Some personal identifiers have been redacted for privacy purposes

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PM CONSTRUCTION & REHAB, LLC and its successors, Respondent.	DOCKET NO. 12-1225

Appearances:

Christopher L. Green, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, Texas
For Complainant

George R. Carlton, Jr., Esq., Godwin Lewis PC, Dallas, Texas
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On March 23, 2012, the Occupational Safety and Health Administration ("OSHA") inspected Respondent's worksite in Houston, Texas. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent. The Citation alleges one "repeat-serious" violation of the Act, with a proposed penalty of $13,860.00. Respondent timely contested the Citation. A trial was conducted in

Houston, Texas on August 22, 2013. The parties each submitted post-trial briefs for consideration.

Five witnesses testified at trial: (1) [redacted], an employee of Respondent; (2) Jesus Robledo, Respondent's site superintendent and competent person; (3) Derek Rusin, OSHA Compliance Safety and Health Officer ("CSHO"); (4) Michael Elliot, Respondent's Operations Manager; and (5) Christian Abels, Respondent's Assistant Operations Manager.

Jurisdiction

Jurisdiction is conferred upon the Commission pursuant to Section 10(c) of the Act. (Tr. 12). Based on the parties' stipulations and the record, the Court finds that Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 13). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

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 of 1970.
2. Respondent is an employer engaged in a business affecting commerce within the meaning of Section 3, subsection (5) at 29 U.S.C. § 652(5).
3. As a result of an inspection that began on or about March 23, 2012, Respondent was issued a citation on May 23, 2012, for serious violations of the Act.
4. Complainant timely received a notice of intent to contest the aforesaid citation and application of the proposed penalty on June 1, 2012.

5. Speed Shore Corporation's Tabulated Data for vertical shores effective January 1, 1995, an authentic business record of Speed Shore Corporation. The parties agree to the admissibility of this document at trial.

Background

On March 22, 2012, Respondent was performing sewer pipe rehabilitation in a residential neighborhood in Houston, Texas. (Tr. 36–37). The rehabilitation work required employees to dig trenches to expose sewer pipes, repair or replace the pipes, and tie those pipes into existing house outlet pipes. (Tr. 37). During the repair of one pipe, [redacted] was seriously injured by a large rock, which broke away from the east end wall of the trench in which he was working. (Tr. 37, 55, 60, 62; Ex. C-8 at 164).

At the time of the accident, Respondent was performing rehabilitation work on a number of different sewer pipes, which required Respondent to dig several trenches that were similar in size and depth. (Tr. 46–47). This work was being supervised by Jesus Robledo, who was identified as the Site Superintendent and competent person at the worksite. (Tr. 76–77). Thus, Mr. Robledo was responsible for directing Respondent's work crews; determining the proper cave-in protection for the trenches; and ensuring that cave-in protection was being properly implemented. (Tr. 76-77). Mr. Robledo directed [redacted] to enter the trench identified in Citation 1, Item 1, and to cut a hole in the pipe to prevent the trench from flooding. (Tr. 79).

The particular trench where [redacted] was injured measured approximately 8 to 9 feet deep and was 14 feet long by 4 feet wide.[1] (Tr. 101; Ex. C-4, C-5). Both Mr. Robledo and [redacted] testified that, on the day of the accident, the long walls of the trench were supported

1. There was discrepancy between Complainant's and Respondent's assessments of the length of the trench. The Court credits Complainant's assessment because CSHO Rusin testified that he actually measured the trench, whereas it appears that Mr. Robledo and [redacted] were estimating the length. Regardless of which party is correct, the Court notes that the length of the trench is not a dispositive fact in this case.

by Speed Shores, which use hydraulic jacks to horizontally press plywood sheets against the walls of the trench. (Tr. 81). According to Mr. Robledo, the Speed Shores were installed pursuant to specifications in the Tabulated Data sheet, which is provided by the manufacturer. (Tr. 83–84, Ex. C-9). The end walls of the trench, however, were not protected with shoring. (Tr. 40, 80). With the exception of a two-foot section of the east end wall, which was sloped to aid in the replacement of the pipe, the remaining sections of the two end walls had vertical faces.[2] (Tr. 40–41; Ex. C-8 at 164, 165).

Complainant learned about the accident through a media report, and sent CSHO Rusin and CSHO Hoover to conduct an inspection of Respondent's worksite on March 23, 2012, the day after the accident. (Tr. 97–98). CSHO Rusin performed the aforementioned measurements and conducted employee interviews. As a result of his inspection, Complainant issued a citation alleging a violation of 29 C.F.R. § 1926.652(a)(1), which requires Respondent to ensure that its employees are protected from cave-ins by an adequate protective system. Respondent contends that Complainant failed to prove a violation of the cited standard, or, alternatively, that the violation was the result of unpreventable employee misconduct.

Discussion

To prove a violation of an OSHA standard, Complainant must establish, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of

2. The support system in the trench in question had been altered by the time CSHO Rusin arrived at the worksite on March 23, 2012, as the local fire department had to remove and replace certain portions of the shoring in order to perform a rescue of [redacted]. (Tr. 103).

reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

A violation is "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 actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

Citation 1, Item 1

Complainant alleged a repeat-serious violation of the Act in Citation 1, Item 1 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 paragraph (b) or (c):
>
> The employer does not ensure that employees are protected from cave-ins while working in excavations. This violation occurred on or about March 22, 2012, where employees were exposed to cave-in hazards when working in an excavation that was not sloped, benched or properly shored.
>
> PM Construction was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 [sic] 1926.652(a)(1), which was contained in OSHA inspection number 314301318, citation number 01 item number 001 and was affirmed as a final order on March 10, 2012, with respect to a workplace that was located at the intersection of Perrin Beitel and Old Perrin Beitel San Antonio, TX 78227.
>
> Pursuant to 29 C.F.R. 1903.19, within ten (10) calendar days of the date of this citation, the employer must submit documentation showing that it is in compliance with the standard including describing the steps that it is taking to ensure that all excavations that employees are required to work in are either sloped, benched, or shored on all sides of the excavation in

> accordance with 29 CFR 1926.652 paragraph (b) and/or (c) to prevent possible cave-ins.

The cited standard provides:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section . . . .

29 C.F.R. § 1926.652(a)(1).

First, the Court finds that the cited standard applied to the conditions at Respondent's worksite. According to 29 C.F.R. § 1926.650(a), "This subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches." A trench 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 (4.6 m)." *Id.* § 1926.650(b). Based on the measurements described above, the Court finds that Respondent's worksite contained trenches that are governed by the standards found in subpart P of Part 1926. Thus, the cited standard applies.

Second, the Court finds that the terms of the standard were violated. According to 1926.652(a)(1), each employee shall be protected from cave-ins in accordance with either subsection (b) or (c). *Id.* § 1926.652(a)(1). Subsection (b) addresses sloping and benching systems, whereas section (c) addresses support systems, shield systems, and other protective systems. *Id.* Thus, if a trench's protective system is not designed in conformity with subsection (b) or (c), then employees that work in that trench are not adequately protected. Mr. Robledo testified that he relied upon the manufacturer's Tabulated Data to determine the specifications and proper implementation of the Speed Shore system. (Tr. 83–84; Ex. C-9). *See also id.* § 1926.652(c)(2). Mr. Robledo also testified that he implemented the Tabulated Data with respect to the two long walls of the trench; however, he admitted that he did not provide shoring for the

two more narrow faces of the trench located on the east and west ends. (Tr. 78, 80, 83). Further, Mr. Robledo admitted that, with the exception of one portion of the east end wall, neither of the two narrow end faces were sloped or benched. Complainant contends that Respondent's failure to shore, slope, bench, or otherwise protect employees from the narrow faces at the east and west ends of the trench constitutes a violation of the standard. The Court agrees.

According to Speed Shore's Tabulated Data, "Whenever a topic or subject is not contained in this Tabulated Data, the ***competent person*** shall refer to CFR 29, Part 1926, Subpart P – Excavations." (Ex. C-9 at ¶ 1.4) (emphasis in original). Further, the Tabulated Data reiterates that the term "shall" means mandatory. (*Id.* at ¶ 2.2). The key section of the Tabulated Data, however, is found at ¶ 5.13. That paragraph states that "[t]he ends of trenches *shall* be shored or sloped in accordance with Appendix B of CFR 29, Part 1926 Subpart P Excavations." (*Id.* at ¶ 5.13). Thus, by its very terms, Speed Shore's Tabulated Data mandates that the ends of a trench "shall be shored or sloped". *Id.* There is no exception for narrow trenches, nor is there any consideration given to the spacing of the shores that are placed along the long walls of a trench. Further, this requirement is phrased in the disjunctive—compliance can be achieved through shoring or through sloping pursuant to Appendix B, which governs "sloping and benching when used as methods of protecting employees working in excavations from cave-ins." 29 C.F.R. § 1926, Subpart P, App. B.

Respondent contends that Appendix B of Section 1926, Subpart P, does not apply to its trench because it chose to design its shoring system in conformity with 1926.652(c). Contrary to Respondent's argument, the fact that it chose to be bound by the requirements of 1926.652(c) does not mean that Speed Shore's Tabulated Data cannot also require Respondent to comply with other portions of Section 1926, Subpart P, to ensure that the implemented protective system

is wholly adequate under the terms of 1926.652(a)(1). Respondent had the option to shore the ends of the trench or, if shoring was not a feasible method of protection, by sloping or benching the end walls in conformity with Appendix B. Respondent did neither of those things.[3] Pursuant to the terms of the Tabulated Data that Respondent expressly relied upon, all four walls of the trench were required to be shored, sloped, or benched. Respondent did not slope, shore, or bench the two end walls.[4] Accordingly, the terms of the standard were violated.

Third, the Court finds that Respondent knew or could have known of the violative condition. As a general rule, the knowledge, action, or inaction of a supervisory employee are imputable to the employer. *See Revoli Constr. Co.*, 19 BNA OSHC 1682 (No. 00-0315, 2001). In the Fifth Circuit,[5] however, "[A] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *W.G. Yates & Sons Constr. Co. Inc. v. OSHRC*, 459 F.3d 604, 608–609 (5th Cir. 2006). In other words, a supervisor's knowledge of his own misconduct is imputable to the employer only in those instances where the misconduct was foreseeable. *Id.*

Mr. Robledo testified that he was aware that the ends of the trench had not been sloped or shored prior to directing [redacted] to enter the trench. Thus, Complainant showed that Mr. Robledo had knowledge of the violative condition. The key question, however, is whether that knowledge is properly imputable to Respondent. Respondent introduced evidence of a safety

---

3. The partial sloping of one-half of one of the end walls did not provide adequate protection because the remaining half of that end wall was still completely vertical.

4. Although CSHO Rusin had a sample of soil taken from the rock that fell into the excavation, he did not rely on the results of the test because the trench was in previously disturbed soil, which means that the soil could only be classified as Type B or Type C soil. (Tr. 126). Accordingly, the trench needed to at least be sloped at 1.5:1 (horizontal to vertical). Because the ends of the trench were vertical, they were not properly sloped. *See* 29 C.F.R. Pt. 1926, Subpt P, App. B (indicating maximum allowable slopes for excavations less than 20 feet deep).

5. The law of the Fifth Circuit applies in this case because that is the Appellate Court to which this case may be appealed.

policy and training regime; however, the Court finds that the policies and training were insufficient. Mr. Robledo's supervisors, Christian Abels and Michael Elliot, both told CSHO Rusin that they did not believe that the end walls needed to be shored.[6] (Tr. 102, 161). This misunderstanding of the requirements of both the Tabulated Data and the standards found in Subpart P clearly illustrates an institutional failure to properly train and educate employees and supervisors regarding the implementation of cave-in protection on the end (narrow) walls of excavations. If Mr. Robledo's own superiors mistakenly believed that the end walls did not need to be protected, then Mr. Robledo's actions on March 22, 2012, were entirely foreseeable. There appeared to be an organizational misinterpretation and/or misapplication of the cited regulation and Tabulated Data sheet. Because his actions were foreseeable, his knowledge is properly imputed to Respondent. Accordingly, the Court finds that Respondent had knowledge of the violative condition.

Finally, the Court finds that Respondent's employees were exposed to the hazardous condition. It is undisputed that [redacted] was working in the trench when one of the vertical, unprotected end walls collapsed. Further, [redacted] testified that the crew dug and worked in a number of other similarly situated trenches, which means that other members of Respondent's work crew were also exposed to this hazard at this jobsite. Accordingly, the Court finds that Complainant established a *prima facie* violation of 29 C.F.R. § 1926.652(a)(1).

Characterization

6. Complainant also argues that Mr. Robledo testified that he knew that the ends of the trench should have been sloped or shored, yet did not ensure that such protection was provided because it was the end of the day and everyone was rushing to go home. (Tr. 79). The Court is not as convinced by this line of testimony because Mr. Robledo's answers were prompted by multiple leading questions. The Court is more convinced by Mr. Robledo's testimony that he believed the ends of the trench did not need to be shored due to the spacing of the shores along the long walls. (Tr. 83–84). This interpretation of the Tabulated Data was supported by Mr. Abels' and Mr. Elliot's statements to CSHO Rusin that they also believed the end walls did not need to be shored. (Tr. 102).

As noted above, if the potential injury addressed by a regulation is death or serious physical harm, then the violation of that regulation is serious. *See Mosser Construction*, 23 BNA OSHC 1044. In this case, however, [redacted] was not only exposed to a potentially serious injury, he was, in fact, seriously injured. *See Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2nd Cir. 1977) ("The fact that the activity in question actually caused death or serious injury constitutes at least *prima facie* evidence of likelihood."). [redacted] suffered a broken pelvis, a hernia, and a rupture of his small intestine when a boulder fell from the unprotected end of the trench. (Tr. 55). Accordingly, the violation was serious.

The Court does not find, however, that the violation was properly characterized as "repeat". "A violation is repeated if the employer was previously cited for a substantially similar violation and that citation became a final order before the occurrence of the alleged repeated violation." *Deep South Crane & Rigging Co.*, 23 BNA OSHC 2099 (No. 09-0240, 2012); *Bunge Corp.*, 638 F.2d 831 (5th Cir. 1981); *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). The Secretary must demonstrate that the earlier citation upon which he relies became a final order of the Commission prior to the date of the alleged repeated violation. *See Potlatch supra*; *see also Dic-Underhill*, 8 BNA OSHC 2223 (No. 10798, 1980) (rejecting repeat characterization because Secretary failed to prove that underlying violation had become final prior to occurrence of alleged repeat violation).

In this case, the underlying citation for a violation of 29 C.F.R. § 1926.652(a)(1) was issued on August 25, 2010. (Ex. C-10). As part of a settlement agreement dated February 10, 2012, Respondent accepted that citation item as written. (Ex. C-11). That settlement agreement became a final order of the Commission on May 4, 2012. (Ex. C-13). The alleged repeat violation in the present case occurred on March 22, 2012. (Ex. C-1). Therefore, the alleged

repeat violation occurred almost a month-and-a-half *before* the underlying citation item became a final order of the Commission. Accordingly, the Court finds that Citation 1, Item 1 is not a repeat violation pursuant to Section 17(a) of the Act. 29 U.S.C. § 666(a).

Affirmative Defenses

In addition to arguing that Complainant failed to prove its *prima facie* case, Respondent also asserted that the violation was the result of unpreventable employee misconduct. To prove that affirmative defense, it is the employer's burden to establish that: (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *GEM Industrial, Inc.*, 17 BNA OSHC 1861 (No. 93-1122, 1996). "[W]here a supervisory employee is involved in the violation, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Daniel Constr. Co.*, 10 BNA OSHC 1549 (No. 16265, 1982). "A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

As discussed above, the Court previously found that Respondent's safety policy and training program, as least as to the protection requirements for end walls of trenches, was insufficient. Respondent introduced evidence of work rules through its safety manual and the Tabulated Data sheet. (Exs. C-9, C-14). Respondent also introduced evidence of its training program through the testimony of Mr. Elliot, Mr. Abels, and [redacted]. (Tr. 67–68, 157, 173–74, 177). The Court finds that the specific rules related to the use of Tabulated Data were

apparently not adequately communicated.[7] Mr. Robledo testified that he believed the ends of the trench did not need to be sloped or shored because the Tabulated Data did not require it. (Tr. 84–85). This understanding was echoed by Mr. Robledo's superiors, who both told CSHO Rusin that they did not believe that the ends of the trench needed to be shored. (Tr. 102). It was this collective misunderstanding of the Tabulated Data that apparently led to the improper construction of the trench's protective system, not the misconduct of Mr. Robledo or [redacted]. The actions of Mr. Robledo, in overseeing the construction of the trench, were wholly preventable had Mr. Robledo been properly trained in the interpretation and implementation of the cited regulation and Tabulated Data. In light of the foregoing, the Court finds that Respondent failed to establish the affirmative defense of unpreventable employee misconduct.

Accordingly, Citation 1, Item 1 shall be AFFIRMED as a serious violation of the Act.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission 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. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). 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. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

7. Mr. Robledo testified that he received competent person training; however, Respondent did not introduce any evidence regarding the substance or extent of the training that he received on particular topics.

In determining an appropriate penalty in this instance, the Court notes that Respondent employs approximately 131 individuals, and it further recognizes that an employee was actually injured as a result of the violative condition. (Ex. C-2). However, the Court finds that the proposed penalty should be reduced for two reasons. First, the citation is now properly characterized as a serious violation, rather than a repeat violation, which means that the statutory maximum fine is $7,000.00. 29 U.S.C. § 666(b). Second, though Respondent violated the standard by not protecting employees from the end walls of the trench, it is clear that Respondent intended to provide protection consistent with the Tabulated Data sheet, even if they failed to properly interpret it. It was undisputed that speed shoring was used along the length of the excavations at this jobsite. This is not a case in which an employer completely failed to provide any excavation protection at all. Rather, it appears that, as to the end walls only, Respondent misinterpreted and misapplied the requirements of the cited regulation and Tabulated Data. Accordingly, based on the totality of the circumstances, the Court will assess a penalty of $5,000.00 for Citation 1, Item 1.

Order

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

Citation 1, Item 1 is MODIFIED to a serious violation of the Act, AFFIRMED as modified, and a penalty of $5,000.00 is ASSESSED.

SO ORDERED.

/s/
Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

Date: January 27, 2014
Denver, Colorado