Manual, Chapter 4 (X) (B) ("Combining and Grouping Violations"). *Compare Capform, Inc.*, 13 BNA OSHC 2219, 1989 CCH OSHD

¶ 28,503 (No. 84-556, 1989) (citation items are impermissibly duplicative if the same abatement action would correct the violative conditions alleged in both items).

I note that the judge's decision in *Pentecost Contracting Corp.*, Nos. 92-3789 & 92-3790, 1995 WL 500370 (OSHRC Aug. 18, 1995) (ALJ), is persuasive here. There, the judge considered a respondent's argument in favor of grouping the same two violations at issue here—violations of § 1926.651(h)(1) and § 1926.652(a)(1). *Id.* at *8. The judge held that grouping was appropriate, primarily because a single protective measure—an adequate shoring system—could have protected against the hazards posed by both of the violations. *Id.* (finding single penalty appropriate "[b]ecause the hazard to be avoided (collapse or cave-in) is the same . . . and a single protective measure (proper shoring) would abate the hazard . . . ."). Likewise here, I find that the Secretary's case focused upon the existence of a single risk at the worksite—the risk of a cave-in. A single protective measure—an adequate shoring system—could have cured the violations at issue in each of these two citations. As such, I would group the two violations for penalty purposes and assess a single penalty of $15,000.[1]

[1] I do not join in the majority's opinion set forth in footnote 3. I believe that there is an insufficient basis in the record to support the majority's conclusion that the sloping reference in question was based on a recording of a third-party complaint—my colleagues simply make an unsubstantiated inference of this fact from their review of a piece of evidence. The majority appears to credit the opinion of Assistant Area Director McDanel regarding the source of the hearsay sloping reference, without making any finding regarding the weight to assign the hearsay evidence. *See, e.g., Hurlock Roofing Co.*, 7 BNA OSHC 1867, 1873, 1979 CCH OSHD ¶ 24,006, p. 29,149 (No. 14907, 1979) ("[T]he weight to be assigned hearsay evidence will depend on the apparent reliability, and must take into account any possible bias or interest on the part of the person or persons who made the statements sought to be introduced.") (citation omitted); *see also School Bd. of Broward Cnty. v. Dep't of Health, Educ. & Welfare*, 525 F. 2d 900, 906 (5th Cir. 1976) (agency considering hearsay evidence must consider those factors which "assure underlying reliability and probative value"); 4 Stein, Mitchell, Menzines, Administrative Law § 26.02 (2014) (discussing agency considerations in determining weight to be given hearsay evidence). Undisputedly, Mr. McDanel was not the author of the document in question. The reality is, as OSHA has conceded, we do not know the identity of the note's author. Consequently, Mr. McDanel's speculation aside, it is also possible that the sloping reference reflects a first-hand account by an OSHA official.

I also question the reliability of deeming the sloping reference to be a third-party complaint based on the timing of OSHA's investigation occurring after the date stated on the document. Indeed, it is the veracity of the document—including both the sloping reference *and* the stated date—which is of concern given the uncertainty about the document's author.

Notwithstanding, Bardav did not fully develop this piece of evidence before the judge, and Bardav failed to raise this document as a basis for vacating Citation 2, Item 2. As such, having

II. The Correct Test to Be Applied to Training Standards is Whether the Secretary Has Proven That a Reasonably Prudent Employer Would Provide Training in the Same Circumstances

I also write separately to express concern regarding the majority's analysis of Citation 1, Item 9, involving an alleged failure to provide safety training. In safety training cases, the Commission should properly consider whether the employer has failed to provide the training instructions *that a reasonably prudent employer would have given in the same circumstances. Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1134, 2009-12 CCH OSHD ¶ 33,071, p. 54,640 (No. 06-1036, 2010), *aff'd,* 663 F.3d 1164 (10th Cir. 2011) (applying reasonably prudent employer test even though employer failed to provide employee with *any* instructions regarding the hazard in question); *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2126, 2000 CCH OSHD ¶ 32,101, p. 48,243 (No. 96-0606, 2000) ("To establish noncompliance with a training standard, the Secretary must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances."), *aff'd,* 255 F.3d 122 (4th Cir. 2001); *Capform, Inc.*, 19 BNA OSHC 1374, 1376, 2001 CCH OSHD ¶ 32,320, p. 49,476 (No. 99-0322, 2001) ("Under § 1926.21(b)(2), an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware.") (internal quotations omitted); *see also Baker Tank Co.*, 17 BNA OSHC 1177, 1179, 1993-95 CCH OSHD ¶ 30,734, p. 42,683 (No. 90-1786-S, 1995); *El Paso Crane & Rigging, Co.*, 16 BNA OSHC 1419, 1424, 1993-95 CCH OSHD ¶ 30,231, p. 41,620 (No. 90-1106, 1993)). Despite my colleagues' constrained attempt to distinguish their own opinion in *Compass Environmental*, I believe the test is equally applicable to all training standards. *See, e.g., Furmanite Am., Inc.*, No. 13-0307, 2014 WL 4052894 (OSHRC June 25, 2014) (ALJ) (rejecting argument that reasonably prudent employer test applies only to certain training standards and holding that the test applies to training standards "generally").[2]

The majority's failure to apply the reasonably prudent employer test is highly problematic as it is based on a tautological argument, employing circular logic that begins by assuming the very thing that is meant to be proven by the alleged violation. Under the majority's

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considered the totality of all the evidence, I join the majority's conclusion that the sloping reference, while relevant, is not sufficient to change the conclusions we draw from the weight of other probative, credible evidence.

[2] Hence, in my opinion, the majority's attempt to distinguish *N&N Contractors, Inc.*, and *Baker Tank Co.*, based on the fact that they involve a different training standard, is unavailing.

analysis, the Secretary can prove a violation of the training standard, without ever proving that any training obligation exists in the first place, merely by showing training was not provided. Nowhere is this more evident than in the majority's application of its own rule, when the majority states: "Bardav's noncompliance is established by its own admission, as well as by testimony from D.O. that he received no excavation safety training from the company." Such reasoning suggests to the Secretary that he can prosecute that which he would otherwise be unable to prove under the Commission precedent issued prior to the majority's opinion herein.[3]

In an effort to avoid the reasonably prudent employer test, the majority has re-framed Bardav's argument in the form of a straw man, claiming Bardav believes its training obligation to be contingent upon the existence of some hazardous condition.[4] The majority then promptly defeats the straw man that it has created, citing to the proposition that an employer is not relieved of training obligations simply because the condition in question complies with other applicable OSHA standards. It is undeniable that an employer is not relieved of applicable training obligations merely because the condition in question may be in compliance with other applicable standards. Here, for example, Bardav could not be relieved of an otherwise-existing training obligation merely by installing shoring in the excavation in question. However, the majority's analysis looks straight past a threshold issue—no training violation could exist in the first place if the conditions in question were such that no reasonable employer would believe that any training was necessary under the circumstances.[5]

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[3] Indeed, under the majority's rationale, the element of *knowledge* is established simply by virtue of the fact that Bardav *knew that it did not train its employees on excavation safety.* Such reasoning—that a violation of a training standard is established if the employer knows it did not provide training—essentially obliterates the required knowledge element, permitting the Secretary to prosecute its citations without offering any proof regarding the element of knowledge.

[4] In fact, Bardav's argument in its brief upon review is entirely different: "Training violations depend on whether the employer failed to provide the instructions that a reasonable [sic] prudent employer would have given in the same circumstances."

[5] A particular excavation, for instance, could be dug in a manner that a training requirement would be unfounded. This could be the case for—for instance—a shallow hole dug in the process of installing a mailbox post, or small holes dug to repair below-ground sprinkler pipes. While I certainly do not take a position about the application of the training standard in any of these hypothetical circumstances, I note these examples to illustrate the significance of the reasonably prudent employer test.

The majority also defends its rejection of the reasonably prudent employer test by focusing upon the second prong of the cited standard[6]—in other words, the question of whether Bardav trained employees on the regulations applicable to an employee's work environment. Under this second prong, the majority contends, the reasonably prudent employer test does not apply. However, the Secretary never alleged, and never tried, the issue of whether Bardav violated the second prong of the cited standard. Instead, the Secretary alleged, and has consistently argued, that Bardav violated the first prong regarding recognition and avoidance of unsafe conditions.[7] Thus, the inquiry as to whether Bardav failed to train its employees in the recognition and avoidance of unsafe conditions necessarily depends upon whether a reasonably prudent employer would have believed that training was necessary under the circumstances—in other words, whether a reasonably prudent employer would have believed that there existed any unsafe conditions requiring training.

As an alternative rationale for departing from the reasonably prudent employer test here, my colleagues state that the Tenth's Circuit's reading of their decision in *Compass Environmental, Inc. v. OSHRC*, 663 F.3d 1164, 1168 (10th Cir. 2011), is inaccurate. Notwithstanding the majority's reading of Compass, the reasonably prudent employer test is not limited to testing the *adequacy* of the employer's instructions. To the contrary, the reasonably prudent employer test is equally applicable where, as here, the *adequacy* of an instruction is not at issue because *no instruction has been given in the first place*. *See, e.g., Compass Envtl., Inc.*, 23 BNA OSHC at 1134, 2009-12 CCH OSHD at p. 54,640 (applying reasonably prudent employer test even though employer failed to provide employee with *any* instructions regarding the hazard in question); *Baker Tank Co.*, 17 BNA OSHC at 1179, 1993-95 CCH OSHD at p. 42,683 (applying reasonably prudent employer test even where there existed no evidence "that Baker's crew had been given *any* instructions about the hazards and precautions in th[e] job…");

[6] The cited standard provides that "[t]he 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." *See* 29 C.F.R. § 1926.21(b)(2).

[7] The citation on this standard stated: "The employer did not ensure employees were trained in the recognition of unsafe conditions in trenching and excavation work, to include hazards, such as, but not limited to, the following: (a) hazards of working in trenches without an adequate employee protective system; (b) hazards of working in trenches where the soil is saturated and there is an accumulation of water; (c) safe means of egress."

Pressure Concrete Constr. Co., 15 BNA OSHC 2011, 2015, 1991-93 CCH OSHD ¶ 29,902, p. 40,810 (No. 90-2668, 1992) (applying reasonably prudent employer test notwithstanding employer's stipulation that "nothing in [the safety manual] specifically addressed the dangerous working conditions that might be encountered on this job").[8] Perhaps more importantly, the majority's opinion as to the precise framework for the reasonably prudent employer test is immaterial here, as the majority has rejected both frameworks and has refused to apply the reasonably prudent employer test in either manner.[9]

Again questioning the Tenth Circuit's reading of the Commission's *Compass* decision, the majority questions whether the reasonably prudent employer test applies *within* the framework of the ordinary four-part test, or as an *alternative* to the ordinary four-part test. *See Compass Envtl.*, 663 F.3d at 1168 (in determining whether the § 1926.21(b)(2) training standard was violated, court construed the Commission's application of the reasonably prudent employer test as recognizing that the ordinary four-part test is not well suited to training standards). Again, the majority's red herring concern about the rule's precise framework does not justify its decision to disregard the rule altogether in this case. As an adjudicative body, we are to apply or set forth a rule of law. The Commission should not rely upon different controlling rules of law for different training cases on an arbitrary case-by-case basis. Under existing Commission precedent, Bardav cannot be liable for violating the cited training standard unless a reasonably prudent employer in Bardav's position would have believed that training was required under the circumstances.

Notwithstanding my criticism of the majority's opinion regarding the training standard, I find that under these circumstances a reasonably prudent employer would have known that training was required here. Bardav was explicitly warned by Morgan that a risk of collapse existed here if adequate shoring was not installed. Indeed, the walls of the excavation continually collapsed throughout the time period in question. Moreover, the very same employee who was involved here—M.G.—had been involved in a prior collapse at the very

[8] To the extent that the majority cites the cases herein for its argument to the contrary, the majority misconstrues the case law.

[9] Incredibly, the majority asserts that "the reasonably prudent employer test is, and has consistently been, used to determine whether an employer has failed to comply with § 1926.21(b)(2)," but then concludes that the reasonably prudent employer test is *"irrelevant" to the citation under § 1926.21(b)(2) here.*

same site. Consequently, I find that Bardav violated 29 C.F.R. § 1926.21(b)(2), and I concur in the majority's decision to affirm Citation 1, Item 9, as a serious violation and assess a penalty of $2,500.

/s/
Heather L. MacDougall
Commissioner

Dated: September 30, 2014

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Bardav, Inc. d/b/a Martha's Vineyard Mobile Home Park, Respondent.	DOCKET NO. 10-1055

Appearances:

Michael Schoen, Esq., Matthew Sallusti, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Frederick McCutchon, Esq., Bonnie Kirkland, Esq., Wood, Boykin & Wolter, P.C., Corpus Christi, Texas
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

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 the Martha's Vineyard Mobile Home Park, owned by Bardav, Inc. (Respondent), in Corpus Christi, Texas between March 25 and April 21, 2010. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging willful, serious, and other-than-serious violations of the Act with total proposed penalties of $50,250.00. Respondent timely contested the Citation. At the beginning of the trial, Complainant withdrew Citation 1 Item 1. (Tr. 28). Therefore, only Citation 1, Items 2 through 11; Citation 2, Items 1 and 2; and Citation 3, Item 1 remained in dispute during the five-day trial conducted in Corpus Christi, Texas over the course of April 5, 6, 7, 28, and 29, 2011.

Before addressing the substantive issues in this case, the court notes that it reviewed and considered the following post-trial submissions: *Respondent's Motion for Sanctions, Complainant's Response to Respondent's Motion for Sanctions, Respondent's Supplemental Motion for Sanctions*, and *Complainant's Response to Respondent's Supplemental Motion for Sanctions.* Respondent argued that the court should exercise its discretion to sanction Complainant because the original of a largely irrelevant document, rather than a photocopy, could not be located; because the third page of a largely irrelevant document could not be located; because a witness[1] claimed he saw Complainant's investigator take more investigative photographs than were produced in discovery; because Complainant's investigator did not record, *verbatim*, conversations which were memorialized through signed witness statements; and because Complainant's post-trial brief contains factual assertions and argument with which Respondent disagrees.

As Respondent correctly stated in its motion, the imposition of sanctions falls within the sound discretion of this court, which the court declines to exercise based on the arguments in Respondent's motions and Complainant's responses. *Commission Rules* 52(f) and 101; *Architectural Glass & Metal Company*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001); *Jersey Steel Erectors*, 16 BNA OSHC 1162 (No. 90-1307, 1993); *Philadelphia Const. Equipment*, 16 BNA OSHC 1128, 1993 CCH OSHD ¶30,051 (No. 92-899, 1993); *Sealtite Corp*., 15 BNA OSHC 1130, 1991 CCH OSHD ¶29,398 (No. 88-1431, 1991); *NL Industries, Inc*., 11 BNA OSHC 2156, 1984-85 CCH OSHD ¶26,997 (No. 78-5204, 1984). Respondent failed to convince the court that Complainant, or its counsel, engaged in any contumacious, improper, or otherwise sanctionable conduct. Furthermore, none of the allegations contained in Respondent's motions established any prejudice to Respondent in defending itself against the substantive allegations in this case. The Respondent had the opportunity to cross exam the Complainant's witnesses over the two largely irrelevant documents, the inability to locate the originals and regarding the witness statements given the CSHO. In addition, as previously stated, the court gave no weight to the testimony of [redacted]

[1] The court addresses the credibility of witness [redacted], who made that allegation, later in this decision.

that the CSHO took more pictures than were tendered to the Respondent. The Respondent also had the opportunity to question the CSHO on this matter. Finally, the assertion that Complainant's post-trial brief contains factual assertions and arguments in which the Respondent disagrees does not constitute grounds for the issuance of sanctions. Post trial briefs contain the arguments of the parties. Because one party disagrees with the arguments raised in a post trial brief, does not make the arguments false or misleading as it is the court that ultimately makes the findings of facts and concludes the law. Accordingly, *Respondent's Motion for Sanctions* and *Respondent's Supplemental Motion for Sanctions* are DENIED.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, that Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (Tr. 11); *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

A violation was "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. §666(k). Complainant need not show that there was a substantial probability that an accident would occur; she need only show that if an accident occurred, serious physical harm would result. If the possible injury addressed by the

regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044, 2010 CCH OSHD ¶33,049 (No. 08-0631, 2010); *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶29,942 (No. 88-0523, 1993).

A violation was "willful" if it was "committed 'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.'" *Kaspar Wireworks, Inc.*, 18 BNA OSHC 2178, 2000 CCH OSHD ¶32,134 (No. 90-2775, 2000); *Georgia Electric Co.*, 595 F.2d 309, 318-19 (5th Cir. 1979*); Ensign-Bickford Co. v. OSHRC,* 717 F.2d 1419, 1422-23 (D.C. Cir. 1983). The employer's state of mind is the key issue. *AJP Construction, Inc*., 357 F.3d 70 (D.C. Cir. 2004). Complainant must show that Respondent had a "heightened awareness" of the illegality of its conduct. *Id*. Heightened awareness is more than simple knowledge of the conditions constituting the alleged violation; such evidence is already necessary to establish the basic violation. *Id.* Instead, Complainant must show that Respondent was actually aware of the unlawfulness of its action or that it "possessed a state of mind such that if it were informed of the standards, it would not care." *Id.*

Stipulations

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Occupational Safety and Health Act ("Act"). (Tr. 10-11).

2. Respondent is engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. Section 652(5). (Tr. 11).

3. Inspection No. 314296740 occurred at Respondent's workplace or jobsite. (Tr. 11-12).

4. Respondent was not subject to the Appropriations Rider set forth in Exhibit C-23 and was not otherwise exempt or subject to any limited scope inspection, specifically from December 18, 2009 through the issuance of the Citation on May 13, 2010. (Tr. 303-306, 707-709).

5. Donald Halterman, of the OSHA Salt Lake Technical Center, was qualified to testify as an expert concerning soil classification under the regulations. (Tr. 415).

Discussion

Thirteen witnesses testified at trial: (1) Michel Caballero, OSHA Compliance Safety and Health Officer ("CSHO"); (2) Donald Halterman, OSHA's expert witness on soil analysis; (3) Jacob Morgan, Corpus Christi area plumber; (4) [redacted], former maintenance employee for Respondent; (5) Abel Pulido, Corpus Christi Fire Department Battalion Chief; (6) Steve McDanel, OSHA Assistant Area Director; (7) Javier Cantu, former maintenance employee for Respondent, (8) Cheryl Rice, Respondent's bookkeeper; (9) Liz Medrano, Respondent's Property Manager; (10) [redacted], current maintenance employee for Respondent; (11) [redacted]; (12) David May, Respondent's owner; and (13) Melissa Stokes, Respondent's General Manager. (Tr. 38, 416, 485, 655, 812, 870, 924, 954, 997, 1033, 1238, 1330, 1401). Based on their testimony and discussion of evidentiary exhibits, the court makes the following additional findings.

Respondent owns and operates a mobile home park in Corpus Christi, Texas. (Tr. 32, 932). On December 30, 2009, Respondent's owner, David May, observed that a section of ground between the mobile home park swimming pool and a perimeter fence was very wet and spongy. (Tr. 660, 1036, 1332). He directed the two mobile home park maintenance employees, [redacted] and [redacted], to determine the cause. (Tr. 660-661, 1334). The following day, December 31, 2009, [redacted] and [redacted] dug in the area with shovels and buckets for approximately four hours, but were unable to find the exact source of the leak. (Tr. 661-662, 1145, 1151). The ground was saturated and soil was falling back into their excavation almost as fast as they could dig. (Tr. 1154, 1159). Ultimately, [redacted] and [redacted] learned that a four-inch water pipe buried approximately 31 inches beneath the ground was leaking. (Tr. 294, 377, 553, 1099).

Over the course of two days, December 31, 2009 and January 1, 2010, Respondent's two maintenance employees, a third-party plumber, and the park owner's son worked to expose and

repair the leak. (Tr. 169-171, 176, 488, 668-669, 1050). Work stopped suddenly on January 1, 2010 when portions of the excavation walls collapsed, temporarily trapping Respondent's maintenance employees inside the excavation. (Tr. 512, 684). Both employees were eventually rescued and taken to a local hospital for treatment of minor injuries. (Tr. 703, 1016). Approximately three months later, as a result of an employee complaint, OSHA CSHO Michele Caballero was assigned to investigate the incident. (Tr. 45-46). Her investigation revealed events and worksite conditions, some unrelated to the excavation collapse, which prompted the issuance of the citation items in dispute in this case.

Citation 2 Item 1

Complainant alleged a willful violation of the Act in Citation 2, Item 1 as follows:

> *29 C.F.R. §1926.651(k)(2): Where the competent person found evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees were not removed from the hazardous area until the necessary precautions had been taken to ensure their safety: At this location, on or about January 1, 2010, maintenance employees were involved in the repair of a water main located between the facility swimming pool and brick fence adjacent to Stone Street. The employer disregarded the warnings and recommendations of the competent person and did not remove employees from an excavation, greater than 4 feet deep, when hazardous conditions were observed, such as, but not limited to the following: (a) fluidity of the saturated sand flowing back into the hole during digging efforts, (b) lack of a protective system in the excavation, (c) accumulated water in the excavation, and (d) lack of safe egress.*

The cited standard provides:

> *29 C.F.R. §1926.651(k)(2): Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.*

On December 31, 2009, after the maintenance employees' unsuccessful initial attempt to locate the leak, Respondent's owner, David May (who also lived in the mobile home park at the time), telephoned Larson Plumbing and asked them to send a plumber out to help fix their leaking pipe. (Tr. 169, 487, 569, 658, 664, 1250). Mr. May also called [redacted], and asked him to come to the mobile home park to help with the pipe repair work. (Tr. 664, 975-976, 1241-1243, 1251, 1294).[2]

Jacob Morgan, a supervisory plumber, arrived later that day with a "mini excavator." (Tr. 1042). Mr. Morgan had been working in the plumbing industry for seventeen years and had personally been involved in over one hundred excavations during his plumbing career. (Tr. 486-487). Mr. Morgan's excavator had the potential to dig as far as eight feet underground, although in this instance, a nearby fence limited the excavator's reach. (Tr. 488-489; Ex. C-60). Soon after Mr. Morgan began digging in the area of the leaking pipe, he observed that the majority of the wet, sandy soil in the area would fall back into the hole with every scoop of the excavator. (Tr. 169-170, 489-490, 493, 500-501, 512, 673-674, 676, 683, 760).

Based on the behavior of the soil, Mr. Morgan decided that an excavation protective system was necessary. (Tr. 491, 504); See also 29 C.F.R. §1926, Subpart P. He testified that sloping was not possible because the sand was too wet, so he decided to install a shoring system on the sides of the excavation using 2x4's and some plywood found on Respondent's property. (Tr. 169-170, 491-

[2] [redacted] was later paid by Respondent for the hours he worked on the pipe repair project. (Tr. 975-976).

492, 566, 667, 1047, 1179, 1383, 1387).

When [redacted] returned to the site after purchasing replacement parts for the pipe, he argued with Mr. Morgan about whether or not the shoring system was actually necessary. (Tr. 169-171, 176-178, 493, 668-669, 682-683, 758). Mr. Morgan insisted that it was, but [redacted] ordered the two maintenance employees to remove the shoring system from the excavation. (Tr. 493, 682, 757-759). Mr. Morgan then told [redacted] that he did not believe it was safe to work in the excavation without the shoring, and that the shoring would also help them dig down to the necessary depth to perform the repairs. (Tr. 495, 616, 757-762). [redacted], in the presence of David May, maintained his refusal to allow Mr. Morgan to shore the excavation and stated that Respondent would not pay him for the time it would take to install and use it. (Tr. 169-171, 176-178, 618, 668-669, 673, 758). Mr. Morgan later memorialized his interactions with [redacted] over the shoring system on an invoice. (Tr. 232, 534; Ex. C-53, C-59). Throughout the excavation work the rest of the day, and through the following day, January 1, 2010, no shoring system or other kind of protective system was used in the excavation. (Tr. 675, 1190). [redacted] described the walls of the excavation as like "the sides of a bowl." (Tr. 1056).

By the end of the day on December 31, 2009, Mr. Morgan was able to dig approximately 31 inches to the underground level of the leaking pipe. (Tr. 490, 1053). [redacted] then entered the excavation and located the leak by feeling along the pipe, which was submerged beneath about 1½ feet of accumulated water. (Tr. 530, 682-683). David May then asked Mr. Morgan, [redacted], [redacted], and [redacted] to come back the next day to help complete the repair. (Tr. 1047, 1049).

After observing the difficulty Mr. Morgan experienced while trying to excavate the wet sand on December 31, 2009, David May decided to call another company to send out a larger excavator the following morning that could more easily expose the leaking pipe. (Tr. 674, 1308, 1338-1339). On January 1, 2010, a larger backhoe, provided and operated by another company, dug for about thirty minutes, fully exposing the pipe so it could be repaired. (Tr. 770-771).

While the larger excavator was digging, [redacted] told [redacted] and Mr. Morgan to pre-assemble the four-foot-long replacement part so that it would be ready to install once the leaking parts were removed. (Tr. 772, 1064). Then [redacted] helped [redacted], [redacted], and Mr. Morgan install the replacement part from inside the excavation. (Tr. 1196, 1259, 1340).

Just seconds after the new part was installed, when the water was turned back on to test the repair, a second leak began which flooded water into the excavation and caused the walls of the excavation to collapse onto [redacted] and [redacted]. (Tr. 380, 516, 684, 688, 774, 1073, 1197, 1200). Mr. Morgan immediately shut the water supply off again. (Tr. 775). At that point, [redacted] and [redacted] were partially stuck in the excavation and could not get out. (Tr. 686-687).

It was quickly determined that they could not be pulled free by the others. So the excavator began digging around [redacted] and [redacted] in an attempt to free them. (Tr. 517). [redacted] was removed quickly, although his leg was struck by the excavator in the removal process. (Tr. 517, 690-691, 1075, 1079-1080). [redacted] could not be removed as easily, and therefore, Respondent's Park Manager, Liz Medrano, called 911. (Tr. 518-520, 693-696, 815-816, 1015, 1075). After multiple unsuccessful attempts to remove [redacted] by the Corpus Christi Fire Department, he was ultimately freed from the excavation approximately two hours later with the help of a City of Corpus Christi vacuum truck, which suctioned out the wet sand around his lower body. (Tr. 543, 690-698, 702-703, 1273; Ex. C-60).

No one involved in the pipe repair ever measured the depth of the excavation, and since OSHA did not begin its investigation until three months after the incident, the precise measurements of the trench at the time of the accident are unknown. (Tr. 253). The court notes, however, that the regulation cited in this instance does not contain any minimum depth in order to be applicable. (Tr. 172, 868). The cited regulation applies when a competent person at an excavation site finds "evidence of a possible cave-in, indications of failure of protective systems,

hazardous atmospheres, or other hazardous conditions." (Tr. 221). The record established that Mr. Morgan was the only competent person for the purposes of excavation safety at this jobsite. (Tr. 177, 221-222, 486-487). Based on his extensive experience in this type of work, he specifically identified cave-in hazards, indications that sloping would not work as a protective method, and the need for a shoring system in the excavation. In addition, Mr. Morgan started to implement a shoring system, with the help of [redacted] and [redacted], which was later ordered to be removed by [redacted]. Even after the hazardous conditions of the excavation were identified by Mr. Morgan, the two maintenance employees continued to work inside the excavation without an adequate protective system. Therefore, the court finds that the cited standard applied and was violated.

To establish employee exposure to a violative condition, Complainant must prove that it was reasonably predictable that employees "will be, are, or have been in the zone of danger" created by a violative condition. *Fabricated Metal Products*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997); *Gilles & Cotting, Inc*., 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶20,448 (No. 504, 1976). [redacted] and [redacted] were exposed to the violative condition each time they worked inside the unprotected excavation on December 31, 2009 and January 1, 2010. (Tr. 169, 177, 217, 495, 496, 661-662, 669, 768, 1050, 1187, 1374).

The violation was serious in that an excavation collapse could have, and unfortunately did, occur in this instance. [redacted] was taken to a hospital by ambulance and treated for loss of blood flow, hypothermia, dehydration, and lacerations. (Tr. 218, 703, 1016; Ex. C-44). [redacted] was taken to a hospital by ambulance and treated for his leg injury. (Tr. 216, 690, 1016; Ex. C-44). The potential injuries could have been much more serious, and possibly even fatal. (Tr. 284). Complainant has determined that "excavation work is one of the most hazardous types of work done in the construction industry [and] [t]he primary type of accident of concern in excavation-related work is [the] cave-in." *Mosser Construction, Inc.,* supra.

David May and [redacted] participated directly in the excavation and repair work, while Liz Medrano, Respondent's Property Manager, and Melissa Stokes, Respondent's General Manager, periodically visited the excavation to observe the progress of the repair. (Tr. 217, 1012-1014, 1178, 1184, 1337, 1344, 1402-1405). In addition, during the course of the excavation project, David May and [redacted] specifically provided the maintenance employees with directions and instructions. (Tr. 658, 671, 678, 754, 792, 929-930, 998, 1018, 1019, 1034, 1141, 1332, 1368, 1390, 1402). Although [redacted] was not a full-time employee of the mobile home park, and only assisted with various projects when requested to do so by his father, an employee who is delegated with authority over other employees, even temporarily, is considered to be a supervisor for the purposes of imputing knowledge to the employer. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1992 CCH OSHD ¶29,617 (No. 86-360, 1992).

The periodic presence of all four supervisors, combined with Mr. Morgan's specific demand for, and attempt to install, a protective system in front of both David May and [redacted], established Respondent's knowledge of the violative condition. *Shaw Construction, Inc.*, 6 BNA OSHC 1341, 1978 CCH OSHD ¶22,524 (No. 3324, 1978); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991).

Complainant characterized the violation as willful because Respondent's managers knew of the hazardous conditions in the excavation from their own observations and from the warnings and attempted shoring by Mr. Morgan, yet Respondent continued to allow the mobile home park's two maintenance employees to work inside the excavation without proper protection. (Tr. 219). Complainant asserted that these actions constituted plain indifference to those employees' safety and health. (Tr. 220). The court agrees. Mr. Morgan was hired by David May for his expertise in the field of repairing underground plumbing leaks. Mr. Morgan quickly identified the hazardous condition of the wet sand in the excavation, and the need for a protective system. Mr. Morgan even attempted to install a shoring system, which [redacted] ordered the maintenance employees to

remove. Despite Mr. Morgan's continued argument with [redacted] over the issue, in the presence of David May at certain points, Respondent refused to allow for the use of a protective system and sent its maintenance employees into the excavation to perform work. Unfortunately, Mr. Morgan's safety concerns were realized when the excavation collapsed trapping the two maintenance employees inside. These facts constitute plain indifference to the requirements of the regulations and to employee safety. *Lakeland Enterprises of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 748 (7th Cir. 2005).

It is also worth noting that this was not the first time that Respondent's maintenance employees had experienced an excavation collapse at this mobile home park. Approximately four years earlier, [redacted][3] was working alone, repairing an underground pipe in a four-foot-deep excavation when it collapsed, dumping soil onto his back and knocking him down inside the excavation. (Tr. 180, 345, 1220). [redacted] told Liz Medrano and [redacted] about the incident after it occurred, but prior to the January 1, 2010 accident. (Tr. 180, 348, 1220). This instance provided heightened knowledge to the Respondent about the condition of the soil on its property, the need to evaluate the work environment and provide adequate safeguards and protections in the future when employees were working in excavations.

In conclusion, the court finds that Complainant established all of the elements necessary to prove the willful violation alleged in Citation 2, Item 1. Citation 2, Item 1 will be AFFIRMED.

Citation 2 Item 2

[3] The court notes at this point that it found the majority of [redacted] testimony to be unreliable. In addition to his demeanor, his testimony was repeatedly inconsistent. For example: (1) he testified that Liz Medrano never entered the maintenance workshops, even though Ms. Medrano personally acknowledged that she did enter them (Tr. 1029-1030, 1116-1117); (2) he testified that when Mr. Morgan first arrived, the shovel-dug excavation was only two feet deep, and then later testified that it was three to four feet deep (Tr. 1151, 1162, 1168, 1176); (3) he then later testified that after additional digging by two different excavators on two different days, the excavation was then only three feet deep; (Tr. 1169-1170, 1173); (4) he also testified that the second, larger excavator brought in on January 1, 2010, only deepened the excavation by six inches (Tr. 1190). Given the potential importance of the depth of the excavation to Citation 2 Item 2, it appeared to the court that [redacted] was intentionally understating its depth. To the extent [redacted] testimony was inconsistent with the testimony of Mr. Morgan and [redacted], the court credits Mr. Morgan's and [redacted] testimony over [redacted]. *American Wrecking Corp.*, 19 BNA OSHC 1703, 2001 CCH OSHD ¶32,504 (No. 96-1330, 2001).

Complainant alleged a willful violation of the Act in Citation 2, Item 2 as follows:

> *29 C.F.R. §1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c), nor had the employer complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than the maximum one and a half horizontal to one vertical (or 34 degrees measured from the horizontal): At this location, on or about January 1, 2010, maintenance employees in an excavation greater than 4 feet deep were involved in the repair of a water main between the facility swimming pool and brick fence adjacent to Stone Street. No cave in protection was used during the repair of the broken 4-inch water main, exposing employees in the excavation to the hazards associated with cave-in.*

The cited standard provides:

> *29 C.F.R. §1926.652(a)(1): Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i)Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.*

Citation 2, Item 1 and Citation 2, Item 2, were both based on Respondent's employees being exposed to cave-ins. Respondent could have eliminated the hazards identified in both proposed violations by either prohibiting employees from working inside the excavation (which is what action the regulation which is subject to Citation 2, Item 1 requires), or by properly implementing one of the excavation protection systems in 29 C.F.R. §1926, Subpart P (which is what action the

regulation which is subject to Citation 2, Item 2 requires). Either choice would have abated the hazardous conditions alleged in both Citation 2, Item 1 and Citation 2, Item 2. In this instance, if the Respondent would have prohibited its employees from working in the excavation as required by 29 C.F.R. §1926.651(k)(2) the hazard would have been eliminated and it would have been duplicative to require the implementation of excavation protection systems. The Commission has long held that citation items are impermissibly duplicative if the same abatement action would correct the violative conditions alleged in both items. *Capform, Inc*., 13 BNA OSHC 2219, 1989 CCH OSHD ¶28,503 (No. 84-556, 1989). Accordingly, Citation 2 Item 2 will be VACATED.

Citation 1 Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> *29 C.F.R. §1910.132(d)(2): The employer did not verify that the required workplace hazard assessment had been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date of the assessment and a statement which identifies the document as a certification of hazard assessment: At this location, on or about March 25, 2010, and at times prior thereto, the employer did not ensure a written hazard assessment, which addressed the work activities and identified the associated Personal Protective Equipment for the maintenance employees, had been developed.*

The cited standard provides:

> *29 C.F.R. §1910.132(d)(2): The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard*

assessment; and, which identifies the document as a certification of hazard assessment.

Respondent did not conduct a workplace hazard assessment despite the fact that its two maintenance employees worked in excavations, used various power tools, performed minor electrical repairs, and handled hazardous chemicals to maintain the swimming pool. (Tr. 65, 87, 124, 743, 1027-1028, 1130, 1221; Ex. C-5, C-6). A properly conducted hazard assessment would have alerted [redacted] and [redacted] to the dangers associated with their varied tasks and ensured that they used appropriate personal protective equipment. (Tr. 66). The court finds that the cited standard applied and was violated.

[redacted] and [redacted] were exposed to the violative condition daily, as they performed maintenance and repair work at Respondent's mobile home park. (Tr. 66-68). Respondent was certainly aware of its failure to conduct and certify the completion of a hazard assessment. Melissa Stokes was even specifically aware that certain jobsite activities exposed Respondent's maintenance employees to certain hazards, as she bought them safety glasses on one occasion and required them to wear steel-toed boots. (Tr. 66-67). Employee exposure and the employer's knowledge of the violative condition were established.

Complainant characterized Citation 1 Item 2 as a serious violation. However, the court notes that Complainant elected to charge Respondent with a violation of 29 C.F.R. §1910.132(d)(2), which requires employers to *certify* that a hazard assessment was performed. The actual requirement to *conduct* a hazard assessment is contained in 29 C.F.R. §1910.132(d), which was not cited here. The court notes that there could be no certification of a hazard assessment since no assessment was performed. Where no hazard assessment was conducted it logically flows that there could be no certification completed. The specific subparagraph cited in this instance is essentially a record-keeping violation. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 2, after

MODIFICATION to an other-than-serious violation. Citation 1, Item 2 will be AFFIRMED as an OTHER-THAN-SERIOUS violation.

Citation 1 Item 3

Complainant alleged a serious violation of the Act in Citation 1 Item 3 as follows:

> *29 C.F.R. §1910.151(c): Where employees were exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body were not provided within the work area for immediate emergency use: At this location, on or about March 25, 2010, and at times prior thereto, in the pool pump house, employees were using corrosive chemical swimming pool and spa additives without an approved emergency eye wash available onsite, or in the immediate area, in the event of a mishap.*

The cited standard provides:

> *29 C.F.R. §1910.151(c): Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.*

During her inspection of the mobile home park, CSHO Caballero observed conditions in and around the maintenance workshop, the paint workshop, and the pumphouse, which were unrelated to the excavation work, and served as the basis for most of the following violations addressed in this Decision. (Tr. 264, 786). For example, in relation to Citation 1 Item 3, she observed containers of swimming pool chemicals and learned that [redacted] and [redacted] maintained the swimming pool at Respondent's mobile home park. (Tr. 70, 1027-1028; Ex. C-6). At least weekly, one or both employees treated the pool water with Burnout 35, Algae Stop, Soda Ash and/or Jumbo Chlorine Tabs, chemicals which were identified by their manufacturers as hazardous and dangerous. (Tr. 64,

70-75, 710-713, 1130; Ex. C-6). Complainant charged Respondent with not having suitable eyewash facilities "within the work area for immediate emergency use" while handling these substances.

The burden is on the Complainant, based on the nature of hazardous chemicals in the area and quantities, to provide evidence as to why a garden hose at the swimming pool, as well as a sink in the swimming pool restroom approximately ten yards away, would be insufficient under the circumstances.

Under Commission precedent, whether an employer has provided suitable facilities depends on the totality of the relevant circumstances, including the nature, strength, and amounts of corrosive material to which employees are exposed, the configuration of the work area, and the distance between the area where any corrosive chemicals are used and the eyewash facilities. *Atlantic Battery Company, Inc.*, 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994). The Commission has held that the Secretary cannot bear her burden of proving that the facilities provided are unsuitable merely by showing that the drenching or flushing facilities are not an eyewash fountain. *Id.*; *see also, E.I. duPont de Nemours & Co.*, 10 BNA OSHC 1320, 1982 CCH OSHD ¶25,883 (No. 76-2400, 1982). In *Atlantic Battery*, the Commission found that the Secretary had not proved that an aerated hose was an unsuitable means of flushing the eyes where the record failed to describe the strength and amount of sulfuric acid used by affected employees, or the nature of the acid mixing operation to which employees were exposed. The Commission in *Gibson Discount Center, Store #15*, 6 BNA OSHC 1526, 1978 CCH OSHD ¶22,669 (No. 14656, 1978), held the availability of running water within a reasonable distance was found "suitable." Also, in *Con Agra Flour Milling Co*, 16 BNA OSHC 1137, CCH OSHD ¶39,045 (No. 88-1250, 1993), the Commission affirmed a decision vacating a § 1910.151(c) citation as the Secretary failed to demonstrate that Con Agra's employees were more than "potentially" exposed to corrosive chemicals in the course of their duties.

The Complainant, in regards to the present citation, failed to carry her burden. While there is evidence in the record as to the strength of the corrosive chemicals to which employees were actually exposed, she failed to establish: (i) the amount of chemicals actually used by the employees; (ii) the nature or the process of the application of the chemicals to which the employees were exposed; (iii) the configuration of the work area; and (iv) the circumstances under which employees were more than potentially exposed to such chemicals. Without the above facts being presented the suitability of the available flushing facilities cannot be properly evaluated. Given the totality of the circumstances, it cannot be found that the garden hose available at the swimming pool, as well as a sink in the swimming pool restroom approximately ten yards away, were unavailable for immediate use. The record established that there was a garden hose available at the swimming pool, as well as a sink in the swimming pool restroom approximately ten yards away. (Tr. 728, 1133-1134). Either could have been quickly accessed and used to irrigate the maintenance employees' eyes in case of an emergency. The totality of the circumstances in this instance, factoring in the type of chemicals involved and the location and type of available washing facilities, convince the court that Respondent did have suitable eyewash facilities available within the work area for immediate emergency use. *Atlantic Battery Co*., 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994); *Gibson Discount Centers,* 6 BNA OSHC 1526, 1978 CCH OSHD ¶22,669 (No. 14657, 1978). Citation 1, Item 3 will be VACATED.

Citation 1 Item 4a

Complainant alleged a serious violation of the Act in Citation 1, Item 4a as follows:

> *29 C.F.R. §1910.303(b)(2): Listed or labeled electrical equipment was not used or installed in accordance with instructions included in the listing or labeling: At this location, on or about March 25, 2010, and at times prior thereto, in the workshop, electrical equipment was not being used or installed properly, such as, but not limited to: (a) One plastic*

receptacle outlet box and one plastic bracket with outlets were not mounted within the wall but attached to the top shelf of the work bench and hung down over the bench top; the conductor wires exited the back; (b) Two re-locatable power strips were series connected (daisy chained) to provide more power outlets for battery chargers and portable tool charging stations; (c) Romex cable exited the outdoor light conduit and ran through a fence hole, strung in mid-air approximately 2-feet in length where it had been spliced and wrapped with black plastic tape, then entered through the wall of the adjacent water well pump house where it was connected to the electrical wiring of the pump.

The cited standard provides:

29 C.F.R. §1910.303(b)(2): Installation and use. Listed or labeled equipment shall be installed and used in accordance with any instructions included in the listing or labeling

While examining the large maintenance work shop and pumphouse, CSHO Caballero observed electrical power strips which were improperly connected, one to another in a series, so that they would reach charging stations for various power tools; an electrical outlet improperly suspended over a workbench, rather than installed in the wall; and Romex electrical wiring which was improperly run through a hole in an exterior wooden fence, then strung mid-air for a couple of feet, and then entered the pumphouse through a hole in its wall. (Tr. 89-91, 97, 106, 131-133, 718-719, 1221, 1393; Ex. C-7). CSHO Caballero testified, without contradiction, that the identified electrical equipment was not supposed to be installed or used under those conditions pursuant to manufacturer instructions. (Tr. 134). Therefore, the court finds that the cited standard applied and was violated.

The maintenance employees visited and worked inside the maintenance shops every day. In

addition, their time cards and a time clock were located in the larger workshop, so they were required to enter that area at least twice a day to clock-in and clock-out. (Tr. 717-719, 1221; Ex. C-7). They also periodically entered the pumphouse to check pressure gauges, to ensure that the pumps were working properly, and during the winter months, to turn lights on to help keep water pipes from freezing. (Tr. 97, 106, 720, 1119-1120). Therefore, the two maintenance employees were exposed to these violative electrical conditions.

David May, Liz Medrano, and Melissa Stokes, all of which supervised the maintenance employees, acknowledged that they periodically visited the maintenance workshops and pumphouse as well. (Tr. (Tr. 658, 671, 678, 739, 754, 792, 929-930, 998, 1018, 1019, 1034, 1141, 1332, 1368, 1390, 1402, 1029-1030, 1357, 1390-1391, 1398, 1442). All of the violative conditions were in plain view to anyone who accessed those areas. (Tr. 104, 134, 715). In addition, constructive knowledge under the Act includes an obligation for supervisors to inspect the work place. *North Landing*, 19 BNA OSHC 1465, 2001 CCH OSHD ¶32,391 (No. 96-721, 2001). Employer knowledge was established in that Respondent's managers knew, or with the exercise of reasonable diligence, could have known of these obvious electrical violations.

Lastly, failure to follow the manufacturer's installation guidelines for electrical wiring and electrical equipment could have resulted in electrical shock or fire, posing a threat of serious physical harm or death to the employees. (Tr. 93). The violation was properly characterized as a serious violation. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1 Item 4a. Citation 1, Item 4a will be AFFIRMED.

Citation 1 Item 4b

Complainant alleged a serious violation of the Act in Citation 1, Item 4b as follows:

> *29 C.F.R. §1910.305(b)(2)(i): In completed installations, each outlet box did not have a cover, faceplate, or fixture canopy: At this location, on or*

about March 25, 2010, and at times prior thereto, the energized junction box in the water well pump house was not provided with a faceplate.

The cited standard provides:

29 C.F.R. §1910.305(b)(2)(i): Covers and canopies. (i) All pull boxes, junction boxes, and fittings shall be provided with covers identified for the purpose. If metal covers are used, they shall be grounded. In completed installations, each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

There was a missing face plate on an electrical junction box inside the pumphouse at Respondent's mobile home park, which exposed live wiring. (Tr. 97-99; Ex. C-8). The cited standard applied and was violated. As stated earlier, maintenance employees entered the pumphouse periodically and were exposed to the condition. (Tr. 97, 106, 720, 1119-1120). David May also acknowledged that he occasionally visited the pumphouse, and the record establishes that the missing face plate was in plain view. (Tr. 721; Ex. C-8). Therefore, employee exposure and employer knowledge were also established. Lastly, accidental contact with the live wiring could have resulted in serious injuries or death. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 4b. Citation 1, Item 4b will be AFFIRMED.

Citation 1 Item 4c

Complainant alleged a serious violation of the Act in Citation 1, Item 4c as follows:

29 C.F.R. §1910.305(j)(1)(i): Fixtures, lampholders, lamps, rosettes, and receptacles had live parts normally exposed to employee contact.

However, rosettes and cleat-type lampholders and receptacles located at least 2.44 m (8.0 ft) above the floor may have exposed terminals. At this location, on or about March 25, 2010, and at times prior thereto, energized outlets were not provided with faceplates, such as, but not limited to the following: (a) the shop work bench where the employee time card was connected; (b) the one receptacle outlet on the north end of the work bench where a portable tool charger was connected; and (c) the four-plex receptacle outlet in the paint work shop on the east wall adjacent to the door where power cords to equipment such as the spray paint machine were connected.

The cited standard provides:

29 C.F.R. §1910.305(j)(1)(i): Equipment for general use – (1) Lighting fixtures, lampholders, lamps, and receptacles. (i) Fixtures, lampholders, lamps, rosettes, and receptacles may have no live parts normally exposed to employee contact. However, rosettes and cleat-type lampholders and receptacles located at least 2.44 m (8.0 ft) above the floor may have exposed terminals.

The missing faceplates listed in Item 4c, located inside the pumphouse at the Respondent's mobile home park, were in plain view to anyone who looked inside or entered the maintenance workshops. (Tr. 104, 725-726; Ex. C-9). The cited standard applied and was violated. The maintenance employees and Respondent's managers regularly visited the maintenance workshops and were exposed to the condition. (Tr. 106, 718-719, 722-726, 1221-1222). Therefore, employee exposure and employer knowledge were also established. Accidental contact with the live wiring could have resulted in serious injuries or death. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1 Item 4c.

Citation 1, Item 4c will be AFFIRMED.

Citation 1 Item 5

Complainant alleged a serious violation of the Act in Citation 1, Item 5 as follows:

> *29 C.F.R. §1910.303(b)(7): Electrical equipment was not installed in a neat and workmanlike manner: At this location, on or about March 25, 2010, and at times prior thereto, in both workshops and the large water well pump house, the electrical wiring to outlets and equipment was not installed in a neat and orderly fashion.*

The cited standard provides:

> *29 C.F.R. §1910.303(b)(7): Mechanical execution of work. Electric equipment shall be installed in a neat and workmanlike manner.*

The improperly installed electrical equipment, wiring, and outlets which serve as the factual basis for Citation 1, Item 5, were also listed as the basis for Citation 1, Item 3 and Citation 1, Item 4. Correction of the hazards identified in Citation 1, Item 3, and Citation 1, Item 4 would have also corrected the violative conditions identified in Citation 1, Item 5. Therefore, the court finds that Citation 1, Item 5 is impermissibly duplicative of those previously discussed citation items. *Capform, Inc*., supra. Accordingly, Citation 1 Item 5 will be VACATED.

Citation 1 Item 6a

Complainant alleged a serious violation of the Act in Citation 1, Item 6a as follows:

> *29 C.F.R. §1910.303(f)(2): Each service, feeder, and branch circuit, at its disconnecting means of overcurrent device, was not legibly marked to indicate its purpose, unless located and arranged to [sic] the purpose is evident: At this location, on or about March 25, 2010, and at times prior thereto, on the outside wall of the office, three circuit breakers in the electrical panel were not labeled as to their function and/or purpose.*

The cited standard provides:

> *29 C.F.R. §1910.303(f)(2): Services, feeders, and branch circuits. Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident.*

In the circuit breaker box behind the mobile home park office, several of the circuit breaker switches were not labeled. (Tr. 111, 732, 1222; Ex. C-11). Maintenance employees accessed this circuit breaker box whenever they performed minor electrical work, by disconnecting power to an area themselves, and by performing electrical work in areas controlled by one or more of the unlabeled circuit breakers. (Tr. 111, 114). [redacted] testified that he accessed the circuit breaker box a couple of times a week. (Tr. 731, 788). Respondent's managers also regularly accessed the circuit breaker box, often to assist the maintenance personnel by shutting off power to a particular area. (Tr. 732, 737). Respondent's managers' use of the circuit breaker box established knowledge of the violative condition. An employer does not have to possess knowledge that a particular condition violated the Act or its regulations, just knowledge that the condition existed. *Shaw Construction, Inc*., supra. The court finds that the standard applied, was violated, that Respondent's maintenance employees were exposed to the condition, and that Respondent knew, or with the exercise of reasonable diligence, could have known of the condition.

Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 6a. Citation 1, Item 6a will be AFFIRMED.

Citation 1 Item 6b

Complainant alleged a serious violation of the Act in Citation 1, Item 6b as follows:

> *29 C.F.R. §1910.305(b)(1)(i): Conductors entering boxes, cabinets, or fittings were not protected from abrasions, and openings through which conductors were entering were not effectively closed. At this location, on*

or about March 25, 2010, and at times prior thereto, the electrical box located on the back, outside wall of the office had a conductor opening on the bottom left side of the box which was not completely closed.

The cited standard provides:

29 C.F.R. §1910.305(b)(1)(i): Conductors entering cutout boxes, cabinets, or fittings shall be protected from abrasion, and openings through which conductors enter shall be effectively closed.

One of the conductors which entered the bottom of the circuit breaker box behind the main office did not completely fill the knockout hole on the box, leaving a small opening of approximately one inch or less. (C-12). [redacted] and [redacted] were exposed to the condition because, as indicated above, they regularly accessed the circuit breaker box. (Tr. 118, 737). The condition was in plain view and managers accessed the circuit breaker box to shut off power to various areas for the maintenance employees. (Tr. 119; Ex. C-12). The court finds that the cited standard applied, was violated, that Respondent's employees were exposed, and that Respondent knew, or with the exercise of reasonable diligence, could have known of the condition.

Complainant argued that the violation was serious because dust, weather, or vermin, could enter the circuit breaker box through the small opening, which could lead to arcing and fire. (Tr. 116; Ex. C-12). Based on the totality of the circumstances, the court does not agree that such a chain of events was reasonably likely to occur and therefore the severity and gravity as assessed to this citation by the CSHO was in error. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 6b, after MODIFICATION to an other-than-serious violation. Citation 1, Item 6b will be AFFIRMED as an OTHER-THAN-SERIOUS violation.

Citation 1 Item 6c

Complainant alleged a serious violation of the Act in Citation 1, Item 6c as follows:

> *29 C.F.R. §1910.305(b)(1)(ii): Unused openings in boxes, cabinets, or fittings were not effectively closed: At this location, on or about March 25, 2010, and at times prior thereto, the electrical panel in the electrical box on the back, outside wall of the office, had openings for circuit breakers which were not closed.*

The cited standard provides:

> *29 C.F.R. §1910.305(b)(1)(ii): Unused openings in cabinets, boxes, and fittings shall be effectively closed.*

The circuit breaker box behind the office also had slots for circuit breakers which were unused and left open. (Tr. 120-121; Ex. C-13). The cited standard applied and was violated. For the reasons stated above, [redacted] and [redacted] were exposed to the condition, and Respondent's managers had knowledge of the condition due to their periodic use of the circuit breaker box. (Tr. 121-122, 737). The openings allowed anyone who accessed the circuit breaker box to easily place their fingers inside and behind the circuit breaker panel, potentially contacting live wiring. The violation was properly characterized as a serious violation. Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1 Item 6c. Citation 1, Item 6c will be AFFIRMED.

Citation 1 Item 7

Complainant alleged a serious violation of the Act in Citation 1, Item 7 as follows:

> *29 C.F.R. §1910.304(a)(2): Grounded conductors were attached to terminals or leads so as to reverse designated polarity: At this location, on or about March 25, 2010, and at times prior thereto, in the paint workshop, maintenance employees were connecting electrical cords to a four-plex receptacle outlet which, when tested, had reverse polarity,*

exposing them to the hazards of electric shock.

The cited standard provides:

> *29 C.F.R. §1910.304(a)(2): Polarity of connections. No grounded conductor may be attached to any terminal or lead so as to reverse designated polarity.*

CSHO Caballero discovered a single four-plex electric receptacle in the paint workshop which indicated reverse polarization when she tested it with her meter. (Tr. 125). She explained that plugging electric tools into an outlet with reverse polarization could have resulted in shock or the inability to turn off a tool. (Tr. 125, 129). Since the condition was not open and obvious, and could only be determined through plugging in electrical testing equipment into the outlet, Complainant failed to introduce sufficient evidence to establish that Respondent knew, or with the exercise of reasonable diligence could have known, of the condition. There is also no evidence in the record to indicate there were prior incidents or events of the receptacle malfunctioning to impute knowledge to the Respondent. Since employer knowledge is a required element for a *prima facie* violation of the Act, Citation 1 Item 7 will be VACATED.

Citation 1 Item 8

Complainant alleged a serious violation of the Act in Citation 1, Item 8 as follows:

> *29 C.F.R. §1910.305(g)(2)(iii): Flexible cords were not connected to devices and fittings so that tension would not be transmitted to joints or terminal screws: At this location, on or about March 25, 2010, and at times prior thereto, in the paint/workshop, the female end of an orange extension cord used by maintenance employees was not provided with strain relief.*

The cited standard provides:

29 C.F.R. §1910.305(g)(2)(iii): Flexible cords and cables shall be connected to devices and fittings so that strain relief is provided that will prevent pull from being directly transmitted to joints or terminal screws.

CSHO Caballero observed and photographed an extension cord on which the outer sheathing had pulled away from the female end of the cord, exposing the internal conductor wires, due to a lack of strain relief during its use. (Tr. 136; Ex. C-15). The male end of the cord was plugged into an electrical outlet, but the female end was not connected to any tools at the time. (Tr. 136; Ex. C-15). [redacted] and [redacted] regularly handled and used the extension cord with electric power tools. (Tr. 136, 740, 1129). The cord was hanging on the wall in the paint workshop in plain view to any of Respondent's supervisors who, as indicated above, regularly visit both maintenance workshops. (Tr. 137). Complainant established that the cited standard applied and was violated, that Respondent's employees were exposed to the condition, and that Respondent knew, or with the exercise of reasonable diligence could have known, of the condition. Lastly, the violation was properly characterized as a serious violation in that employees could have been seriously injured, or killed, if they had come into contact with the internal conductor wiring during its use. (Tr. 138). Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1 Item 8. Citation 1, Item 8 will be AFFIRMED.

Citation 1 Item 9

Complainant alleged a serious violation of the Act in Citation 1, Item 9 as follows:

29 C.F.R. §1926.21(b)(2): The employer did not 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: At this location, on or about January 1, 2010, maintenance employees were involved in the repair of a leaking water main. The employer did not ensure employees were

trained in the recognition of unsafe conditions in trenching and excavation work, to include hazards, such as, but not limited to, the following: (a) hazards of working in trenches without an adequate employee protective system; (b) hazards of working in trenches where the soil is saturated and there is an accumulation of water; (c) safe means of egress.

The cited standard provides:

29 C.F.R. §1926.21(b)(2): 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.

Two maintenance employees were directed to enter an unprotected excavation area and perform pipe repairs on December 31, 2009 and January 1, 2010. (Tr. 143-145). In addition, both David May and [redacted] observed the wet and unstable soil conditions in the excavation, and were specifically told by plumber Jacob Morgan that the excavation was unsafe and needed a protective system. (Tr. 145). In the past seven years, [redacted] testified that he has helped repair ten excavation-related plumbing leaks at the mobile home park. (Tr. 1035). Despite these facts, neither of Respondent's maintenance employees had ever been instructed by Respondent on the potential hazards and injuries associated with excavation work. (Tr. 143-144, 809). The court also notes that Complainant requested employee training records before trial, but no such records were produced. (Tr. 148-149; Ex. C-52, C-54). The cited standard applied, was violated, and Respondent's two maintenance employees were exposed to the condition.

Respondent is also deemed to have knowledge of the training and instruction it provides, or in this case did not provide, to its employees. Failure to instruct employees on how to recognize and avoid unsafe conditions in the work they are assigned can, and unfortunately did in this case,

result in serious injuries. (Tr. 146). Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1, Item 9. Citation 1, Item 9 will be AFFIRMED.

Citation 1 Item 10

Complainant alleged a serious violation of the Act in Citation 1 Item 10 as follows:

> *29 C.F.R. §1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees: At this location, on or about January 1, 2010, between the facility swimming pool and the brick fence adjacent to Stone Street, maintenance employees were working in a trench at [a] depth greater than 4 feet and a ladder had not been provided for egress.*

The cited standard provides:

> *29 C.F.R. §1926.651(c)(2): Means of egress from trench excavations.*[4] *A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.*

The precise dimensions of the excavation before the accident are not known. (Tr. 345). None of the witnesses ever measured the excavation, although numerous witnesses gave widely varying, and largely unreliable, estimates on its depth, ranging from as shallow as two feet seven inches, to as deep as ten feet. (Tr. 510, 666, 683, 686, 761, 818, 820, 866-867, 1066, 1159-1162, 1268-1270, 1341, 1378, 1405). The preponderance of the evidence established that at the time of the collapse, the excavation was between four and five feet deep. This conclusion credits the

[4] The regulation makes specific reference to "trench excavation." There is a specific definition which applies to a "trench excavation." 29 C.F.R. §1926.650(b). Since the Secretary is the author of her own regulations, it is clear from its face that in order for this requirement to apply, the excavation must be a "trench excavation" as opposed to an excavation.

undisputed testimony from several witnesses indicating that the leaking pipe was 31 inches underground, that the plumber reached the depth of the pipe on December 31, 2009 and that a larger excavator was used the following day to dig past the depth of the pipe creating several inches of space beneath the pipe and the bottom of the excavation. Despite initial claims of a greater depth, even CSHO Caballero ultimately conceded at trial that the excavation was "approximately four feet or greater." (Tr. 274). The width of the excavation, which ranged from five to fifteen feet, was greater than the depth of the excavation. (Tr. 1056).

The cited standard in Item 10 requires ladders or other safe means of egress for a "trench excavation" which is defined as "a narrow excavation (in relation to its length) made below the surface of the ground. In general, the *depth is greater than the width*, but the width of a trench (measured at the bottom) is not greater than 15 feet." 29 C.F.R. §1926.650(b)(emphasis added). Accordingly, the cited standard did not apply since the Complainant has not established by a preponderance of the evidence that the depth of the trench excavation was deeper than it was wide. The width of the excavation, which ranged from five to fifteen feet, was greater than the depth. (Tr. 1056). Since application of the standard is a required element, Citation 1 Item 10 will be VACATED.

Citation 1 Item 11

Complainant alleged a serious violation of the Act in Citation 1, Item 11 as follows:

> *29 C.F.R. §1926.651(h)(1): The employer did not ensure that adequate precautions were taken to protect employees against the hazards posed by water accumulation. At this location, on or about January 1, 2010, between the facility swimming pool and the brick fence adjacent to Stone Street, the employer directed maintenance employees to continue working in an excavation, greater than 4 feet in depth, with an accumulation of water.*

The cited standard provides:

> *29 C.F.R. §1926.651(h)(1): Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.*

The cited standard applied because Respondent's employees were working in an excavation for two days, with varying levels of accumulated water, attempting to repair a pipe leak. (Tr. 164). Initially, water pumps were used to remove water from the excavation, but they kept clogging and became ineffective. (Tr. 164-166). The record clearly established that [redacted] and [redacted] worked inside the excavation at various times between December 31, 2009 and January 1, 2010 while it contained standing water ranging from just a few inches to as much as 1 ½ feet. (Tr. 164-165, 522, 682, 1044, 1051, 1342, 1406). In fact, the maintenance employees wore waders while working in the excavation. (Tr. 767-768).

The accumulated water was in plain view to every supervisor who visited the excavation, and despite Mr. Morgan's conversations with [redacted] and David May about the hazardous condition of the excavation, no protective systems or other precautions were ever taken. The terms of the cited standard were violated and employer knowledge of the condition was established. The violation was serious because the accumulation of water inside an excavation creates hazardous conditions beyond those typically found in a dry excavation, such as drowning and increased instability of the surrounding excavation walls. (Tr. 167). Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 1,

Item 11. Citation 1, Item 11 will be AFFIRMED.

Citation 3 Item 1

Complainant alleged an other-than-serious violation of the Act in Citation 3, Item 1 as follows:

> *29 C.F.R. §1910.1200(e)(1): The employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met: At this location, employees engaged in swimming pool and spa maintenance, as well as small equipment operations and repairs, were exposed to hazardous chemicals such as, but not limited to, Leslie's Swimming Pool Supplies 3-inch Jumbo Chlorine Tabs, BioGuard Strip Kwik, BioGuard Burnout 35, Leslie's Ultra Bright, [and] Soda Ash. The employer had not developed a program which would address labeling and other forms of warning on chemical containers, Material Safety Data Sheets, and employee information and training on the hazards associated with chemicals used at this site. The written program must also contain the following: (a) a list of all hazardous chemicals on site, (b) the methods the employer will use to inform employees of the hazards associated with non-routine tasks involving chemicals, such as a spill, (c) the hazards of chemicals contained in piping that is not labeled, and (d) the method the employer will use to inform other employers (contractors) of the chemicals their employees might be exposed to while performing duties at this site.*

The cited standard provides:

> *29 C.F.R. §1910.1200(e)(1): Written hazard communication program. (1)*

> *Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also include the following: [list of hazardous chemicals and methods of informing employees of hazards when performing non-routine tasks]*

Employees regularly used the hazardous chemicals and substances listed in the citation during the course of weekly swimming pool maintenance. (Tr. 140-141, 706-707, 710-713, 1027-1028, 1130; Ex. C-7, C-21). The manufacturers' labeling on those chemicals identified the hazardous nature of the substances. (Ex. C-6). Despite this fact, neither the maintenance employees nor managers of the mobile home park could produce a written hazard communication program or Material Safety Data Sheets for the chemicals. (Tr. 140-141, 1441). The cited standard applied, was violated, and Respondent's two maintenance employees were exposed.

Respondent is deemed to have knowledge of written programs which it failed to develop, implement, and maintain. This knowledge is strengthened by the fact that Respondent purchased the pool chemicals for the maintenance employees to use, and required them to complete a log confirming their weekly maintenance of the pool. (Tr. 141-142, 713). Accordingly, the court finds that Complainant established all of the elements necessary to prove the violation alleged in Citation 3, Item 1. Citation3, Item 1 will be AFFIRMED.

Affirmative Defenses

Respondent failed to argue any of its originally pled affirmative defenses in its *Post Hearing Brief*. Typically, this results in a waiver of any affirmative defenses listed in the *Answer*. See *Georgia-Pacific Corp*., 15 BNA OSHC 1127, 1991 CCH OSHD ¶29,395 (No. 89-2713, 1991). However, Respondent alluded to certain defenses during the trial. Therefore, the court will briefly

address them.

Fourth Amendment

Respondent attempted to argue that Complainant's walkaround inspection of the mobile home park violated its Fourth Amendment protection against unreasonable searches. *Marshall v. Barlows,* 436 U.S. 307 (1978). The court ruled during trial that this defense was untimely as it had never been previously raised in Respondent's *Answer*. The court maintains its ruling on that issue and, in addition, briefly notes that the record clearly established that CSHO Caballero obtained permission from Park Manager Liz Medrano to enter the park property to conduct her inspection. (Tr. 49-50, 260-261, 1004-1005, 1438). The court also notes that no one, including Park Manager Medrano, ever attempted to withdraw that consent or otherwise protest CSHO Caballero's presence on Respondent's property. (Tr. 55-56). Respondent unequivocally waived any Fourth Amendment defense through its consent to the inspection. *Cody-Zeigler, Inc*., 19 BNA OSHC 1777, 2002 CCH OSHD ¶32,559 (No. 01-1236, 2002). Accordingly, Respondent's assertion of a Fourth Amendment affirmative defense to the inspection is REJECTED.

Unpreventable Employee Misconduct

Some of Respondent's questioning related to an unpreventable employee misconduct defense. To establish that affirmative defense, Respondent must prove that: (1) it established work rules designed to prevent the violation, (2) it adequately communicated those rules to its employees, (3) it took steps to discover violations, and (4) it effectively enforced the rules when violations were discovered. *American Sterilizer Co.,* 18 BNA OSHC 1082, 1995-97 CCH OSHD ¶31,451 (No. 91-2494, 1997). The court notes that Complainant requested records of employee discipline for any purported violation of work rules, but none were ever produced (Tr. 144; Ex. C-58) and there is no evidence in the record to establish the existence of established work rules and the enforcement of those rules. The court also notes that [redacted], to whom many of the questions implying employee misconduct were posed, was never disciplined by Respondent in any way for the

excavation incident. (Tr. 809). A review of the record confirms that Respondent failed to prove any of the elements necessary to establish an unpreventable employee misconduct defense for any of the affirmed violations. Accordingly, Respondent's assertion of unpreventable employee misconduct as an affirmative defense is REJECTED.

Borrowed Servant Doctrine

Respondent argued during trial that because Mr. Morgan instructed [redacted] and [redacted] at various times during the excavation work, the borrowed servant doctrine shielded Respondent from liability for any OSHA violations proven in this case. (Tr. 582-583). However, the Commission has clearly stated that the borrowed servant doctrine is not a defense in OSHA proceedings as multiple entities may be deemed employers for the purposes of the Act. *Frohlick Crane Service*, 521 F.2d 628 (10th Cir. 1975); *Froedtert Memorial Lutheran Hospital*, 20 BNA OSHC 1500 (No. 97-1839, 2004); *Baroid Division, NL Industries*, 1977 CCH OSHD ¶22,280 (No. 16096, 1976). Additionally, even if the doctrine did apply, the record established that [redacted] and [redacted] were employed by Respondent the entire time; took direction from several of Respondent's managers before, during, and after the excavation work; were paid by Respondent; and used Respondent's tools and materials; all of which occurred on Respondent's property. (Tr. 496-497, 580, 1370-1371). Accordingly, Respondent's assertion of a borrowed servant doctrine as an affirmative defense is REJECTED.

Infeasibility

Respondent argued in its Answer that the infeasibility defense shielded the Respondent from liability. The defense of infeasibility requires an employer to prove that: (1) the means of compliance prescribed by the standard are technologically or economically infeasible, or necessary work operations are technologically infeasible after implementation; and (2) there are no feasible alternative means of protection or an alternative method of protection was used. *V.I.P. Structures, Inc.,* 16 BNA OSHC 1873, 1993-95 CCH OSHD ¶30,485 (No. 91-1167, 1994). *See also A. J.*

McNulty & Co., 19 BNA OSHC 1121, 1129 (No. 94-1758, 2000). Employer has the burden of proving infeasibility of compliance. *State Sheet Metal*, 16 BNA OSHC 1155, 1161 (No. 90-2894, 1993). The Respondent failed to establish infeasibility as an affirmative defense. The Respondent provided no proof that compliance with the Act and its regulations were infeasible. The Respondent abated the deficiencies noted in the citations after the inspection. This action itself establishes that it was feasible to comply with the Act and its regulations prior to the inspection. Accordingly, Respondent's assertion of infeasibility as an affirmative defense is REJECTED.

Vindictive Prosecution and Bias

Respondent attempted to argue the entire inspection, the resulting issuance of the Citation and the prosecution of this case is based either upon a theory of vindictive prosecution or bias. The court ruled during trial that this defense was untimely as it had never been previously raised as an affirmative defense in the Answer. The court maintains its ruling on that issue.

Although there is no uniform test for proving vindictive prosecution, a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right. *Nat'l Eng'g & Contracting Co*., 18 BNA OSHC 1075, 1077 (No. 94-2787, 1997) (consolidated), *aff'd*, 181 F.3d 715 (6th Cir. 1999). There is no evidence that a protected right was at issue here. The Respondent's assertion of an affirmative defense or bias is REJECTED.

Penalty

In calculating the appropriate penalty for affirmed violations, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (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, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993).

It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995). In calculating the proposed penalties, CSHO Caballero generally credited Respondent with a sixty percent reduction due to its status as a small employer, and a ten percent reduction for its lack of OSHA violation history. (Tr. 69, 85, 110, 123, 138, 147, 182, 223).

With regard to Citation 2 Item 1, the court considered the totality of the circumstances, including the fact that Respondent is a very small business; that two of its employees were exposed to serious excavation hazards for two days; that a third-party plumber specifically warned Respondent's managers of the hazardous nature of the excavation; that Respondent ordered its employees to remove the plumber's initial attempts at a shoring system;, that the plumber's safety concerns were realized when the excavation actually collapsed;, and that Respondent's employees were actually injured. As a result, the court will assess the penalty for Citation 2 Item 1 at $15,000.00.

With regard to Citation 1, Item 9, the court considered the totality of the circumstances. It considered the same factors that it considered in assessing the penalty for Citation 2, Item 1 in determining the penalty for Citation 1, Item 9. Other factors the court considered as to Citation 1, Item 9 were the established facts that two maintenance employees were not provided with the training required under the Act and there were past events clearly indicating training was lacking and needed. In the past seven years, [redacted] testified that he has helped repair ten excavation-related plumbing leaks at the mobile home park. (Tr. 1035). The Respondent produced no training records. (Tr. 148-149; Ex. C-52, C-54). And finally, there was a prior incident in which [redacted] was involved in the collapse of an excavation. For seven years and after having knowledge of past incidences, the Respondent provided no training. As a result, the court will assess the penalty for

Citation 1, Item 9 at $2,500.00.

Based on the totality of the circumstances discussed above with regard to each of the other affirmed violations, the court assesses the penalties as set out below.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1 Item 1 was withdrawn by Complainant (Tr. 28);
2. Citation 1 Item 2 is MODIFIED to an other-than-serious violation, AFFIRMED as modified, and a penalty of $225.00 is ASSESSED;
3. Citation 1 Item 3 is VACATED;
4. Citation 1 Item 4a is AFFIRMED and a penalty of $750.00 is ASSESSED;
5. Citation 1 Item 4b is AFFIRMED, which for penalty purposes was grouped with Item 4a;
6. Citation 1 Item 4c is AFFIRMED, which for penalty purposes was grouped with Item 4a;
7. Citation 1 Item 5 is VACATED;
8. Citation 1 Item 6a is AFFIRMED and a penalty of $750.00 is ASSESSED;
9. Citation 1 Item 6b is MODIFIED to an other-than serious violation, AFFIRMED as modified, which for penalty purposes was grouped with Item 6a;
10. Citation 1 Item 6c is AFFIRMED, which for penalty purposes was grouped with Item 6a;
11. Citation 1 Item 7 is VACATED;
12. Citation 1 Item 8 is AFFIRMED and a penalty of $450.00 is ASSESSED;
13. Citation 1 Item 9 is AFFIRMED and a penalty of $2,500.00 is ASSESSED;
14. Citation 1 Item 10 is VACATED;
15. Citation 1 Item 11 is AFFIRMED and a penalty of $1,000.00 is ASSESSED;
16. Citation 2 Item 1 is AFFIRMED and a penalty of $15,000.00 is ASSESSED;
17. Citation 2 Item 2 is VACATED; and
18. Citation 3 Item 1 is AFFIRMED and a penalty of $0.00 is ASSESSED.

/s/

Date: January 27, 2012
Denver, Colorado

PATRICK B. AUGUSTINE
Judge, OSHRC