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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Turpin, Inc., Respondent.	OSHRC Docket No. **14-0774**

Appearances:

Jean C. Abreu, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Ashley Turpin, Project Manager, *pro se*, Turpin, Inc., Forest Park, Georgia
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). Turpin, Incorporated (hereinafter Turpin) is a boring company headquartered in Lake City, Georgia. On November 22, 2013, Occupational Safety and Health Administration Compliance Officer (CSHO) Matt Munson conducted an inspection of Turpin at 1955 Highway 129 in Cleveland, Georgia. Based upon CSHO Munson's inspection, the Secretary of Labor, on April 17, 2014, issued two Citations and a Notice of Penalty to Turpin. In Citation 1, containing two items, the Secretary alleged serious violations of 29 C.F.R. § 1926.651(j)(1) for failing to protect employees from soil or rock falling from an excavation face and 29 C.F.R. § 1926.1053(b)(1) for failing to ensure a ladder used by employees to enter and exit an excavation extended three feet above the excavation's edge. In Citation 2 the Secretary alleged a willful violation of 29 C.F.R. § 1926.652(a)(1) for failing to ensure employees in an excavation over 8 feet deep were protected from cave-in. The Secretary proposed a total penalty of $29,810.00 for

the Citations. Turpin timely contested the Citations. At the hearing, Turpin withdrew its notice of contest with regard to Item 2 of Citation 1,[1] and the Secretary withdrew Item 1 of Citation 1 (Tr. 6-7). Therefore, only Citation 2 is at issue in this proceeding.

I held a hearing in this matter on December 4, 2014, in Atlanta, Georgia. The parties filed post-hearing briefs on February 24, 2015.[2]

For the reasons discussed below, Citation 2 is affirmed as a serious violation and a penalty of $3,000.00 is assessed.

Jurisdiction

The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act. The parties also stipulated at all times relevant to this action, Turpin was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act.

Background

Turpin is a boring and utility company incorporated in the State of Georgia (Tr. 15, 27). Judy Turpin is CEO of the company (Tr. 26). Her sons, Ashley and Keith Turpin, are project managers for the company (Tr. 26-27). Ashley Turpin, who represented the company at the hearing, testified his duties as project manager include estimating the cost of and bidding jobs, oversight of worksites, and ensuring employee safety (Tr. 27, 30). As a boring company, Turpin's jobs consist largely of boring holes under the surface of roadways in order to connect various utility lines (Tr. 55-56). Ashely Turpin testified 90 percent of the Turpin's jobs require work in trenches over 5 feet deep and near roadways (Tr. 27).

In 2013, Turpin was performing boring work at a worksite on Highway 129 in Cleveland, Georgia (Tr. 15). The entire project was a multimillion dollar project covering a 2 mile stretch of Highway 129 or the bypass of the city of Cleveland, Georgia (Tr. 31, 55). Turpin had sub-contracted to perform the boring work for the project, which Mr. Turpin estimated was about

[1] In its brief, Turpin states it will "accept" Item 2 of Citation 1 "if Citation 2 is also vacated." This was not Turpin's position in the Joint Prehearing Statement signed by Mr. Turpin or as stated at the hearing (Tr. 6-7). Both the Secretary and the Court proceeded under the understanding Item 2 of Citation 1 was not in contest. It would be highly prejudicial to the Secretary to now require him to prove the elements of a violation of that citation item. Therefore, Turpin is bound by its written and oral representations it has withdrawn its notice of contest with regard to Item 2 of Citation 1.

[2] To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

five percent of the entire project (Tr. 55). In total, Turpin was to perform 15 bores (Tr. 55). The parties stipulated on November 22, 2013, at the time of the OSHA inspection, Turpin was working at 1955 Highway 129 (Tr. 15). Turpin was to perform two bores at that location (Tr. 31). The parties also stipulated at the time of the inspection the excavation was 8.7 feet deep and 25 feet wide (Tr. 15).

Working for Turpin on the site were William Bain, the foreman and competent person, and two employees - Roberto Maldonado and Edwin Shacklock (Tr. 15, 63, 114; Exh. J-1[3], p. 11). Mr. Maldonado had been an employee for a little over one year, while Mr. Shacklock was a new employee (Tr. 114; Exh. C-7).[4] Mr. Bain had been an employee of Turpin for ten years and a foreman for the last seven years (Exh. J-1, pp. 9-10).

According to Mr. Bain, when he and his crew arrived on site at approximately 8:00 a.m. on November 22, 2013, several State officials were already there due to the project having disturbed a State waterway (Exh. J-1, p. 27). Upon pulling into the worksite, Mr. Bain was approached by someone he believed was a State Department of Transportation (DOT) official. This official told Mr. Bain he needed to cover his excavation at the end of the workday (Exh. J-1, p. 28). Mr. Bain informed the DOT official he did not have sufficient materials to cover the excavation but would follow his usual procedure of putting up barricades (Exh. J-1, p. 28). Mr. Bain then proceeded to start digging the excavation with his excavator (Exh. J-1, p. 28). He testified he tried to do everything possible to slope the excavation but was unable to do so (Exh. J-1, pp. 28-29). He testified he did not want to use the trench boxes Turpin had available on the site because the excavation was "not that deep" and the trench boxes were inconveniently located across the parking lot, which he had already gotten complaints about "destroying" with his excavator (Exh. J-1, pp. 28-29). Because he could not properly slope the excavation, Mr. Bain testified his final plan was to use the trench boxes. To do so he needed to enlarge the excavation (Exh. J-1, p. 29).

At some point after lunch, Mr. Bain was again approached by a State official (Exh. J-1, pp. 29-30). This individual again told Mr. Bain he needed to either cover or refill the excavation at the end of the day. Mr. Bain testified he told the official he did not have sufficient equipment

[3] Mr. Bain was not available to testify and, by agreement of the parties with prior court approval, his testimony was presented via deposition which was marked and admitted as Exhibit J-1.

[4] Mr. Bain testified he had worked with Mr. Mandolado for five or six years (Exh. J-1, p. 11). However, Mr. Maldonado's statement indicates he had been with the company for just over one year.

to do so but the official did not waiver (Exh. J-1, p. 30). Mr. Bain then called Ashely Turpin. According to Mr. Bain, Mr. Turpin told him to "finish the damn job." (Exh. J-1, p. 30). Mr. Bain testified he interpreted Mr. Turpin's statement to mean he did not care how the job got finished (Exh. J-1, p. 35). Mr. Bain testified he considered himself in a "Catch-22" at that point because he did not have sufficient time to complete the bore and refill the excavation, nor sufficient materials to cover it. Mr. Turpin did agree to contact the general contractor to ask whether Turpin could borrow a trench box (Exh. J-1, p. 31). Mr. Bain testified, however, the boxes were not large enough, given the requirements the State officials had imposed (Exh. J-1, pp. 31, 33, 39-40). He stated at that point he was "at the point of frustration where I just kept digging….And I was thinking I'll try to figure it out later…" (Exh. J-1, p. 31).

During this same time, Mr. Maldonado and Mr. Shacklock began to perform the work to grade the bottom of the excavation or to "shoot the grade." Mr. Shacklock testified he entered the excavation via the ladder (Tr. 115-116). He first smoothed out about 5 feet of the gravel at the bottom of the excavation (Tr. 116). Then, Mr. Shacklock and Mr. Maldonado together measured the excavation and made two grade markings at the bottom of the excavation. This was done by Mr. Shacklock holding a rod and Mr. Maldonado using an instrument referred to as a "transit" to "take the shot." (Tr. 117; Exh. J-1, p. 42). Mr. Shacklock then marked the two grade shots with green spray paint (Tr. 117). Mr. Shacklock testified this operation took 5 to 10 minutes (Tr. 119). After he had placed the second mark, Mr. Shacklock testified Mr. Bain turned around and saw him in the excavation (Tr. 120). Mr. Bain then ordered Mr. Shacklock out of the excavation (Tr. 120; Exh. J-1, p. 41). Mr. Shacklock immediately got out of the excavation (Tr. 121).

CSHO Munson testified on November 22, 2013, he was driving past Turpin's worksite on Highway 129 when he saw a ladder sticking out of an excavation (Tr. 62). Pursuant to a National Emphasis Program for Trenching, he stopped to inspect the site (Tr. 62). He took a photograph of the worksite before initiating his inspection (Tr. 62; Exh. C-11a). Mr. Bain was running an excavator at the time, while Mr. Shacklock and Mr. Maldonado were standing outside of the excavation. After Mr. Shacklock and Mr. Maldonado told CSHO Munson Mr. Bain was in charge, CSHO Munson held an opening conference with Mr. Bain (Tr. 65). CSHO Munson then conducted a walk around inspection of the worksite during which he took more photographs of the excavation (Tr. 66; Exhs. C-11b-11g). CSHO Munson observed conditions from which he

concluded someone had been in the excavation (Tr. 66-67). He later confirmed through interviews with Mr. Shacklock and Mr. Mandolado that Mr. Shacklock had been in the excavation to take measurements and get elevations (Tr. 85-86; Exhs. C-6 and C-7).

CSHO Munson then measured the excavation using a trench rod (Tr. 69). He found the excavation to be 8.7 feet deep (Tr. 70; Exh. C-11d). He observed fissuring of the soil on the excavation walls and water in the bottom of the excavation (Tr. 73-75; Exhs. C-11c, 11e). From these observations, CSHO Munson concluded employees in the excavation were exposed to the hazard of being struck by the excavation wall (Tr. 73).

CSHO Munson noted the excavation had been dug in previously disturbed soil as evidenced by a pipe that had been installed prior to the excavation being dug (Tr. 74; Exh. C-11b). Based on this observation, CSHO Munson judged the soil to be type C (Tr. 74). CSHO Munson took a soil sample which he sent to OSHA's lab in Salt Lake City (Tr. 78; Exh. C-11g). The lab report confirmed the soil to be type C (Tr. 79; Exh. C-5).

Based upon his measurements and the type of soil, CSHO Munson determined the excavation had not been properly sloped (Tr. 79-80). Although Turpin had two onsite, no trench boxes or other protective system had been in use (Tr. 82-84). CSHO Munson recommended a citation for a violation of 29 C.F.R. § 1926.652(a)(1) be issued because Mr. Shacklock had been in the excavation without proper cave-in protection. He recommended the citation be classified as willful because Turpin had the necessary equipment onsite, but had not used it, and because Turpin had been cited for similar violations in the past (Tr. 86-87).

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Item 1 of Citation 2 alleges a willful violation of 29 C.F.R. § 1926.652(a)(1). The citation alleges:

> An employee was exposed to cave in hazards while performing elevation measurements in an excavation approximately 8.7 feet deep. The employer failed

to install a protective system for the trench opened in Type C soil.

The cited standard requires "each employee in an excavation [] be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section." Designs for proper sloping and benching systems are set out in § 1926.652(b); and for support systems in § 1926.652(c).

Applicability of the Standard

The standard requires the protection of employees working in excavations from cave-ins. The standard applies to circumstances in which employees are working in excavations over 5 feet deep and not dug in stable rock. 29 C.F.R. §§ 1926.652(a)(1)(i) and (ii). The standard defines excavation as any "man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." There is no dispute in the record the worksite contained an excavation dug by Turpin's employee that was not in stable rock (Exh. J-1, pp. 40, 44-47). The parties stipulated the excavation was over 5 feet deep. The standard applies to the cited conditions.

Failure to Comply with the Terms of the Standard

Section 1926.652(a)(1) allows an employer two methods of compliance. The employer may use a sloping or benching system as set out in § 1926.652(b) or a support system as set out in § 1926.652(c). The preponderance of the evidence establishes Turpin used neither method. There is no dispute in the record Turpin did not have a support system in the excavation at the time Mr. Shacklock entered it. Nor did Turpin slope or bench the excavation in accordance with § 1926.652(b).[5]

The record evidence establishes the excavation at issue was dug in type C soil. CSHO Munson observed the soil conditions and took soil samples. Both the conditions he observed and the results of testing of his samples confirmed the soil was type C (Tr. 75; Exh. C-5). CSHO Munson testified he believed the soil sample he took to be representative of the entire excavation. Turpin contends the soil sample was not representative and disputes whether the entire excavation was dug in type C soil. I do not find Turpin's evidence sufficient to rebut the

[5] Sections 1926.652(b)(1) and (2) provide for sloping and benching options consistent with Appendices A and B of Subpart P. Sections 1926.652(b)(3) and (4) provide for designs using either tabulated data or a design by a registered engineer. Turpin does not contend, and the evidence does not support a finding, it was using the options set out in § 1926.652(b)(3) or (4).

Secretary's proof of the excavation's soil type. Turpin presented no evidence of contrary soil testing results. Turpin's contention, in its brief, that the excavation was in entirely type B soil is unsupported by any testimony or documentary evidence. Mr. Bain testified, based on his years of experience, he assessed the soil at the top 5 feet of the excavation to be type B soil and the bottom to be "old swampy clay mush" which he testified he believed was type C soil (Exh. J-1, p. 47). The sloping requirements for an excavation dug in type C soil and one dug in type B or type C soil are identical. See Appendix B to Subpart P of Part 1926 – Sloping and Benching. Therefore, even if I were to accept Mr. Bain's assessment over CSHO Munson's and the lab test results, the analysis of whether Turpin complied with the cited standard is the same.

An excavation of 8.7 feet[6] in depth in type C soil or type B over type C soil would have to be sloped such that it would be 26.1 feet wide at a minimum. To be properly sloped, it would need to be wider, depending upon the width of the excavation at the bottom. Because the excavation at issue was approximately 6 feet wide at the bottom, it would have needed to be wider than 26.1 feet at the top. The parties stipulated the excavation was 25 feet at the top. Mr. Bain testified he was unable to bench or slope the excavation because of the poor soil conditions (Exh. J-1, pp. 28, 44-45). I find Turpin was in violation of the terms of the standard.

Employee Exposure to the Hazard

There is no dispute Mr. Shacklock was in the excavation while no protective system was in place. Therefore, the Secretary has established he was exposed to the hazard of cave-in addressed by § 1926.652(a)(1).

[6] As previously noted, the parties stipulated the excavation was 8.7 feet deep. In its brief, Turpin contends the excavation was "an average of 7.7 feet in depth." The record contains no testimony or documentary evidence supporting that contention. Moreover, the photograph upon which Turpin relies was not presented at the hearing and is not part of the record in this proceeding. Therefore, I will not consider it for this or any other purpose.

Employer knowledge

The Secretary has the burden to establish Turpin was aware of the violative condition. To establish employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). I find the preponderance of the evidence fails to establish Turpin had actual knowledge of the violative condition. Although both Mr. Shacklock and Mr. Maldonado were aware Mr. Shacklock had entered the excavation while no protective system was in place, there is no evidence either had sufficient supervisory authority such that their knowledge could be imputed to Turpin. Nor did the evidence establish Mr. Bain ordered Mr. Shacklock to enter the excavation or was even aware Mr. Shacklock had entered it until turning to see him in the excavation. Only the out-of-court statement of Mr. Maldonado supports a finding Mr. Bain ordered him and Mr. Shacklock to enter the excavation before the trench box was in place. In his statement to CSHO Munson, Mr. Maldonado states Mr. Bain told him to "get the elevations" and he did so, knowing it was not safe to enter the excavation without the trench box in place (Exh. C-7). Both Mr. Bain and Mr. Shacklock testified Mr. Shacklock entered the excavation on his own without Mr. Bain's knowledge in an effort to get his part of the job done (Tr. 115-16; Exhs. C-6, J-1, p. 41). Both also state, upon seeing Mr. Shacklock in the excavation, Mr. Bain ordered him out (Tr. 120; Exh. J-1, p. 41). Although Mr. Bain's testimony is not entirely consistent with his prior statements, Mr. Shacklock's is. Moreover, I found Mr. Shacklock to be a straightforward witness and, therefore, credible. The Secretary has failed to establish Turpin had actual knowledge of the violative condition.

To establish constructive knowledge, the Secretary must show Turpin could have discovered the condition with the exercise of reasonable diligence. "Reasonable diligence" includes the employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). To determine whether an employer acted with reasonable diligence, consideration must be given to "several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Precision Concrete Construction*, 19 BNA

OSHC 1404 (No. 99-0701, 2001). The Commission has held that "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000 (citations omitted), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001). I find the evidence establishes Turpin failed to take any such steps and constructive knowledge is established.

As the project manager, Mr. Turpin had overall responsibility for the jobsite and the authority to discipline employees. According to his testimony, he does not regularly visit jobsites while work is ongoing (Tr. 29-31; see also Exh. J-1, pp. 48-49). He had never visited the worksite that was the subject of the inspection. Rather, Mr. Bain was the individual responsible for work on that site (Tr. 36; Exh. J-1, p. 11). According to the record, Mr. Bain had last received competent person training for trenching in 2004 (Exh. J-1, p. 13). He had also been involved in two prior OSHA inspections during which citations for violations of the same or similar standards had been issued for which he received no discipline (Exh. J-1, pp. 15-16). There is no evidence Mr. Bain had any authority to discipline employees or any obligation to monitor or inspect the worksite.

There is no evidence Turpin routinely trained its employees on excavation hazards to which they would likely be exposed given the nature of Turpin's business. There is no evidence Turpin trained Mr. Maldonado in trench safety and his statement indicates he was "not sure" about company policy on excavation safety (Exh. C-7). Although the record contains evidence Mr. Shacklock may have been trained in the past, there is no evidence of recent training. The record supports a finding Turpin provided Mr. Shacklock with a New Employee Orientation Tape, but not that he ever reviewed it or was familiar with its contents (Exh. C-15). Mr. Turpin's testimony regarding the training Turpin provides its employees was so vague it failed to rebut the Secretary's evidence of lack of training (Tr. 37).

There is no evidence of, and Turpin did not allege, any employee discipline for past safety violations. Mr. Bain testified he was required to attend a class after the company had received citations (Exh. J-1, pp. 49-50). Otherwise, according to Mr. Bain, the only discipline Turpin issued was "cussing and screaming and….all the displeasure." (Exh. J-1, p. 50). The only other evidence of employee discipline was three "essays" Turpin alleges were written by employees at various times, upon his observation of a safety issue (Tr. 39-42). Mr. Turpin declined to identify these as a form of discipline, so their purpose is not clear. Contrary to Mr.

Turpin's testimony, Mr. Shacklock credibly testified all three of the individuals who were required to write these essays were instructed to do so by Mr. Turpin during a meeting at the company's warehouse several months after the citations at issue in this proceeding were issued (Tr. 125-26). Based upon the record as a whole, I find these essays were an after-the-fact attempt by Mr. Turpin to improve the appearance of the company's safety program and fail to rebut the Secretary evidence of lack of employee discipline.

I also find Turpin's safety program lacking, based on evidence Mr. Maldonado and Mr. Shacklock performed work that necessitated entering an unprotected excavation without either appreciating that it was unsafe or concern for the consequences. Mr. Shacklock testified he entered the excavation because he did not believe it was unsafe (Tr. 122). Mr. Bain testified Mr. Maldonado was frequently in a hurry and proceeded with this task without his knowledge or consent (Exh. J-1, pp. 39-40). He also testified this was not the first time employees had proceeded to complete work in an unsafe manner without his knowledge on jobs for which he was foreman (Exh. J-1, p. 51). There is no evidence these employees were ever disciplined for this conduct. That employees felt free to proceed on their own and work in an unsafe manner establishes Turpin paid little attention to compliance and its safety program was lax.

Based upon the totality of the evidence, I find the Secretary has established Turpin had constructive knowledge of the violative condition.

Unpreventable Employee Misconduct

Turpin has asserted a defense of unpreventable employee misconduct. To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., Stark Excavating, Inc.*, 2014 WL 5825310 (Nos. 09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). As discussed in detail above, Turpin has failed to meet its burden with regard to this defense.

The only evidence Turpin had a work rule designed to prevent the violation was the orientation materials Turpin alleges were provided to Mr. Shacklock that make reference to trench safety (Exh. C-15). There is no other evidence of a written safety program or safety rules. Even if the employee orientation were adequate evidence of a company policy or rules, as noted

above, Mr. Turpin's testimony about how this was communicated to employees was vague and confusing (Tr. 37). Mr. Maldonado, who had been with the company for over a year at the time of the inspection, could not state the company's policy on excavation safety (Exh. C-7). Mr. Bain, who was a foreman with oversight of jobs, had not received training on excavation safety since 2004. Although the evidence establishes Turpin held safety meetings on Monday mornings, there is no evidence employees received any training specific to excavation safety. Nor does the record contain evidence of Turpin making efforts to discover violations or to discipline employees found in violation of safety rules. Mr. Turpin admitted to visiting worksites infrequently. Although foremen had oversight of jobsites, Turpin presented no evidence foremen had authority to discipline employees for safety violations. The record contains no credible evidence of any disciplinary actions taken by anyone against any employee. Turpin failed to establish the affirmative defense of employee misconduct.

Classification

The Secretary alleged Item 1 of Citation 2 was a willful violation. A violation is "willful" if it was committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983); *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff'd* 73 F.3d 1146 (8th Cir. 1996). The employer's state of mind is the key issue. *AJP Construction, Inc. v. Secretary of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004). The Secretary must differentiate a willful from a serious violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Valdak Corp.*, 17 BNA OSHC at 1136. The Secretary must show that, at the time of the violative act, the employer was 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, 1684 (No. 96-0265, 1999). I find the Secretary has failed to prove willfulness for the reasons set forth below.

The Secretary argues in his brief Turpin had a heightened awareness of the requirements of § 1926.652(a)(1), having been previously cited for the same standard. Turpin contends, because these citations were either vacated or reduced in classification, they cannot form the basis for the willful classification. On this, Turpin is mistaken. Even if the prior citations did

not become a final order, the fact Turpin was previously inspected and cited put it on notice of the requirements of the standard. *MJP Constr. Co.*, 19 BNA OSHC 1638, 1648 (No. 98-0502, 2001). After Mr. Bain's attempts to bench and then slope the excavation were unsuccessful, he ultimately recognized he needed to use the trench boxes (Exh. J-1, pp. 56-67). Although I find this evidence does establish Mr. Bain's awareness of the need for proper protection before allowing an employee to enter the excavation, it does not establish anyone with supervisory authority for Turpin ordered Mr. Shacklock into the excavation or was aware he had entered it without the proper protection. Mr. Shacklock credibly testified when he entered the excavation, Mr. Bain was in the excavator facing away from the excavation (Tr. 120). When asked why he entered the excavation, he testified, "I just had got hired and I was trying to do a good job so [I] jumped ahead and went down there and tried to work." (Tr. 115-16). Mr. Shacklock went on to testify after he had marked two grade points, Mr. Bain turned around and, upon seeing him in the excavation, ordered him out (Tr. 119). Absent credible evidence Mr. Bain was aware of Mr. Shacklock's action prior to this time, I find the Secretary has failed to meet his burden to establish the violation was willful. *See Southern Pan Services, Co.*, 21 BNA OSHC 1274 (99-0933, 2005); *citing American Wrecking Corp*., 351 F.3d 1254, 1264-65 (D.C. Cir. 2003) and *J.A. Jones Const. Co*., 15 BNA OSHC 2201 (No. 87-2059, 1993).

I am mindful Turpin was under pressure to complete the job that day and Mr. Bain's requests for assistance were met with a curt "finish the damn job." However, this evidence is not sufficient to rebut the credible testimony of Mr. Shacklock that he entered the excavation on his own.

A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. As the Third Circuit has explained:

> It is well-settled that, pursuant to § 666(k), when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible*, the employer has committed a serious violation of the regulation. The "substantial probability" portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur.

Secretary of Labor v. Trinity Industries, 504 F.3d 397, 401 (3d Cir. 2007) (internal quotation marks and citations omitted); *See also, Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Mosser Construction*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2087-2088 (No. 88-0523, 1993). The likelihood of an accident goes to the gravity of the violation, which is a factor in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214.

It is undisputed excavation cave-ins pose a serious risk to the safety of employees working in and around excavations. Turpin's foreman conceded it is well known in the industry a cave-in can cause death or serious injury (Exh. J-1, p. 16). Although Mr. Shacklock was in the excavation a short time, he was exposed to the hazard posed by the unprotected excavation. I find Item 1 of Citation 2 a serious violation of 29 C.F.R. § 1926.652(a)(1).

Penalty Determination

The Secretary proposed a penalty of $24,200.00 for Item 1 of Citation 2. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* § 17(j) of the Act. The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Because I have found Item 1 of Citation 2 was a serious, and not a willful, violation, the maximum penalty under the Act is $7,000.00. CSHO Munson testified he rated the severity of the violation high because, should a cave-in occur, death of the employee in the excavation could result (Tr. 88). He rated the probability as low due to the short duration of exposure (Tr. 88). I agree the severity of the violation is high. Excavation work is recognized as some of the most

hazardous work in the construction industry and cave-in hazards are more likely to be fatal than any other construction accident. 54 Fed. Reg. at 45897-98. Mr. Bain described the soil in the lower part of the excavation as "old swampy clay mush" that was "sliding" and "didn't hold." (Exh. J-1, pp. 46-47). Given these conditions there is a greater likelihood of an accident occurring. Mitigating these factors is the fact that only one employee was exposed and for a short duration. I also have considered that Turpin is a small employer. Taking all of these factors into consideration, a penalty of $3,000.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, Citation 1, alleging a violation of § 1926.651(j)(1) is vacated;
2. Item 2, Citation 1, alleging a violation of § 1926.1053(b)(1) is affirmed as a serious violation, and a penalty of $1,760.00 is assessed; and
3. Item 1, Citation 2, alleging a violation of § 1926.652(a)(1) is affirmed as a serious violation, and a penalty of $3,000.00 is assessed.

/s/ *Heather Joys*
HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia

Date: March 16, 2015