UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PAN OCEANIC ENGINEERING CO., INC., Respondent.	OSHRC DOCKET NO. 14-0214

Travis Gosselin, Esq. and Catherine Homolka, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Matthew W. Horn, Esq. and William Klinger, Esq., SmithAmundsen, Chicago, Illinois
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. 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 a Pan Oceanic Engineering ("Respondent") worksite in Chicago, Illinois on July 22, 2013. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging one serious, one willful, and two repeat violations of the Act with penalties totaling $105,600.00. The Citation was issued on January 9, 2014. Respondent timely contested the Citation.

In its Answer, Respondent asserted the affirmative defense of unpreventable employee misconduct. However, one day prior to trial, Respondent filed a motion seeking withdrawal of

this defense. *See Respondent's Motion to Withdraw Its Employee Misconduct Defense*. The motion was granted by the Court on the first day of trial. (Tr. 13).

Trial in this matter commenced on Tuesday, January 27, 2015, in Chicago, Illinois. Only three witnesses testified: Compliance Safety and Health Officer (CSHO) Drew Youpel, Pan Oceanic foreman Jose Orozco, and Optimum Results consultant Jerry Prindiville. During the course of CSHO Youpel's testimony, he revealed Complainant failed to provide parts of the investigative file that were responsive to a discovery request served by Respondent during the pre-trial phase of this case. (Tr. 135, 140). In response to Respondent's oral motion for sanctions, the Court held a special proceeding[1] and sanctioned Complainant by vacating one of the citation items contained in the Citation. *See* Section IV, *infra*.

At the conclusion of the trial, the parties timely filed briefs.

II. Stipulations

The parties entered into a series of stipulations regarding jurisdiction, previously issued citations, and applicable statutes, regulations, and rules. In lieu of reproducing the entire set of stipulations within the body of this Decision and Order, the Court shall note that the parties' Revised Joint Stipulation Statement is appended to Volume 1 of the Official Transcript as Joint Exhibit 1. Citations to the Joint Stipulations shall be referenced as "Ex. J-1".

III. Jurisdiction

Pursuant to the parties' Joint Stipulations in this matter, the Court has jurisdiction over this proceeding pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c). (Ex. J-1). The Joint Stipulations also state that Respondent is engaged in a business affecting interstate commerce and has employees. (Ex. J-1). *See also* 29 U.S.C. § 652(c).

1. References to the Special Proceedings transcript shall be marked as "SP Tr.".

IV. Discovery Sanctions

In response to CSHO Youpel's testimony that he had taken more pictures than what appeared in Complainant's exhibit notebook, the Court directed Complainant's counsel to review the file at the close of that day's evidence and determine whether all photos responsive to Respondent's discovery request had been provided. (Tr. 142–43). The next morning, Complainant's counsel represented to the Court that he had found fifteen additional photos in a separate portion of the investigatory file. (Tr. 262). Complainant's counsel provided those photos to Respondent via email after he discovered them. (Tr. 260). After discussing the matter with Complainant off the record, Respondent sought by oral motion to dismiss the Complaint and vacate the Citation pursuant to Federal Rule of Civil Procedure 37(b)(2)(a)(v). (Tr. 263).

Complainant's counsel explained that when an OSHA case comes into the Solicitor's Office that includes penalties over $100,000, there is a pre-citation review. (Tr. 264). After the case is reviewed by the Solicitor's Office, the pre-citation file is sent back to OSHA. Several months later, OSHA will send the Official Investigative File once a Notice of Contest is filed. The Solicitor's Office does not consider the pre-citation file complete, nor is it part of the investigation or litigation file. (Tr. 264). The additional photos were located in the pre-citation file, and Complainant's counsel failed to review it for the purposes of responding to discovery requests. Complainant's counsel admitted his oversight but stated that his failure was not intentional. The Court took the matter under advisement and recessed for the remainder of the day, with the following provisos: (1) trial would commence the following morning at 9:00 a.m. to allow Respondent time to review the newly produced photographs and revise its litigation strategy; (2) Respondent would be allowed to use the photographs in their entirety without objection as to foundation or authenticity; and (3) Respondent would be permitted to call

witnesses not previously designated who may have knowledge of the content of the newly produced evidence. (Tr. 268–69).

Prior to the presentation of trial evidence on the third day, the Court held a Special Proceeding on Respondent's Third Motion for Sanctions, which the Court accepted on oral motion pursuant to Commission Rule 40.[2] *See* 29 C.F.R. § 2200.40(a). After considering the representations of the parties, the Court discussed its power to issue sanctions pursuant to Commission Rules 101 and 52(f).[3] (SP Tr. 13). While the Court found that Respondent had been prejudiced in its presentation of the evidence, the Court did not find contumacious conduct on behalf of Complainant, which is required for the sanction of dismissal pursuant to Commission Rule 101. *See Sealtite Corp.*, 15 BNA OSHC 1130 (No. 88-1431, 1991) (holding that failure to comply with court orders or proceed in any fashion constituted contumacious conduct and warranted sanction of dismissal); *see also* 29 C.F.R. § 2200.101(c) (indicating Rule 101 does not address discovery sanctions).

The Court instead proceeded pursuant to Commission Rule 52(f). Although the typical process of filing a motion to compel and subsequent failure to answer did not occur, the Court explained that because Complainant's failure to produce was not discovered until CSHO Youpel's testimony, the typical process was not available to Respondent. Nonetheless, the Court allowed each party to address their respective positions as to whether sanctions should be imposed. Commission Rule 52(f) states that "the Judge may make such orders with regard to the failure as are just." 29 C.F.R. § 2200.52(f). When considering the sanction of dismissal, the Commission and federal courts typically consider eight criteria, principal among those being prejudice to the party seeking discovery, whether there is a showing of willful default, and

2. The two previous motions were directed at the identification and designation of witnesses. (SP Tr. 7–8).
3. At trial, the Court referred to Commission Rule 56 as cross-referencing Fed. R. Civ. P. 37 and the sanctions associated therewith; in fact, the proper Commission Rule is 52(f). Errata Order (Jan. 30, 2015).

contumacious conduct by the noncomplying party. *Int'l Diving Svcs.*, 22 BNA OSHC 1921 (No. 08-1886, 2009) (citing *Duquesne Light Co.*, 8 BNA OSHC 1218, 1221 (No. 78-5303, 1980)). According to the Commission, only one of those criteria is necessary to render a judgment of default against a party. *Id.* (citing *Ford Dev. Corp.*, 15 BNA OSHC 2003, (No. 90-1505, 1992).

The Court finds Respondent was prejudiced in its preparation for the trial in this matter in that it did not receive photographs that were requested during the discovery phase of this litigation until the second day of trial. As ALJ Phillips held in *International Diving Services*, "Had Respondent provided complete responses to the Secretary's discovery requests, she could have conducted more informed depositions and better prepared trial tactics and strategies regarding the issues in dispute for the upcoming trial." *Id.* The Court finds that Respondent has been so prejudiced in this case. Though Respondent was given a day to review the newly produced documents—as well as additional opportunities to cure any additional prejudice—this does not make up for the opportunities lost during the pre-trial phase of this litigation.

Based on the totality of the circumstances—namely, the prejudice to Respondent and the lack of contumacious conduct on behalf of the government—the Court found that vacating one citation item would serve as an adequate sanction. As such, Citation 1, Item 3, and its associated penalty, were VACATED without objection. (Tr. 19).

V. Factual Background

a. The Inspection

Respondent is an underground construction company that operates in the Chicago area. It provides both private and public services, including, as is relevant to the present case, sewer repair for the City of Chicago and its residents. (Tr. 293). On the day of the inspection, July 22, 2013, one of Respondent's crews was called to repair a sanitary drainage service at 1008 N. LeClaire Street (hereinafter "worksite"), which was part of a larger project to repair private

drains across the City of Chicago. (Tr. 293, 317). The crew consisted of three employees: Jose Orozco, a foreman; Alex Reyes, a laborer or "bottom man"; and Jerry McDonagh, a machine operator. (Tr. 214–15, 317–18). Orozco had just become a foreman earlier that month. (Tr. 292).

In response to an anonymous phone call that workers were inside an unprotected trench, the OSHA Calumet City Area Office sent CSHO Youpel to perform an inspection pursuant to the trench and excavation National Emphasis Program. (Tr. 41, 47). CSHO Youpel drove to the worksite and parked on the right side of the street, approximately one-half block from the trench. (Tr. 49–50; Exs. C-6, C-7). While sitting in his car, CSHO Youpel took a number of photographs which depicted Reyes, Orozco, and McDonagh working around the trench. (Ex. C-5, C-7). During the course of his observations, CSHO Youpel noticed Mr. Orozco lean down over the trench as if to speak to someone. (Tr. 50; Ex. C-7). At that time, CSHO Youpel could not see into the trench and had no reason to believe that someone was in the trench. However, as he observed this, CSHO Youpel saw a piece of pipe being thrown out of the trench. (Tr. 51). After witnessing the thrown pipe, CSHO Youpel pulled his car to the other side of the street, taking care not to lose sight of the trench. (Tr. 72–73). Right before entering the worksite, CSHO Youpel took a photograph of Reyes climbing out of the trench on a bright blue ladder. (Ex. C-5). The photograph also depicts a skid steer, the combination machine being operated by McDonagh, a red truck containing equipment, and shoring equipment adjacent to the trench. (Ex. C-5).

Upon entering the worksite, CSHO Youpel asked to speak with the foreman, and identified himself as a compliance safety and health officer. (Tr. 52). CSHO Youpel discussed with Orozco what he had just observed. In response, Orozco testified that he was not aware that Reyes was in the trench until he returned from his truck, where he went to gather shoring materials, at which time he stated that he asked Reyes to exit the trench. (Tr. 283, 351). Orozco

testified that he had not told Reyes to enter the trench and, instead, told him to guide McDonagh in clearing out the bottom of the trench. (Tr. 333). Orozco also testified that there was no need to enter the unprotected trench because they had already located and identified the underground utilities. (Tr. 284).

At trial, Respondent advised the Court that Orozco did not speak English very well and would require an interpreter. That said, CSHO Youpel testified that he conducted his entire inspection in English and that at no time during his inspection did Orozco indicate that he did not understand. (Tr. 52–53). Nevertheless, after he began the inspection, CSHO Youpel suggested that Orozco contact Jerry Prindiville, with whom CSHO Youpel had worked on previous inspections of Respondent. (Tr. 71, 250). After a series of phone calls, Prindiville arrived at the worksite approximately thirty (30) minutes later. (Tr. 71–72, 421).

Over the course of his inspection, CSHO Youpel measured the dimensions of the trench: 8 feet, 10 inches deep; 8 feet, 3 inches long; and 5 feet wide. (Tr. 81–82, 89, 92–93; Exs. C-2, C-8, C-9). He determined that that trench was dug in "Type B soil at best", based on the fact that it was previously disturbed soil and due to the presence of pea gravel. (Tr. 86). The ladder he observed from across the street extended down to the deepest part of the trench, and, consistent with the photos that he took, CSHO Youpel observed hydraulic shoring and finboard right next to the trench but not installed. (Tr. 66). He also observed the damaged, orange-clay sanitary line at the bottom of the trench, as well as a piece of that damaged pipe resting outside the trench. (Tr. 65, 96, 146–47).

CSHO Youpel also conducted interviews of Orozco, Reyes, and McDonagh during the course of his inspection. He learned that it was Respondent's practice to install trench protection only after all of the utilities had been located in the trench using shovels, probes, or the machine. (Tr. 67, 111; Ex. C-2, C-4). This practice was confirmed by CSHO Youpel's subsequent review

of previous inspections, wherein he discovered that "[i]t was an ongoing theme . . . ." (Tr. 113). During his interview with McDonagh, the equipment operator, he learned that McDonagh had told Orozco that cave-in protection should be installed but that Orozco told him not to worry about it. (Tr. 68–70, 110; Ex. C-2).

b. Respondent's Safety Program

In order to illustrate that it has a pattern and practice of compliance and that the actions of Reyes were unforeseeable, Respondent introduced evidence relating to its safety program, including its safety manual, training attendance forms, test scores, and internal inspection documentation. (Ex. R-14, R-15, R-16, R-19, R-26). The training sessions, inspections, and documentation were facilitated or generated by employees of Optimum Results, including Prindiville. (Tr. 402, 404–405).

According to Orozco and Prindiville, Respondent presented two large training sessions per year—once in Spring, after workers return from a seasonal lay-off, and again later in the year. (Tr. 299, 405–406). These training sessions cover, amongst other issues, a review of excavation procedures and safety rules, which are included in the Excavation Safety section of the manual. (Tr. 406, Ex. R-19). In fact, Orozco attended a mandatory training session on excavation safety just nine days prior to the inspection (Tr. 310–11; Ex. R-12). Orozco also received competent person training on March 26, 2011. (Ex. R-15).

In October of 2012, Prindiville conducted an inspection of a worksite supervised by Orozco.[4] This inspection covered the same basic points as an OSHA inspection, including PPE and trench protection. (Tr. 415–16; Ex. R-26). Based on his inspection, Prindiville found that

4. Although Orozco did not become a foreman until July 2013, he testified that there were occasions when he served as a temporary foreman. (Tr. 205). Considering the date of this inspection by Optimum, it would appear that this was one of those instances. (Ex. R-26).

Orozco's crew was, for the most part, following proper procedures and safety protocol. (Tr. 315–17, 416–20; Ex. R-26).

VI. Discussion

a. Law Applicable to all Citations

To establish a *prima facie* violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the 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. *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

b. Citation 1, Item 1[5]

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 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.
>
> a. On or about July 22, 2013—at the above addressed jobsite, the competent person identified cave-in hazards in a trench measuring eight (8) feet ten (10) inches in depth and permitted an employee to enter the trench, thereby exposing the employee to cave-in hazards.

(Ex. C-1).

c. Citation 2, Item 1

Complainant alleged a willful violation of the Act as follows:

> 29 CFR 1926.652(a)(1): Each employee in an excavations is not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section:

5. The Court has not reproduced the language of 1926.651(k)(2) in this section because the exact language of the standard appears in the body of the citation item. In those cases where the language of the standard has been modified to include the allegation, the Court has reproduced the exact language of the standard. *See* Section V.c and V.d, *infra*.

The employer does not protect each employee in its excavations by properly sloping the excavation or by using appropriate protective systems designed in accordance with paragraphs (b) or (c) of 29 CFR 1926.652.

a. This most recently occurred on July 22, 2013—at 1008 N. LeClaire in Chicago, IL 60651, an employee is exposed to cave-in hazards while working in an unprotected trench measuring eight (8) feet ten (10) inches in depth.

To abate this hazard in the future, the employer must ensure that its excavations are properly sloped, or that protective systems designed in accordance with this standard are used, and that no employees enter the excavations until protection is provided.

This employer has been cited to this practice that included: Pan Oceanic Engineering CO., Inc., was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.652(a)(1) which was contained in OSHA violation number 310176540, citation number 1, item 1, issued on June 28, 2007, and became a final order on or about July 10, 2007, with respect to a workplace located at 11148 South Champlain in Chicago, IL 60628, and OSHA violation number 312595655, citation 1, item 1, issued on August 4, 2009, and became a final order on or about August 28, 2009, with respect to a workplace located at 25th and Claremont in Chicago, IL 60608, and OSHA violation 313934325, citation 2, item 1, issued May 27, 2010 and became a final order on or about November 23, 2010, with respect to the workplace located at 720 W 67th St. in Chicago, IL, and OSHA violation number 313935793, citation number 2, item 1, issued August 17, 2010, and became a final order on or about September 8, 2010, with respect to a workplace located at 1114 W. Taylor St. in Chicago, IL 60607, and OSHA violation number 3151566307, citation number 2, item 1, issued May 19, 2011, and became a final order on or about June 15, 2011, with respect to a workplace located at 60 E. 102nd Pl. in Chicago, IL 60628.

(Ex. C-1).

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 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.

29 C.F.R. § 1926.652(a)(1).

i. The Foregoing Citation Items Are Duplicative

Respondent contends that Citation 1, Item 1, and Citation 2, Item 1 are duplicative. Specifically, Respondent argues that, because the citation items stem from the same alleged conduct and necessarily require the same abatement, the items are duplicative and that Citation 2, Item 1 should be vacated. Complainant did not address this issue in his brief. Based on its review of the applicable case law, the standards cited, and the facts of this case, the Court finds that the citation items are duplicative. For the reasons that follow, the Court shall vacate Citation 1, Item 1 as being duplicative of Citation 2, Item 1.

According to the Commission, violations are considered duplicative "where the standards cited require the same abatement measures, *or where abatement of one citation will necessarily result in the abatement of the other item as well*." *Rawson Contractors*, 20 BNA OSHC 1078 n.5 (No. 99-0018, 2003) (emphasis added) (citing *Flint Eng. & Constr. Co.*, 15 BNA OSHC 2052, 2056–57 (No. 90-2783, 1992)).

To prove a violation of 29 C.F.R. § 1926.651(k)(2), Complainant must establish that "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." To prove a violation of 29 C.F.R. § 1926.652(a)(1), Complainant must establish that employees were not protected from cave-ins by an adequate protective system. Thus, the hazard faced by employees under either scenario is the same—cave-ins. Depending on the situation, however, the abatement could be different. When viewed in isolation, the proper abatement for a violation of 1926.651(k)(2) would be removal of the employee from the excavation until such time as the hazard has been removed, as opposed to 1926.652(a)(1), which would require the installation of an adequate protective system. Under the facts of this case, however, it is apparent that if

Respondent had installed proper protective equipment, there would have been no need to remove the employee from the excavation.

This exact issue as addressed by ALJ Frye in *Pentecost Contracting Corp.*, 17 BNA OSHC 1429 (No. 92-3789 *et al.*, 1995). As in this case, the respondent company was cited for violating both 1926.651(k)(2) and 1926.652(a)(1). Citing favorably to the Commission's holding in *Capform*, 13 BNA OSHC 2219 (No. 84-556, 1989), ALJ Frye held, "If the Respondent had complied with the first standard and used proper shoring techniques to avoid the danger of cave-in, he would have also been in compliance with the second standard, because without the hazard of a cave-in, there is no need to remove the employees from the excavation." *Pentecost*, 17 BNA OSHC 1429.

Based on the foregoing, the Court finds that the citation items are duplicative: abatement of Citation 2, Item 1 will necessarily result in the abatement of Citation 1, Item 1. Accordingly, the Court shall follow the precedent laid down by the Commission in *Capform* and hereby VACATES Citation 1, Item 1. *See Capform*, 13 BNA OSHC 2219 (vacating duplicative citation item); *see also U.S. Steel Corp.*, 10 BNA OSHC 2123 (No. 77-3378, 1982) (same); *Manganas Painting Co., Inc.*, 21 BNA OSHC 1964 (No. 94-0588, 2007) (vacating duplicative citation involving "substantially the same violative conduct [that requires] the same means of abatement").

ii. The Standard Applies[6]

The scope and application paragraph for Subpart P—Excavations states, "This subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches." 29 C.F.R. § 1910.650(a). A trench, according to Subpart P, is a narrow excavation made below the surface of the ground, wherein "the depth is greater than the width, but the width

6. The remainder of this section deals solely with Citation 2, Item 1.

of a trench (measured at the bottom) is not greater than 15 feet (4.6m)." The trench at issue measured 5 feet wide by 8 feet, 3 inches long by 8 feet, 10 inches deep. Thus, the standard applies.

iii. The Terms of the Standard Were Violated

The terms of the standard were also violated. CSHO Youpel observed Reyes exiting a trench that did not have appropriate protective equipment installed. (Ex. C-5). While shoring equipment was present at the worksite—in fact, located adjacent to the trench itself—no attempt had been made to install the shoring equipment prior to Reyes' entry into the trench. In addition, neither of the exceptions applies to this trench. The trench was greater than 5 feet deep and the soil, according to CSHO Youpel, was Type B, owing to the fact that the ground was previously disturbed.

iv. Respondent Knew or, with the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

The key issue in this dispute is whether Respondent, through its foreman, Orozco, knew or could have known of the violative condition. According to Complainant, Respondent had both actual and constructive knowledge of the condition. Complainant contends that not only did Orozco know that the trench was deeper than five feet and that there was no cave-in protection installed, but that he actually observed Reyes in the trench. Respondent, on the other hand, argues that Orozco only became aware of Reyes' presence in the trench when he returned to the trench from his truck, where he claims he was retrieving shoring equipment.

The crux of this issue and much of this case hinges on the word of CSHO Youpel versus that of Orozco. There is no question that Reyes was observed exiting a trench that did not have cave-in protection installed. (Ex. C-5). Prior to observing Reyes in the trench, CSHO Youpel, while parked on the right side of the road, observed what appeared to be a piece of pipe being thrown out of the excavation. (Tr. 49, 147). At the same time he observed the pipe being thrown

out of the excavation, he also saw Orozco standing at the edge of the excavation. (Tr. 50–51; Ex. C-7). According to CSHO Youpel, it appeared as if Orozco was providing directions to someone inside the trench. (Tr. 50).

Orozco, on the other hand, testified that he had not told Reyes to enter the trench. Rather, he instructed Reyes and McDonagh to clean out the bottom of the trench so that the sanitary line could be fixed and the shoring equipment installed. (Tr. 333). He clarified that he did not tell Reyes to go into the trench; rather, he intended that Reyes would direct McDonagh, who operated the combination machine, to scoop out the bottom.[7] Orozco stated that there was no reason for Reyes to enter the trench because all of the utilities had already been located. (Tr. 284). After he had given Reyes his instructions, Orozco explained that he went to his truck to gather additional shoring materials, or perhaps a monitor for the camera used to look inside the pipes. (Tr. 333). When he got to his truck, Orozco testified that he turned around and saw a ladder sticking out of the trench. (Tr. 333–34). Upon seeing this, Orozco went to the trench and told Reyes to "get out of there." (Tr. 334). Orozco testified that Reyes had said that he entered the excavation because water was seeping out of the sanitary main into the excavation.[8]

Thus the Court is confronted with the question of whether it believes CSHO Youpel saw Orozco standing over the excavation when a piece of pipe was thrown out of it—which supports a conclusion that Orozco had actual knowledge of the violation—or whether it believes that Orozco did not become aware of Reyes' presence in the trench until he turned around while retrieving supplies from his truck. Based on the Court's credibility determination, the evidence, and reasonable inferences drawn therefrom, the Court finds that Mr. Orozco had actual knowledge of Mr. Reyes' presence in the trench.

7. According to Orozco, part of Reyes' job as the "bottom man" is to direct the machine operator where to dig in the excavation. (Tr. 338).
8. Apparently the combination scoop damaged a portion of the sanitary main. (Tr. 335). Orozco said that this did not concern him because they were already there to repair the sanitary system.

CSHO Youpel testified that he observed a piece of pipe being thrown out of the trench during his pre-inspection observation of the worksite. This observation appears to be confirmed by the fact that CSHO Youpel observed broken pieces of pipe, like the one he had seen thrown out of the trench, resting outside of the trench and by the fact that Reyes told him he was in the bottom of the trench to locate the utility and remove the broken pipe from the excavation.[9] (Tr. 65–66; Ex. C-5). Orozco testified that these pipe sections could have been pulled out of the excavation by the combination machine shovel; however, he admitted that he did not observe the combination machine pulling pipe sections out of the trench. (Tr. 391).

A couple of the photographic exhibits submitted by Complainant lend additional support to CSHO Youpel's version of the facts. In Exhibit C-5, it is clear that Reyes is exiting the trench using a bright blue ladder, which extends roughly three feet above the surface of the street. (Ex. C-5). As to C-7, however, the Court is again confronted with a difference of opinion. According to CSHO Youpel, this picture illustrates the point in time when Orozco, who is wearing a dark, long-sleeved sweatshirt, was speaking with Reyes in the trench just after a piece of pipe was thrown out of it. (Tr. 73). Respondent contends that this is impossible, because, according to Orozco, the ladder is sitting directly behind him in the photograph marked as C-7. (Tr. 348–49). Thus, Respondent claims, Reyes could not have entered the trench because there was no means by which to do so. CSHO Youpel testified, however, that the equipment directly behind Orozco in C-7 appeared to be a piece of hydraulic shoring. (Tr. 66–74). When C-5 and C-7 are compared, the Court finds that CSHO Youpel's testimony is more consistent with the photographic evidence.

As noted above, the ladder used by Reyes was bright blue and clearly sticks out in the center of the photograph in C-5. In C-7, however, the item which Orozco identified as the ladder

9. CSHO Youpel also testified that those pieces of pipe could only have come from the bottom of the trench because they matched the sanitary line in both color and make-up. (Tr. 65, 392).

is not blue, nor does it stick out in the same manner as the ladder identified in C-5. (Ex. C-7). Considering that there are other aspects of the picture that are blue—such as the bottom of the license plate of the black SUV parked to the left of the excavation and the handicap parking signs adjacent to it—the court would expect that the ladder would exhibit a similar color.[10] (Exs. C-5, C-7). When looking at C-5 (where the ladder is clearly visible), there is a piece of equipment resting to the side of the gravel pile that has the same shape and is resting in roughly the same orientation as the piece of equipment identified as shoring equipment by CSHO Youpel in Exhibit C-7. (*Id.*). Given that CSHO Youpel testified that his eyes never left the worksite when he traveled from the right side of the road (where he took photo C-7) to the left side of the road (where he took C-5), and never saw the ladder inserted into the trench, it stands to reason that whatever is resting behind Orozco in C-7 is not a ladder. (Tr. 73, 148–49, 168).

The Court assigns little weight to Orozco's version of the facts. As stated above, Orozco testified that he observed the ladder sticking out of the trench after he had turned towards the worksite upon reaching the bed of his truck to gather additional shoring supplies. According to Orozco, the front of the truck depicted in C-5 (with the door open) was approximately 50 feet away from the trench, which means that the bed of the truck was even farther away. (Tr. 386). The ladder was sticking out of the trench at a height roughly equal to the height of the gravel pile located between the trench and the front of the truck. (Ex. C-5). Thus, while gathering shoring materials—which Orozco was not carrying at the time he returned to the trench—Orozco claims to have seen the ladder sticking out of the trench from the back of the truck, through the rear window and front windshield, and over the gravel pile. (Tr. 386). And yet somehow, during his brief trip from the trench to the truck and back again, Orozco was not able to see or hear Reyes

10. Further, given the distance of the SUV and the handicap signs from the trench in Exhibit C-5, the fact that the blue color stands out so clearly on those items as opposed to the purported ladder lends additional support to CSHO Youpel's observations.

pick up the ladder, stand it up, and insert it into the trench. (Tr. 219–220). Similarly, CSHO Youpel, who testified that his eyes never left the site of the trench when he drove from the right side of the road to the left, did not observe a ladder being inserted into the trench. Based on these observations, the Court finds that it is reasonable to infer that the reason why neither CSHO Youpel nor Orozco observed a ladder being inserted into the trench was that it was already there. *See Oakland Constr. Co.*, 3 BNA OSHC 2023 (holding that reasonable inferences from circumstantial evidence are proper).

In addition to finding that CSHO Youpel's testimony more closely conforms to the photographic evidence, the Court finds his testimony more credible and gives it great weight. As an example of CSHO Youpel's credibility, the Court notes that CSHO Youpel admitted that the photographic exhibits contained in Complainant's exhibit notebook did not constitute the entirety of the photos he had taken at Respondent's worksite, notwithstanding the fact that Respondent had previously requested such photos in discovery and that such an admission could (and did) have serious consequences. (Tr. 134–40).

Based on the foregoing, the Court credits CSHO Youpel's testimony that Orozco was standing above the trench and communicating with Reyes while Reyes was working in the bottom of an unprotected trench. Thus, through Orozco, the Court finds that Respondent had direct, actual knowledge of the violation. *See Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82–928, 1986) ("The actual or constructive knowledge of an employer's foreman can be imputed to the employer."); *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381–82 (No. 76–4271, 1981) ("An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer.").

v. Respondent's Employees Were Exposed to the Hazard

As described above, Respondent's employee, Reyes, was exposed to the hazard of cave-ins at the worksite. Under the supervision of his foreman, Reyes entered an 8-foot, 10-inch-deep trench with vertical walls and no cave-in protection. Without proper protection in the form of sloping, benching, or shoring, Reyes was exposed to a significant hazard that can result in serious injuries, up to and including death. (Tr. 101).

Accordingly, the Court finds that Complainant proved his *prima facie* case. The Court now turns to the question of whether Complainant properly characterized the violation as willful.

vi. The Violation was Willful

"A willful violation is one committed with either intentional disregard of or plain indifference to the requirements of the Act or a standard." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). "[I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *Hern Iron Works*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). In other words, Complainant must show that, at the time of the violative act, the employer was either actually aware that the act was unlawful or "that it possessed a state of mind such that if it were informed of the standard, it would not care." *Propellex Corp.*, 18 BNA OSHC 1677 (No. 96-0265, 1999). Thus, it is not enough to show that Respondent was merely careless or displayed a lack of diligence. *Beta Constr. Co.*, 16 BNA OSHC 1435 (No. 91-102, 1993). The Commission has found such heightened awareness where an employer has been previously cited for a violation of the standard in question, is aware of the standard's

requirements, and is on notice that a violative condition exists. *See J.A. Jones*, 15 BNA OSHC 2201; *D.A. & L Caruso, Inc.*, 11 BNA OSHC 2138, 2142 (No. 79-5676, 1984).[11]

Good faith efforts to correct a particular hazard can negate a claim of willfulness; however, the Commission applies a test of objective reasonableness to determine whether an employer acted in good faith. *J.A. Jones*, 15 BNA OSHC 2201 (citing *A.P. O'Horo*, 14 BNA OSHC 2004, 2013 (No. 85-369, 1991); *Calang Corp.*, 14 BNA OSHC 1789 (No. 85-319, 1990). Thus, an employer "is not necessarily spared from a finding of willfulness by taking any measure, regardless how minimal, to enhance employee safety." *Id.* (citing *Coleco Indus.*, 14 BNA OSHC 1961 (No. 87-2007, 1992).

Complainant asserts that this citation item should be characterized as willful for the following reasons. First, Respondent has a lengthy history of noncompliance with the specific standard at issue in this citation item—29 C.F.R. § 1926.652(a)(1)—as illustrated by the parties' Joint Stipulations. (Ex. J-1). Second, Respondent had detailed knowledge of the requirements of the Act through regularly scheduled training sessions and by virtue of its safety manual having an entire section dedicated to excavation requirements. (Ex. R-14, R-15, R-19). Third, Respondent, through Orozco, knew that the trench was non-compliant and nonetheless directed Reyes to enter the trench. Fourth, Respondent had an established practice of locating all utilities, regardless of depth, prior to installing a cave-in protection system. Finally, CSHO Youpel testified that the combination machine operator, McDonagh, told him that he had told Orozco that they needed to install shoring in the excavation and that Orozco told him not to worry about it. (Tr. 68).

11. The Seventh Circuit recently attempted to clarify the burden of proof applicable to a willful violation. *Dukane Precast, Inc. v. Perez*, 785 F.3d 252 (7th Cir. 2015). Specifically, the court held that "proof of willfulness . . . requires only that the defendant was aware of the risk, knew that it was serious, and knew that he could take effective measures to avoid it, but did not—in short, that he was reckless in the most commonly understood sense of the word." *Id.*at 256. As will be shown, under either formulation (recklessness versus plain indifference), Orozco knew of the risk associated with unprotected trenches, had the opportunity to abate the hazard, and failed to do so. As such, Respondent's violation of the standard was properly characterized as willful.

Consistent with the previous discussion, Respondent contends that Orozco did not consciously disregard a known safety violation; rather, it was only when Orozco saw Reyes in the trench that he became aware of the violation. As the Court has already rejected this contention, it will instead focus on Respondent's other argument—that its comprehensive safety program, implemented in response to earlier citations, illustrates that it was not plainly indifferent to employee safety nor did it consciously disregard the requirements of the Act. In essence, though not specifically stated, Respondent argues that its good faith efforts to correct and/or prevent trench hazards should negate a finding of willfulness.

The Commission has characterized a citation item as willful when the Secretary can establish that Respondent: (1) was previously cited for a violation of the standard at issue; (2) was aware of the standard's requirements; and (3) was on notice that a violative condition existed. As stipulated by the parties, Respondent was cited pursuant to 29 C.F.R. § 1926.652(a)(1) four separate times between August 2009 and the inspection at issue.[12] (Ex. J-1). At least one of these citation items was issued *after* Respondent claims to have implemented a more robust culture of safety in response to two such citation items that were issued in 2010. (Tr. 405; Ex. J-1).

As part of its new emphasis on a culture of safety, Respondent worked closely with Optimum to increase meetings, trainings, and inspection frequency. (Tr. 405). This includes full-company trainings two to three times annually, including a refresher course given to employees who are coming back from the winter layoff. (Tr. 406). In the spring meeting held in March of 2011, Optimum provided competent person training to a number of Respondent's employees, including Orozco. (Tr. 406–407). According to Prindiville, that course, which was four hours long, went through the basics of soil types, trench protection and how to install it, ladders,

12. Respondent was also cited for a violation of the same standard in 2007. The citation item under discussion is not included in that number.

electrical safety, soil management, and spoil piles. (Tr. 407). In addition, Prindiville indicated that he performs multiple unannounced inspections of various worksites to ensure compliance with safety rules. (Tr. 314–17; 414–20). These inspections are performed in a manner similar to OSHA inspections, and a written report is produced to indicate compliance or whether discipline needs to be issued. (Ex. R-26).

Although the foregoing safety program certainly speaks to Respondent's attempts at compliance, the Court is concerned with what appears to be Respondent's practice of installing shoring only after all utilities have been located. According to CSHO Youpel, this practice "was an ongoing theme of [past] inspections." (Tr. 113). He premised this conclusion on his review of Respondent's past inspections, the documentation of which indicated that utilities were always located prior to the installation of cave-in protection. (Tr. 112–13). That pattern and practice was confirmed by the statements given to CSHO Youpel by Orozco, Reyes, and McDonagh. CSHO Youpel testified that Reyes and Orozco told him that they wait to install cave-in protection until after the utilities are located because the process of installation and removal is time-consuming if it has to be done during the utility-locating process, which may require multiple attempts. (Tr. 110–11). McDonagh told CSHO Youpel that he had told Orozco that cave-in protection needed to be installed, but that Orozco told him not to worry about it. (Tr. 109).

Even though Respondent had a policy, training, and an inspection regime in place, the manner and order in which utilities were located and shoring was installed does not appear to have changed over the course of four years. This is problematic because, as in this case, there may be situations where utilities are not identified until after the five-foot threshold in 29 C.F.R. § 1926.652(a)(1) is already breached. Although this pattern of conduct may not *necessarily* place an employee in harm's way—conceivably, there are instances where utilities will be located before the trench is more than five feet deep—it nonetheless reflects an unwillingness or

inability to learn from past mistakes and indicates that Respondent places undue emphasis on production versus safety. This emphasis on production appears to be ingrained—not only did CSHO Youpel identify it as a "common theme", but each of the employees he spoke to at the worksite, including the foreman, stated to him that it was standard practice to identify utilities prior to installing cave-in protection. In the Court's view, blindly adhering to a pattern or practice without regard to the potential safety consequences of that pattern or practice constitutes, at the very least, plain indifference to the requirements of the standard.

Respondent, both at the institutional level and at the individual level (Orozco) had a heightened awareness of the requirements of the standard. Not only had they been cited pursuant to the same standard four times in the four years leading up to the present case, they had twice-annual training sessions and monthly surprise inspections that dealt with this very issue. Further, Orozco had not only been in attendance at the company-wide trainings, and been a participant in surprise inspections performed by Optimum, he was also specifically told by a member of his crew that his trench needed shoring. Instead of heeding that warning, Orozco responded by telling the crew member not to worry and proceeded to direct work inside a non-compliant, unprotected trench until the utilities were located and the trench was properly cleaned out. In other words, Respondent, through Orozco, was directly aware of the violative condition and nonetheless chose to proceed with the work in spite of it.

Respondent attempted to illustrate its good faith by pointing out that the shoring was resting to the side of the excavation, waiting to be installed when needed. The problem, however, is that at the point when Reyes was discovered coming out of the unprotected trench, the trench was almost four feet deeper than the threshold for requiring cave-in protection. This alone both confirms CSHO Youpel's testimony that Respondent had a pattern of waiting to install shoring until after the utilities were located and illustrates the hazard of adhering to that pattern of

conduct in the face of very clear and obvious hazards (especially from the point of view of a competent person).

The Court finds that Respondent committed a willful violation of the standard. Its recent history of violations, coupled with specific and repeated training on the issues related to excavations, show that Respondent had a heightened awareness of the requirements of the standard. Notwithstanding its renewed emphasis on safety and heightened awareness of the requirements of 29 C.F.R. § 1926.652(a)(1), Respondent nonetheless maintained some aspects of its production-focused mindset; namely, by adhering to the practice of waiting to install cave-in protection until all utilities had been located. Orozco clearly adhered to this practice because, even when confronted by McDonagh, he refused to install cave-in protection and allowed Reyes to enter the trench without proper protection.

Respondent has had multiple opportunities to cure the underlying behavior that led to the previous and current citations being issued, and yet it has either refused to address it or willfully blinded itself to the consequences of its practice of identifying utilities prior to installing cave-in protection. Even after Respondent re-committed itself to safety by revamping its program in response to citations targeting its excavation practices, Respondent nonetheless received two subsequent citations (including the one at bar) pursuant to the same standard and identifying the same pattern of conduct. As such, the Court finds that Respondent was, at the institutional level, plainly indifferent to a work practice that has repeatedly subjected it to citations and penalties and its employees to hazardous working conditions. This institutional state of mind is also reflected in Orozco's decision to allow Reyes to enter the trench without cave-in protection—though he was clearly aware of the requirements of the standard, and that his trench was non-compliance, he still allowed Reyes to enter the trench.

Based on the foregoing, the Court hereby AFFIRMS Citation 2, Item 1 as a willful violation of 29 C.F.R. § 1926.652(a)(1).

d. Citation 3, Item 2

Complainant alleged a repeat violation of the Act as follows:

> 29 CFR 1926.651(i)(3): Sidewalks, pavements and appurtenant structure are undermined and a support system or another method of protection is not provided to protect employees from the possible collapse of such structures.
>
> The employer does not ensure sidewalks, pavements and appurtenant structure are not undermined unless a support system or another method of protection in [sic] provided to protect employees from possible collapse of such structures.
>
> a. This most recently occurred on July 22, 2013—at 1008 N. LeClaire in Chicago, IL 60651, an employee is working in a trench measured at eight (8) feet ten (10) inches in depth. The trench undermines the street and is not supported nor provided a means of protection from possible collapse of the street, thereby exposing the employee to cave-in hazards.
>
> To abate this hazard in the future, the employer must ensure sidewalks, pavements and appurtenant structures are not undermined unless a support system or another method of protection is provided to protect employees from possible collapse of such structures.
>
> This employer had been cited for this practice that included: Pan Oceanic Engineering CO., Inc., was previously cited for a violation of this occupational safety and health standard or its equivalent 29 CFR 1926.651(i)(3) which was contained in OSHA violation number 313934325, citation 1, item 2, issued on May 27, 2010, and became a final order on or about November 23, 2010, with respect to a workplace located at 720 W. 67th St. in Chicago, IL 60621, and OSHA violation number 313935793, citation 1, item 2b, issued August 17, 2010, and became a final order on or about September 8, 2010, with respect to a workplace located at 1114 W. Taylor St. in Chicago, IL 60607.
>
> The cited standard provides:
>
> Sidewalks, pavements, and appurtenant structure shall not be undermined unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures.

29 C.F.R. § 1926.651(i)(3).

i. The Standard Applies

For the reasons described in Section VI.c.ii, *supra*, the Court finds that the standard applies.

ii. The Terms of the Standard Were Not Violated

The cited standard prohibits undermining sidewalks, pavements, and other appurtenant structures unless a support system or another method of protection is provided to prevent collapse. The term "undermined" is not defined by the regulations, nor is any clarity gained through a review of the regulatory history of the standard. *See* Occupational Safety and Health Standards—Excavations, 54 Fed. Reg. 45894-01, 45924 (Oct. 31, 1989). Suffice it to say, however, that common sense indicates that a sidewalk is undermined when the underlying substrates (dirt and rock) are excavated from underneath. *See* WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 967 (1969) ("to excavate the earth beneath: form a mine under"); *see also Bunge Corp.*, 12 BNA OSHC 1785 (No. 77-1622 et al., 1986) ("It is axiomatic that OSHA standards must be interpreted in accordance with the natural and plain meaning of their words . . . .").

Complainant points out that the issue of whether it is Complainant's burden to prove that a hazard exists or whether the standard presumes a hazard is currently unsettled. *Compare Rawson Contractors, Inc.*, 20 BNA OSHC 1273 (No. 02-1291, 2003) (ALJ) (holding 1926.651(i)(3) presumes a hazard) *with Florida Gas Contractors, Inc.*, No. 14-0948, slip op. (Dec. 12, 2014) (ALJ) (holding standard does not presume a hazard).[13] While that may be the case, the Court finds that Complainant has failed to prove that the trench in question was undermined.

13. ALJ Joys' decision in *Florida Gas Contractors, Inc.* is currently pending review before the Commission.

The evidence presented by Complainant on this citation item was cursory; in fact, the colloquy addressing the facts of this violation spanned a mere two pages in the trial transcript. (Tr. 120–21). During that discussion, CSHO Youpel stated that he found a portion of the trench (right side of the picture in C-9) to be undermined. (Tr. 120). CSHO Youpel, however, did not indicate the extent of the undermining, and the photograph in C-9 does not provide a good angle to determine whether that portion of the trench is, in fact, undermined. The picture, insofar as the Court can tell, was taken to illustrate the length of the trench, not to illustrate any perceived undermining. Further, when compared with the multitude of photographs that were taken of the other alleged violations and the amount of testimony and evidence associated with them, the citation item alleging that the trench was undermined appears to be little more than an after-the-fact determination based on a less-than-helpful photograph focused on the trench's length. (Ex. C-9). Though it does appear as if there might be a depression in the wall or sloughing of dirt/rock, it is not clear to the Court that this rises to the level of undermining. *See Rawson*, 20 BNA OSHC 1273 (finding violation of standard when soil had flowed into the excavation from a wall that had undermined the pavement by *five feet*). On cross-examination, Complainant got Prindiville to admit that the trench was "undermined", but that any such undermining was "minimal". (Tr. 454). The Court perceives Prindiville's testimony to be little more than an admission that the picture appears to have a depression underneath the surface level of the excavation and, therefore, only undermined in the most technical sense.

Complainant has presented the Court with little more than a badly angled photograph and the CSHO's word, with no corresponding facts, that the trench wall was undermined. With nothing more, the Court cannot find that Complainant proved that the terms of the standard were violated. As such, Citation 3, Item 2 shall be VACATED. In addition, to the extent that the foregoing violation would have been abated by the installation of a hydraulic shoring system, the

Court finds that it is duplicative of Citation 2, Item 1, and could be vacated on that basis as well.[14]

VII. Penalty

In determining 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 Constr. Co.*, 15 BNA OSHC 2201, 2214 (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. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

Without question, the gravity of the violation alleged in Citation 2, Item 1 is high. The trench was nearly nine feet deep with vertical walls and no cave-in protection. The worksite itself was located on a road with traffic driving by and heavy machinery operating adjacent to the trench, both of which cause vibrations that contribute to the possibility of a cave-in. Further, as multiple cases and the testimony of CSHO Youpel illustrate, working in an unprotected trench is incredibly dangerous and exposes employees to serious injury, often involving death. Although only one individual was exposed to the hazard, the likelihood of a collapse was high in light of the foregoing, and in consideration of the fact that the trench itself was dug in previously

14. The Court recognizes that there are multiple hazards that can be associated with an undermined excavation (e.g., cave-ins affecting people in the trench or collapse of the undermined sidewalk, pavement or appurtenant structure affecting people outside of it); however, based on Prindiville's testimony that any undermining was minimal, and CSHO Youpel's testimony that his concern was for the exposure of individuals *inside* the excavation, it appears as if hydraulic shoring would have abated the hazard perceived by CSHO Youpel.

disturbed soil that showed signs of sloughing into the excavation. Thus, in all areas but one, the Court agrees with the assessment of Complainant as to the criteria for determining a proper penalty.

The Court disagrees with Complainant's assessment as to Respondent's size. The penalty assessed by Complainant is based on Respondent being characterized as a large employer. (Ex. C-2). A large employer, according to Complainant's own criteria, is one with over 250 employees. (Ex. C-2). The first problem with Complainant's assessment is that it did not properly apply its own criteria—CSHO Youpel documented that Respondent had 214 employees, which would qualify it for a 10% reduction in penalty (as opposed to the 0% that it received). (Ex. C-2). There is no evidence in the record to indicate that Respondent has this many employees. The only testimony as to the number of employees Respondent has came from Orozco, who testified that approximately 40 people attended the Spring kick-off training session and that those people constituted "All company, all the workers." (Tr. 305; Ex. R-14). The Court is not entirely convinced by this evidence, as there were likely workers that were not in attendance due to their positions at the company (and Orozco is hardly in the best position to make an estimate of how many people work for Respondent); however, when the proposed penalty of this willful citation item is compared to the proposed penalty of the willful items documented in Exhibit J-1, there is a fairly drastic discrepancy. The highest penalty proposed for a willful violation in the underlying citation items was $35,000. (Ex. J-1). Considering the manner in which Complainant calculates penalties for willful violations (no credit for good faith, no credit on history), it stands to reason that the former penalties were reduced based on Respondent's size.

As such, the Court is not convinced by Complainant's estimate of Respondent's size and shall reduce the penalty accordingly. That said, the Court is not bound by the penalty

determinations of Complainant or its decision to grant or withhold credit for good faith, history, or size. What most concerns the Court in this case is the gravity of this violation and Respondent's repeated disregard of the requirements of the cave-in protection standard. In light of those facts, taking into account a slight downward adjustment for Respondent's size, the Court finds that a penalty of $50,000 is appropriate.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, and its associated penalty are VACATED.
2. Citation 2, Item 1 is AFFIRMED and a penalty of $50,000.00 is ASSESSED.
3. Citation 3, Item 1, and its associated penalty are VACATED.
4. Citation 3, Item 2, and its associated penalty are VACATED.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: September 28, 2015
Denver, Colorado