OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, **Complainant,** **v.** **MONDO CONSTRUCTION COMPANY, LLC** **Respondent.**	**OSHRC DOCKET NO. 13-1322**

Appearances:

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Government Center
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For the Complainant.

William T. Blake, Jr., Attorney
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For the Respondent.

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

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"). As a result of an inspection of a trenching project in Bridgeport, Connecticut, the Secretary issued to Respondent, Mondo Construction Company, LLC ("Mondo" or "Respondent") two citations alleging violations of the OSHA trenching standards. Citation 1, item 1(a), alleged a serious violation of 29 C.F.R. §1926.652(c)[1] and Citation 2, item 1, alleged a repeat violation of 29 C.F.R. §1926.652(a)(1). On May 15, 2014, Citation 2 was amended to allege a repeat violation of 29 C.F.R. §1926.652(e)(1)(ii). The Secretary proposed total penalties of $18,480 for the two citations.

A hearing on this matter was held in Hartford, Connecticut on June 2, 2014. Both parties have filed briefs and the matter is ready for decision. For the reasons set forth below, Citation 1, item 1(a) and Citation 2, item 1, each are affirmed as serious violations and a total penalty of $6,160 is assessed.

FACTS

Following a referral from Compliance Safety and Health Officer ("CSHO") Michael Kovacs, who observed the worksite earlier in the day, CSHO Paul Bernor was assigned to inspect Respondent's trench in front of 238 Fairfield Avenue in Bridgeport, Connecticut. The inspection was conducted on April 30, 2013. (Tr. 17-18, 29, Ex. J-1).

Mondo excavated the trench to facilitate repair to existing AT&T facilities. (Tr. 104). AT&T had finished the repairs and the excavation was being reopened to make the repairs permanent[2]. (Tr. 104). The trench was shored with plywood, but there were no struts or cross braces in place. (Tr. 31). The cables were enclosed in a multi-tile duct structure, which is a clay type structure that looks like a big box composed of several chambers with cables running

[1] Citation 1 also contained item 1(b) which alleged a serious violation of 29 C.F.R. §1926.652(e)(1)(i). Citation 1, item 1(b) was withdrawn at the hearing by the Secretary and is no longer before the Commission. (Tr. 5-6).

[2] After AT&T makes the initial repairs, the excavation is temporarily closed and the repairs tested to ensure that they were properly made. After this test period, the excavation is reopened, the repairs made permanent and the hole is closed. While Mondo does the excavation work, the actual repairs are made by AT&T. (Tr. 104-05, 195).

through them. A concrete cap was placed on top of the structure. (Tr. 106). To enable the repairs, Mondo had to first break the concrete cap and then break whatever tiles had to be removed to access the cables that were to be repaired. (Tr. 107). An old and brittle gas main was inches from the tile structure. (Tr. 108). Blocks, made of 4 x 4s, were set in narrow channels that kept the sheets of plywood shoring from contacting the gas line. (Tr. 61-62, 108). The channels were also needed to facilitate the construction of a concrete encasement around the repaired utilities. (Tr. 112). The channels ran along both sides of the trench, were 3 ½- 4 inches wide and were dug alongside the multi-tile clay structure. (Tr. 111-12, Ex. J-2). The channels ran along most of the length of the trench and extended to the trench walls. (Tr. 90).

When CSHO Bernor arrived at the site, an employee was in the trench. The employee was measuring the distance between the top of plywood sheets that were in the excavation and the top of the excavation. He gave measurements to the foreman, who cut 4 x 4s blocks. After the blocks were cut, the foreman tossed them into the trench, to the employee, who placed them underneath the plywood sheets already in the trench. The blocks were used to prop up the plywood sheets so they extended to the top of the trench. (Tr. 30-31, 61). The purpose of the shoring was to protect the utilities from falling debris. (Tr. 122, 169-70).

After showing his credentials, the CSHO interviewed the foreman, Michael Marshall. The foreman told him that the soil was previously disturbed and classified as Type C[3]. (Tr. 31). The CSHO took photographs and measurements of the trench. (Tr. 33). The trench measured 25 feet long and 4 ½ feet wide. (Ex. J-2). The walls were vertical. (Tr. 113, Ex. J-3). In most locations, the CSHO measured the depth of the trench at the channels by using a 25-foot steel

[3] Soil is classified as either type A, B, C, or hard rock. Type C soil is the least cohesive soil which contains gravel, sand or loamy sand. Previously disturbed soil is generally classified as Type C. (29 C.F.R. §1926, Subpart P, Appendix A, Tr. 23-24)

tape measure. (Tr. 43). In one location, where the depth was measured to be 67 inches, the CSHO was not able to use the tape measure. Instead, he took a pry bar and laid it across the top of the trench and, with the help of an employee who held the bar in place, took a folding ruler and measured from the bottom of the pry bar to the bottom of the channel. (Tr. 43, 187-88). Where the employee was working, the CSHO measured the depth to be six feet from the bottom of the channel. (Tr. 35, 38, 72, 74, Exs. J-2, C-2, p. 2). In other locations, the trench ranged from four feet to 66 inches deep. (Tr. 35-36, Ex. J-2). In at least three locations, within the channels, the trench measured over five feet deep. (Ex. J-2)

The foreman indicated that the trench protection system being used was installed according to an engineer's plan. (Tr. 31). The foreman was not able to produce a copy of the engineer's plan when requested by the CSHO. (Tr. 31, 34). A copy of the plan was sent to the CSHO after the inspection. (Tr. 44). Clifford Barone, the structural engineer who wrote the plan, testified that he was requested by Respondent to create a typical calculation sheet to have on jobsites in case they were audited[4]. (Tr. 125, 144). The plan was generic and did not represent any particular trench or job site. (Tr. 130, 150). It required that trenches, six feet deep or less and six feet wide, be protected by plywood sheets and bracing. (Tr. 138, 148, 150, Ex. J-4). Mr. Barone never visited the site and was not asked to determine the sufficiency of Respondent's trench protection. Based on photographs, he testified that the trench was not consistent with his design because it lacked bracing. (Tr. 141). However, he also testified that, in his opinion, even without the braces, Respondent's trench was safe. (Tr. 130, 144).

Both Bruce Mondo, Sr. and Bruce Mondo, Jr., Respondent's managers, testified that it was not necessary to protect the trench from cave-in because the trench was less than five feet

[4] Prior to the hearing, Respondent filed a motion to preclude the testimony of Mr. Barone. That motion was denied on May 29, 2014.

deep. They also testified that the plywood shoring was installed to protect the utilities from falling debris. (Tr. 122, 169-70). This was confirmed by Respondent's foreman Michael Marshall. (Tr. 192, 198, Ex. R-4).

The Alleged Violations

Jurisdiction

In its Answer Respondent admitted that jurisdiction in this matter is conferred upon the Commission by section 10(c) of the Act and that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act. (Tr. 9). Therefore, Respondent was an employer within the meaning of sections 3(3) and 3(5) of the Act and the Commission has jurisdiction of the parties and subject matter of this proceeding.

Applicable Law

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Applicability of Standards

The cited standards are located within Subpart P, which contain the construction standards applicable to excavations. Under 29 C.F.R. §1926.650(a), the requirements of Subpart P apply to "all open excavations made in the earth's surface. Excavations are defined to include trenches." It is undisputed that Respondent was engaged in construction work and that its

employees were working in an excavation. The requirements of Subpart P clearly applied to Respondent's worksite.

Respondent argues that the CSHO improperly measured the depth of the trench from the bottom of the channels rather than the area where the employee was working. It asserts that the cited standards did not apply because the depth of the area where the employee was working was less than five feet deep. (Tr. 122, 170). Respondent's competent person, Bruce Mondo, Jr., determined that there was no indication of a potential cave-in because the trench was less than five feet deep. (Tr. 103, 121-22). Photographic exhibits demonstrate that the employee, who was five foot five inches tall, is standing in the trench with his shoulders and head above the surface. (Resp. Brief at 9-10, Ex. J-3, p. 1, Tr. 171). Respondent further asserts that it was not possible for the employee to work inside the very narrow channel. (Resp. Brief at 11, Tr. 190).

I find no merit in Respondent's contention that the depth of the trench should not have been measured from the bottom of the channel. 29 C.F.R. §1926.652(a)(1) requires that

> 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*:
>
> * * *
>
> (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.

(emphasis added)

The party claiming the benefit of an exception bears the burden of proving that its case falls within that exception. *Bardav, Inc., d/b/a Martha's Vineyard Mobile Home Park,* 2014 WL 5025977 *4 (No. 10-1055, Sept. 30, 2014)(citing *Ford Dev. Corp*., 15 BNA OSHC 2003, 2010 (No. 90-1505, 1992)). Respondent failed to establish the applicability of the exception.

A trench wall is only as stable as its weakest component. *Woolston Constr. Co.,* 15 BNA OSHC 1114, 1117 (No. 88-1877, 1991), *aff'd* 15 BNA OSHC 1634 *(*No. 91-1413) (D.C. Cir.

1992)(*Per Curium*). The channels ran along both sides of the trench and up to the trench walls. (Tr. 90, Ex. J-2). Mr. Barone, the structural engineer who drafted the trenching protection plan for Mondo, testified that the deeper the trench, the greater the lateral load. (Tr. 139). The stress on a trench wall is greatest at the bottom of the trench. (Tr. 132-34). This testimony establishes the depth added by the channels that ran up to the trench walls, created an additional load on those walls[5]. In contrast, Respondent did not adduce a scintilla of evidence to suggest that the channels did not increase the stress on the trench walls. Therefore, I find that the CSHO properly measured the depth of the trench from the bottom of the channels.

Because the evidence clearly establishes that an employee worked inside the trench that was over five feet deep, the fact that the employee stood on a conduit or platform which was less than five feet below the surface is not relevant. As the First Circuit said in *P. Gioioso & Sons, Inc. v. O.S.H.R.C.:*

> The safety standard is implicated by the depth of a particular trench, without regard to an individual worker's precise position in it. The notion that having workers stand on a laid pipe within a trench is a satisfactory method of protecting them from the risk of cave-ins is nonsense. While the regulations are performance-oriented, they only allow employers to choose from a limited universe of acceptable procedures, not to jury-rig convenient alternatives and impose them on an imperiled work force.

115 F.3d. 100, 109 (1st Cir. 1997). The Commission decision in *Ford Development Corp.,* which was cited by the First Circuit, is particularly applicable. In that case, the employer argued that there was no excavation violation in a trench, six feet deep, because the employee, while standing on a pipe, was only three and a half feet below the ground. Rejecting the argument the

[5] Mr. Barone further testified that, if the trench collapsed, material would fall under the shoring that had been erected and fill up the trench only to the top of the inserted posts which the shoring rested upon. (Tr. 133). I find that this testimony highlights the need to determine the depth of the trench from the bottom of the channels since Mr. Barone's testimony recognizes the additional load caused by the presence of the channels and presumes the presence of shoring in the trench to protect it from collapsing from the top.

Commission observed that "[t]he standard speaks of the depth of the trench, not the position of employees in the trench." 15 BNA OSHC at 2011[6].

Accordingly, I find that the cited standards applied to Respondent's trench.

Citation 1

According to 29 C.F.R. §1926.652(a)(1), the employer must design trench protective systems in accordance with §1926.652(c), except when "[e]xcavations are made entirely in stable rock;" or "[e]xcavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in." It is undisputed that the trench was dug in Type C soil. Moreover, the evidence establishes that the trench was over five feet deep. Therefore, Respondent was required to protect the trench in accordance with §1926.652(c). Citation 1, item 1(a), alleged a serious violation of 29 C.F.R. §1926.652(c) which provides:

> Designs of support systems, shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with:
>
> the requirements of paragraph (c)(1);
> or, in the alternative, paragraph (c)(2);
> or, in the alternative, paragraph (c)(3);
> or, in the alternative, paragraph (c)(4) . . . .

Respondent opted to follow paragraph (c)(4). (Tr. 51). Paragraph (c)(4) requires a written design plan by a registered professional engineer "indicating the sizes, types, and configurations of the materials to be used in the protective system" and requires that "[a]t least one copy of the design shall be maintained at the jobsite during construction of the protective system." The plan designed by Mr. Barone required that the shoring in the trench be augmented

[6] I note that, despite Respondent's assertion that the channels were too small for an employee to work in (Tr. 190), the CSHO testified that he actually observed the employee working inside the channel. (Tr. 65-66, 68). Because, the position of the employee inside the channel is not relevant in determining whether a trench over five feet deep needs to be protected, it is unnecessary to determine precisely where in the trench the employee was working.

with bracing. Respondent's trench lacked these braces. Accordingly, the Secretary alleges that, contrary to the cited standard, the trench was not built in accordance with the engineer's design. The Secretary proposed a penalty of $3,080 for the alleged violation.

Mr. Barone testified that the shoring used by Mondo did not conform to his plan. (Tr. 130, 141, 151). For example, the plan required the use of cross braces. (Ex. J-4). Respondent's trench had none. (Tr. 130, Exs. J-2, J-3 (pp. 1-2)) Also, the plan called for the trench to be shored from the bottom. (Ex. J-4). Here, the shoring was placed above the bottom of the trench and was propped up by blocks. (Tr. 39, 44, 131, Ex. J-3 (pp. 3-4)). Bruce Mondo, Sr., Respondent's manager, agreed that the shoring did not conform to the engineer's design, but explained that, in his view, shoring was not necessary because the trench was not six feet deep. (Tr. 178).

Respondent points out that Mr. Barone also testified that the deviation did not make the trench unsafe. (Resp. Brief at 14-15, Tr. 130, 144). Little weight is given to Mr. Barone's testimony that the employees working in the trench were not exposed to a hazard. Mr. Barone was not present at this job site. He based his opinion only on a review of the site photos. (Tr. 135-36, 140-41, 144-45, 150, 152.). According to Mr. Barone, "if there was a special situation, I could have been called in to look at it; but, I was never called to look at it." (Tr. 144). I would also note that Mr. Barone made a substantial error when calculating the load his planned shoring system was designed to withstand. That error resulted in the plan claiming that the shoring system was able to withstand a load far greater than its design actually permitted. (Tr. 131-32).

In any event, when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.,* 6 BNA OSHC 1335, 1337 (No. 15983, 1978). Here, the standard is worded so that the existence of a hazard is presumed for any improperly protected trench that is five feet deep or

greater. The Secretary need only establish that employees are exposed to the improperly protected trench. Respondent stipulated that its employee was working in the trench. (Ex. J-1(c)). As noted above, that Respondent's employee was standing on a conduit and was less than five feet below the ground is not relevant. What is relevant is the depth of the trench, not the employee's location in it. *Ford Dev. Corp.,* 15 BNA OSHC at 2011.

Employee exposure was established.

The evidence establishes that Respondent knew, or with the exercise of reasonable diligence should have known of the violation. During the inspection, foreman Michael Marshall told the CSHO that they were installing the shoring system according to an engineer's plan. (Tr. 31, 44, 49, 80). However, he allowed the employee to work inside the trench, even though the trench lacked the struts or cross-bracing that was clearly required by the plan. As foreman, his knowledge is imputed to Respondent. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994).

The violation was established.

The violation was cited as serious. A violation is serious if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there is a substantial probability that an accident will occur; he need only show that if an accident does occur serious physical harm would result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984) (*citing California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 988 n.1 (9th Cir. 1975)).

The CSHO testified that the severity of a trench collapse would be high. (Tr. 90). Respondent asserts that the seriousness of any incident was reduced because its employee was standing on a conduit and was less than five feet below the ground. Respondent's assertion is

without merit. Had the trench collapsed, the employee could have been knocked off the conduit and buried by the collapsing trench. Finally, as noted above, little weight is given to Mr. Barone's testimony that the employees working in the trench were not exposed to a hazard.

The violation was properly cited as serious.

The Secretary proposed a penalty of $3,080. Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the South*, *Inc.*, 14 BNA OSHC 1910, 1910 (No. 89-2241, 1990). These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993) (*citing Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992); *Astra Pharmaceutical Prods., Inc.*, 10 BNA OSHC 2070 (No. 78-6247, 1982)).

The CSHO testified that the gravity of the violation was high because both the probability of an accident was greater and the severity of an accident was high. (Tr. 53, 90). He also testified that, in assessing the penalty, the history and size of the employer were considered. With only 15 employees, Respondent is a small employer. (Tr. 159). Respondent has a history of prior violations. (Tr. 46, Exs. C-3, C-4). Respondent also exhibited good faith throughout this matter. Considering the statutory factors, I find that the proposed penalty is appropriate.

Citation 2

As amended, Citation 2 alleges a repeat violation of 29 C.F.R. §1926.652(e)(1)(ii) which provides:

> Support systems shall be installed and removed in a manner that protects employees from cave-ins, structural collapses, or from being struck by members of the support system.

The Secretary asserts that Respondent's employee was in the trench while installing the support system and was not protected from cave-ins, structural collapses or from being struck by members of the support system. The Secretary also asserts that Respondent was cited for substantially similar violations on July 30, 2008 and July 20, 2010. (Exs. C-3, C-4). Both citations have become final orders of the Commission and form the basis of the Secretary's allegation that the currently cited violation was repeated. The Secretary proposed a penalty of $15,400.

The parties dispute whether the employee was installing or removing the support system at the time of the inspection. (Tr. 31). Whether the support system was being installed or removed is not relevant. The standard plainly states that "[s]upport systems shall be *installed and removed* . . . ." The evidence clearly establishes that Respondent's employee was in the trench while working on the support system. (Tr. 31, Ex. C-2, p. 3).

The CSHO testified that there was no reason why the employee had to enter the trench to install a protective system because there are several options available to employers to prevent employees from being exposed to a hazardous trench when installing or removing a protective system. (Tr. 52). Industry practice is to install cave-in protection from the top of the trench down and then remove it from the bottom up, which protects employees from the hazards of a cave-in. (Tr. 28-29). Moreover, Respondent could have used a shielding system such as a trench box. (Tr. 32). Mr. Barone testified that whether the shoring system he designed could be installed without standing in the trench was beyond the scope of his expertise. (Tr. 142-43). Respondent did not produce any evidence to suggest that it was not feasible to install or remove the shoring

in a manner that would not expose the employee to the hazard of a cave-in. In its brief, Respondent withdrew its affirmative defense of infeasibility. (Resp.'s Brief at p. 7, n.4).

The evidence further establishes that an employee was working on the shoring while in the trench and, therefore, was exposed to the hazard. Respondent's foreman was cutting the blocks and handing them to the employee who used the blocks to prop up the shoring. Therefore, the foreman had actual knowledge of the violative condition. The foreman's knowledge is imputed to Respondent. *Jersey Steel Erectors*, 16 BNA OSHC at 1164.

The Secretary cited the violation as a repeat. The Secretary bases the repeat allegation on two prior citations. The first citation was issued to Respondent in July 2008 at a worksite in West Haven, Connecticut. It alleged a serious violation of 29 C.F.R. §1926.652(a)(1) on the grounds that Respondent's employee was not protected from cave-ins by an adequate protective system while manually shoveling in a trench more than five feet deep. (Tr. 46, Ex. C-3, Secretary's Brief at 8). The second citation was issued in July, 2010 and alleged a repeat violation of 29 C.F.R. §1926.652(a)(1)[7] at a worksite in Bristol, Connecticut on the grounds that cave-in protection was not provided for employees who were in a trench over five feet deep with vertical walls. (Tr. 46, Ex. C-4, Secretary's Brief at 8)[8].

"A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Co.,* 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996). However, where a repeat citation is based on a different standard, the burden is on the Secretary to show that the two situations were substantially identical and that there is a sufficient similarity of circumstances to justify a repeat

[7] According to that citation, the repeat allegation in the 2010 citation was based on the July 2008 citation.
[8] Both prior citations contained other alleged trenching violations. However, at the hearing and his brief, the Secretary relies on the allegations that Respondent violated 29 C.F.R. §1926.652(a)(1).

characterization[9]. *J.L. Foti Constr. v. OSHRC,* 687 F.2d 853, 856 (6th Cir.1982); *Monitor Constr. Co.,* 16 BNA OSHC 1589, 1593 (No. 91-1807, 1994).

Even though the underlying citations allege a violation of a different standard, the Secretary asserts that the violation was properly classified as repeated. According to the Secretary, " 'substantial similarity' must be defined so as to include 'those [violations] that indicate a failure to learn from experience '. . . the citation for the first violation [must] place the employer on notice of the need to take steps to prevent the second violation." *See* Secretary's Brief at 8, quoting *Caterpillar, Inc. v. Herman,* 154 F.3d 400, 403 (7th Cir. 1998).

The Secretary's reliance on *Caterpillar* is misplaced. First, the repeat allegation in *Caterpillar* was based on a violation of part of the same machine guarding regulation as the underlying citation. Second, when quoting *Caterpillar*, the Secretary left out a critical part of the quote. According to the court, "'substantially similar' must be defined *sufficiently narrowly* that the citation for the first violation placed the employer on notice of the need to take steps to prevent the second violation." *Id.* (emphasis added).

Here, the Secretary asserts that the violations were "substantially similar" because both involve "a failure to protect employees from the hazards of potential trench collapse." (Secretary's Brief at 9). The problem with the Secretary's theory is that it attempts to tie "substantial similarity" to the nature of the hazard rather than the factual circumstances of the violation. To tie "substantial similarity" to the nature of the hazard would, as the Seventh Circuit warned in *Caterpillar*, broaden the term so that the first citation would not give the employer "notice of the need to take steps to prevent the second violation." Disparate factual circumstances can result in the same hazard. For example, the hazard of trench collapse could

[9] The Secretary initially alleged a repeat violation of 29 C.F.R. §1926.652(a)(1), the standard involved in the two underlying citations. However, the Secretary amended the citation to allege a repeat violation of 29 C.F.R. §1926.652(e)(1)(ii). (Tr. 6-7)

encompass both the failure to adequately shore or slope a trench (29 C.F.R. §1926.652(a)(1)) and the failure to conduct daily inspections of a trench (29 C.F.R. §1926.651(k)(1)). Despite the similarity of the hazard, a citation for not adequately protecting a trench would not necessarily place the employer on notice of the need to conduct daily inspections of a properly protected trench. Here, the underlying citations alleged failures to adequately protect a trench, while the instant citation alleges that Respondent used an inadequate technique to install or remove that protective system.

Other than entering the two underlying citations into evidence, the Secretary did not adduce any evidence to establish the factual circumstances surrounding those violations. I find that the Secretary has shown nothing in the underlying citations that should have placed Respondent on notice that it was required to keep the employee out of the trench when installing or removing a protective system. Accordingly, the Secretary failed to lay a foundation sufficient to establish the requisite "substantial similarity" that would support the "repeat" allegation.

Although not repeated, the Secretary established that the violation was serious. As with Citation 1, item 1, had the trench collapsed, the results could have been death or serious physical harm. The CSHO testified that the Section 17(j) factors considered for both citations were the same. (Tr. 53). Finding the gravity of the two citations to be equal and with all of the other statutory factors being the same, I find that, as with Citation 1, item 1, a penalty of $3,080 for Citation 2 is appropriate and 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.

Conclusion and Order

Based upon the foregoing decision, it is ORDERED that:

Citation 1, item 1, alleging a serious violation 29 C.F.R. § 1926.652(c) is **Affirmed** and a penalty of $3080 is **assessed**;

Citation 2, item 1, alleging a repeat violation of 29 C.F.R. §1926.652(e)(1)(ii) is **Affirmed** as a serious violation and a penalty of $3080 is **assessed**.

So Ordered.

/s/ Carol A. Baumerich

Carol A. Baumerich
Judge, OSHRC

Washington, D.C.
Dated: December 1, 2014