United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Bolton Fencing and Construction, LLC, Respondent.	OSHRC Docket No. 11-0590

Appearances:

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Before: Administrative Law Judge Sharon D. Calhoun

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). Bolton Fencing and Construction, LLC (Bolton) is a contractor based in Meeker, Colorado, which performs work in support of the oil and gas industry. In December 2010, it was working on the Petrox Pipeline Project located in Arboles, Colorado. Pursuant to a complaint, the site was inspected by Occupational Safety and Health (OSHA) Compliance Safety and Health Officer Dan Holland. As a result of OSHA's inspection, Bolton was issued a citation alleging willful violations of the Act and proposing total penalties of $49,000. Citation 1, item 1a alleges a willful violation of 29 C.F.R. § 1926.651(k)(2) on the grounds that the competent person onsite exposed employees to a cave-in hazard by allowing them to work in a trench with vertical walls in excess of 5 feet in height without taking precautions to protect the employees inside. Citation 1, item 1b alleges a willful violation of

29 C.F.R. § 1926.652(a)(1) on the grounds that employees were exposed to cave-in hazards while working in a trench with vertical walls in excess of 5 feet in height with no protective system in place. Respondent filed a timely Notice of Contest and the undersigned held a hearing in Denver, Colorado on August 24-25, 2011. Both parties filed post-hearing briefs.

For the reasons that follow, the undersigned affirms the citation as serious and assesses a penalty of $5,000.

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The parties also stipulated that at all times relevant to this action, Bolton was an employer engaged in a business affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) & (5) (Tr. V. 1, p. 17).[1]

The OSHA Inspection

On December 16, 2010, OSHA received a complaint alleging employees were working in excavations 5-6 feet deep with no protective system in place (Tr. V. 1, p. 55, Ex. C-1). In response to that complaint, OSHA sent Holland to Bolton's worksite at the Candelleria Well, an excavation site which was part of the Petrox Pipeline Project (project). The project, centered in Archuleta County, involved installation of a natural gas pipeline and spanned private land, U.S. Forest Service land, and property controlled by the Southern Ute Tribe (Tr. V.1, pp. 38-39, 339, 341).

Holland arrived at the site at 9:30 a.m. on Saturday, December 18, 2010, when only a handful of people were working[2] (Tr. V. 1, p. 63). Upon arrival at the site, he observed two people working in an excavation which was adjacent to and parallel with a road. According to Holland, the top of the excavation was clearly above the heads of the employees (Tr. V. 1., p. 65). No shoring, sloping, or other protective system was in use (Tr. V. 1, p. 67). Holland met with the supervisor of the site, John Myers who told him the excavation was approximately 6 feet deep (Tr. V. 1, p. 66). Holland testified when asked why no protective system was in place, Myers

[1] The transcript in this case is divided into two volumes, and each volume begins as page 1. Therefore, all citations to the transcript indicate both the volume and the page number.

[2] Holland testified that he had trouble locating the site and arrived on Friday, at 4:30 p.m. when it was already dark. Therefore, he began the inspection on the next day.

replied the job was on Southern Ute tribal land and the tribe required the job be completed by December 22 (Tr. V. 1, p. 67).

Holland also interviewed Cesar Cordova, who identified himself as the lead man and as a competent person (Tr. V. 1, p. 77). Because of the language barrier, Holland had some difficulty understanding Cordova (Tr. V. 1, p. 79-80). Cordova was aware that an excavation over 5 feet deep is required to have a protective system in place (Tr. V. 1, p. 78). When asked why there was no protective system in place, Cordova allegedly told Holland the job had to be done by December 22 (Tr. V. 1, p. 78).

Holland also attempted to interview the two employees who were in the excavation. Those employees did not speak English, so Cordova attempted to translate. However, as the Secretary stated in her opening statement: "Facts simply got lost in translation" (Tr. V. 1, p. 29).[3]

Discussion

The Secretary has the burden of establishing the employer violated the cited standards.

> 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).

The Citation

Item 1a of the citation alleges:

> 29 C.F.R. § 1926.652(k)(2): Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.
>
> On or about December 18, 2010, and at times prior, employees were exposed to cave-in hazards as the competent person onsite allowed employees to work in a trench with vertical walls in excess of five feet and did not take precautions to protect the employees.[4]

[3] Apparently, due to the language barrier, Holland thought Cordova was one of the employees in the trench. Holland did not learn of his error until Cordova's deposition (Tr. V. 1, pp. 79-80). On the OSHA-1B Worksheet, he had listed Cordova as one of the employees in the excavation (Tr. V. 1, pp. 79-80, Exh. C-2, pp. 35, 39).

[4] As alleged by the Secretary, the two cited standards are being applied co-extensively and the facts required to

Item 1b of the citation alleges:

> 29 C.F.R. § 1926.652(a)(1): Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.
>
> On or about December 18, 2010, and at times prior, employees were exposed to cave-in hazards while working in a trench that had vertical walls in excess of five feet deep with no protective system in place.

(1) Applicability of the Cited Standards

Section 1926.651(h)(1) is found in "Subpart P – Excavations" of the 1926 Construction standards. Section 1926.650(a) provides that Subpart P applies to all open excavations made in the earth's surface. Excavations are defined to include "trenches." Bolton was performing work inside of a trench on the jobsite. The cited standards are applicable.

(2) Compliance with the Terms of the Cited Standards

The OSHA inspection occurred in an area known as the Candelleria site, which was located on private property (Tr. V. 1, p. 341). Myers had just been assigned as the supervisor at the site and the date of the inspection was his first day on that job (Tr. V. 1, pp. 83, 228, Ex. R-1). When he arrived at the site for the first time, on December 18, Holland had already arrived. The lead man and foreman for the excavation crew was Cordova (Tr. V. 2 p. 109-110). Both men had competent person training (Tr. V. 2, pp. 109, 112, 213, 270).

Before the inspection and before Myers arrived at the site, Cordova instructed two employees to enter the trench to clean snow off the poly pipes. Cordova then left the site to get supplies in the yard, approximately 2 miles away (Tr. V. 1, p. 246, V. 2, pp. 138-139). Cordova estimated he was absent from the site for approximately five to ten minutes (Tr. V. 2, p. 139).

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establish a violation of each are virtually identical. It could be argued, however, that 29 C.F.R. §1926.651(k)(2) was intended to apply only when there are changes to the condition of an excavation that create a hazard that did not exist before. Thus, an excavation may be in compliance with 29 C.F.R. §1926.652(a)(1), in that it is properly shored, sloped, or otherwise protected, but a change in conditions, such as weather, can create a hazard that did not previously exist. In such an instance, the competent person on the site must remove employees until this new hazard is abated. *Globe Contractors, Inc.*, 17 BNA OSHC 2165 (No. 95-0494, 1996)(ALJ); 54 FR 45894, 45926 (Oct. 31, 1989). The standard has been applied both ways by Commission judges. *Compare D.R.B. Boring & Drilling,* 21 BNA OSHC 1504 (No. 05-0693, 1996)(change of conditions) with *N.M. Savko & Sons, Inc.* 18 BNA OSHC 1176 (No. 95-1276, 1997)(co-extensive). The applicability of 29 C.F.R. §1926.651(k)(2) has not been addressed by the full Commission. Because neither party has raised this issue, the Court will not raise the issue *sua sponte.*

When he returned, the OSHA inspection was in progress and the employees had been removed from the excavation (Tr. V. 2, p. 139).

Bolton was to install approximately 18 miles of a 16-inch steel natural gas pipeline (Tr. V. 1, p. 339). A 4-inch poly pipe for carrying water ran along the 16-inch steel pipe and beneath the 4-inch connector pipe at the inspection location (Tr. V. 2, pp. 120-122, 233-234). At Candelleria, the excavation connected with the main pipeline trench to form a "T-junction," where the main line was connected to a well (T. V. 2, pp. 233-234, Ex. C-4). The poly pipe ran a few inches underneath the T-junction and turned towards the 4-inch pipe (Tr. V. 1, pp. 233-234). On the day of the inspection, a Bolton crew planned to install two elbows to the 4-inch poly water pipe to connect the poly pipe sections running towards the well (Tr. V. 2, pp. 232-234).

At the T-junction, the trench was 8 feet deep and 8 to 9 feet wide (Tr. V. 1, p. 98, 109, 133, Exh. C-7, pp. 1-4, C-8). Holland measured the height of the eastern wall (designated wall "C" in the exhibits) at 8 feet. He estimated the remaining walls ("A" and "B") were of equal height or slightly shorter (Tr. V. 1, pp. 109-110, 195, 200-201). When Holland asked Myers to estimate the depth of the excavation, he replied it was about 6 feet deep (Tr. V. 1, p. 125). At the hearing, however, Myers estimated the remaining walls were 5 feet in height because the top of 5-foot long shovels, leaning up against the walls, were basically even with the top of the trench (Tr. V. 2, pp. 239-240, Exh. C-5). The Secretary contends the tops of the shovels are not reliable indicators of the height of the trench walls because they were not inserted into the bottom of the trench (Tr. V. 1, p. 112, Exh. C-5, p. 1).

The evidence establishes that the depth of the excavation at wall "C" was 8 feet. Also, the evidence establishes the height of walls "A" and "B" were, at a minimum, 5 feet. At the hearing, after viewing the video (Exh. C-8), Shawn Bolton, one of Respondent's owners, agreed that the excavation looked deeper than 6 feet (Tr. V. 2, p. 167). The standard cited in Item 1a, 29 C.F.R. § 1926.651(k)(2) requires the competent person to remove employees from any trench that presents a hazard of cave-in without regard to its height. The standard cited in Item 1b, 29 C.F.R. § 1926.652(a)(1), applies to all excavations 5 feet or more in height.

It had been snowing and at the worksite the pipes were covered with snow. Cordova and Myers both testified the trench was hard and frozen (Tr. V. 2, p. 127, 133, 155, 243, 278). However, Holland testified in his opinion, the trench did not appear to be frozen, rather the conditions were muddy and wet (Tr. V. 1, p. 137). Holland later qualified his testimony, stating

he did not know whether the soil inside the excavation was frozen solid (Tr. V. 1, p. 204). Holland further testified his first impression of the soil was that it was either Type B or the more unstable Type C, as confirmed by the thumb penetration test he performed (Tr. V. 1, pp. 145-148). He testified trenches dug in Type B soil must be sloped at an angle of 45 degrees, or 1 foot back for each foot of depth (Tr. V. 1, 157). As an alternative to sloping, the employer can use other protective devices such as shoring, or a trench box (Tr. V. 1, p. 160). Type B soil generally has a compressive strength of .5 to 1.5 tsf (tons per square foot)[5] (Tr. V. 1, p. 143). Holland testified Type A soil has a compressive strength in excess of 1.5 tsf, and besides stable rock, is the most stable soil, and is seldom found in Colorado (Tr. V.1, pp. 142, 205). According to Holland, the soil was not stable rock, but rather was wet, loose, and subject to vibration (Tr. V. 1, p. 148). Holland did not see any cracks or fissures in the excavation (Tr. V. 1, p. 205).

The trench ran adjacent and parallel to a road (Tr. V. 1, p. 65). That road was the only means of access to the excavation. There were truck tire and backhoe tracks on the road which were 4-5 feet from the excavation (Tr. V. 1, p. 98). Heavy equipment being used by another Bolton crew to repair a cattle guard was being operated approximately 100 feet from the Candelleria site (Tr. V. 1, pp 63-64, 92, 209).

Holland sent a soil sample from the excavation to the Salt Lake Technical Center Laboratory in Salt Lake City, Utah. Steven Anderson, an analytical chemist at the Center, testified the sample was cohesive Type B soil (Tr. V. 1, pp. 257, 276, 311, Exh. C-10, p. 19). He performed three compression tests, each of which indicated a high compressive strength of 4.5 tsf (Tr. V. 1, p. 293). According to Anderson, compressive strength is only one consideration when determining soil type (Tr. V. 1, p. 290, 315). The sample he tested was 45.7% sand and gravel, which generally indicates Type B soil[6] (Tr. V. 1, pp. 295, 310, Exh. C-10, p. 22). Plasticity tests demonstrated the soil was cohesive, which can be a characteristic of all three soil types (Tr. V. 1, p. 293-294). The soil sample had clumps of different sizes which indicated fissuring[7]. Also, without applying significant pressure, the clumps broke apart in Anderson's hands (Tr. V. 1, p. 281). The sample also contained plant matter indicating the soil was previously disturbed

[5] Compressive strength is the load per unit of area at which the soil will fail under compression (Tr. V. 1, p. 289).

[6] According to Anderson, soil that is 45.7% sand and gravel can also be Type A (Tr. V. 1, pp. 295, 310-311).

[7] The undersigned notes that Holland testified he did not see any cracks or fissuring in the excavation (Tr. V. 1, p. 205). This does not diminish the results of the lab tests which are designed to determine the propensity of the soil to fissure, not whether it has actually fissured on the site.

(Tr. V. 1, p. 285). According to Anderson, the plasticity test, fissuring, and percentage of sand and gravel were such that the soil "had to be Type B" (Tr. V. 1, p. 278).

The undersigned finds that the preponderance of the evidence establishes the soil was Type B. The testimony of both Holland and Anderson in this regard was credible and convincing. Bolton apparently did not disagree with OSHA's soil classification as evidenced by Myers's testimony (Tr. V. 2, p. 271). The evidence establishes that none of the trench walls were shored, sloped, or otherwise protected against cave-in, in violation of § 1926.652(a)(1), as cited in item 1b. Further, it is undisputed that Cordova failed to remove the two employees from the unprotected trench where there was evidence a possible case-in could occur, in violation of the standard found at § 1926.652(k)(2) as cited in item 1a.

(3) Employee Access

To establish employee exposure to a violative condition, Complainant must prove that it was reasonably predictable that employees "will be, are, or have been in the zone of danger" created by the violative condition. *Fabricated Metal Products*, 18 BNA OSHC 1072, 1073-1074 (No. 93-1853, 1997); *Gilles & Cotting, Inc*., 3 BNA OSHC 2002, 2003 (No. 504, 1976).

The evidence establishes two employees were working in a trench which was dug in Type B soil and over 5 feet deep; and which was not shored sloped or otherwise protected against cave-in. The competent person and lead man/foreman of the crew, Cordova, failed to remove the men from the excavation and had ordered them into the trench exposing them to the hazard of cave-in. Cordova did not show them where to work or instruct them to avoid certain areas of the excavation (Tr. V. 2, p. 162). The employees were working in proximity of walls "A" and "B" both of which were at least 5 feet high. They were assigned to install elbows at the T-junction of the pipes in the excavation, which was approximately 5½ feet from wall "C" which was 8 feet high (Tr. V. 2, pp. 16-17). Had any of the walls collapsed, employees would have been in the zone of danger and at risk of death or serious physical harm (Tr. V. 1, p. 125-126, 132, 162). Not having been instructed to avoid getting closer to the walls, and with the competent person absent from the site, it was reasonably predictable that either while in the course of their assigned duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, employees will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). The evidence establishes employees were exposed to the hazard of the unprotected trench.

(1) Knowledge

An employee delegated supervisory authority has been found to be a supervisor for purposes of determining whether that employee's actual or constructive knowledge may be imputed to his employer. *Georgia Electric Co.,* 5 BNA OSHC 1112, 115, *aff'd* 595 F.2d 309 (5th Cir. 1979). Cordova had supervisory authority over the two man crew. He was the person who directed the crew to enter the excavation and instructed them on what work to do. He identified himself as the lead man to Holland and testified when he is in charge he is a leader or foreman (Tr. V .1, p. 77, V. 2, p. 109). As the lead man or foreman, his knowledge is imputed to Bolton. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3rd Cir. 1994).

Bolton first asserts that neither Bolton nor Cordova had actual knowledge employees were exposed to a wall over 5 feet in height. It argues Cordova had no reason to anticipate employees would get close to the 8-foot high back wall. Therefore, until he returned to the site, Cordova did not have actual knowledge of the violations. The evidence fails to establish Cordova had "actual" knowledge of the height of trench walls "A" and "B." He took no measurements, relying instead on his eyeball estimate to determine, incorrectly, that the walls were 5 feet high, which he erroneously deemed "safe for us" (Tr. V. 2, p. 100, 135, 177). However, had Cordova acted with reasonable diligence he could have known that walls "A" and "B" were required to be sloped or otherwise protected. He knew employees would be working "at least" 3 feet from wall "C" which was 8 feet high (Tr. V. 2, p. 134).[8] Not only was it reasonably predictable these employees might have occasion to approach the walls even closer than 3 feet, but there is no evidence Cordova ever instructed the employees not to approach the walls. With the exercise of reasonable diligence, Cordova, as a competent person, should have known of the violative conditions. Constructive knowledge of Cordova is established.

Bolton also asserts the knowledge of its supervisor should not be imputed to it. Bolton asserts the Secretary adduced no evidence that Bolton had any reason, prior to the inspection, to believe Cordova would not be able to properly apply his training. As a result, Bolton argues, the Secretary has not shown it was foreseeable that Cordova would expose his crew to a cave-in hazard. *See Mountain States Tel. & Tel. Co.,* 623 F.2d 155, 158 (10th Cir. 1980) (government has

[8] Bolton estimated from the exhibits that the employees were working five and a half feet from wall "C" (Tr. V. 2, pp. 16-17).

the burden of proving preventability of employee misconduct).[9] Bolton's argument is not persuasive. In assessing reasonable diligence, the Commission considers "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." *General Motors, Corp., CPCV Oklahoma City Plant* 22 BNA OSHC 1019, 1030 (No. 91-2834E & 91-2950, 2007); *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001). In order to establish that the violation of a supervisor was not foreseeable and, therefore, not imputable, the employer must show that it adequately trained the employee with respect to the hazards associated with his work. This is especially true where, as here, the employer provided minimal on-site supervision. *Paul Betty d/b/a/ Betty Brothers*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981).

The record reveals Cordova was confused regarding hazards associated with excavation work. Although he had been trained as a competent person, Cordova had limited on-site experience (Tr. V. 2, pp. 109, 175). Until the OSHA inspection, he had not worked in any trenches and in only two excavations (Tr. V. 2, p. 113). His lack of experience was highlighted by his misconceptions of what constitutes a safe excavation. For example, he did not think the employees were in danger because they were not working near wall "C" and employees were only going to be in the excavation for a short time (Tr. V. 2, pp. 134, 171, 243). He did not know if rain or snow affects the stability of the soil (Tr. V. 2, p. 188). Although Cordova checked to make sure there was a proper means of ingress and egress, he took no measurements of the excavation (Tr. V. 2, pp. 125-126, 128, 158). Because the soil was hard and frozen, he concluded the excavation was safe (Tr. V. 2, p. 126-127, 132-133, 154-155). He did not conduct any manual tests of the soil to determine its type (Tr. V. 2, pp. 91, 154-155).

At the hearing, Myers explained "I don't think that he just understood the whole deal of the rules of the deal[sic]. Yes, they were –he was thinking they were going to be far enough away

[9] This matter arose in the 10th Circuit. Where the Secretary establishes that the violation is based on the actions of a supervisor, other circuits place the burden on the employer to establish, as part of an affirmative defense that the violation was unforeseeable. *E.g. Danis-Shook Joint Venture XXV v. Secretary of Labor,* 319 F.3d 805, 812 (6th Cir. 2003); *Modern Continental Const. Co., Inc. v. OSHRC,* 305 F.3d 43, 51 (1st Cir. 2002). The 10th Circuit, on the other hand, places the burden on the Secretary to show that there were feasible steps that the employer could have taken to prevent the violation. *Mountain States Tel. & Tel. Co.,* 623 F.2d at 158. Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit, even where it may differ from Commission precedent. *Kern Bros. Tree Service,* 18 BNA OSHC 2069, 2072 (No. 96-1719, 2000)

from the edge, but with that edge being that tall, I just would have sloped it" (Tr. V. 2, p. 244). Mr. Meyer's further testified that:

> Well, I think he got confused—my personal opinion is that he got confused with the trench and the excavation and they were going to be near—he didn't think they were going to be near the edge of the excavation. And they—they had their means of egress. And the soils were pretty—he thought the soils were pretty stable.
>
> Yeah. He—I think he just got confused with a little bit of everything. You know, the—he knew that the excavation, if it was wider than it was deep, you know, it depended on how tall it was. He knew if it was in the trench and it was over his head, if it was over 5 feet, that they shouldn't be in there.
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> He got confused, I think, because he had a little bit of both. And him thinking that they were going to be more to the middle of that excavation, he thought they were safe.

(Tr. V. 2, pp. 246-247).

Myers further testified Cordova "needed more experience and he needed somebody to—mentor him a little bit on—why—and just—but further grasp on all the rules and the—whys and how-tos" (Tr. V. 2, p. 269).

Owner Bolton also tried to explain Cordova's decision not to properly protect the employees in the excavation:

> Well, he—he had the basic knowledge. You know, he just didn't—just didn't apply it to the full range of what—what he had here. He had—there was a lot of different factors in this hole that he—he had him an excavation on one side. He had him a trench on another.
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> You know, it was a, you know, just a little complicated situation there, but you know, he—he did what he thought was right and he had his reasoning's behind it. He didn't just throw people down in there for—for no good reason.

(Tr. V. 2, p. 42). Owner Bolton then explained Cordova "didn't really catch the full scope of what was going on" (Tr. V. 2, p. 43).

Having entrusted Cordova with supervisory responsibility, it was incumbent upon Bolton to adequately train him with respect to hazards associated with his work. *Paul Betty d/b/a Betty Brothers,* 9 BNA OSHC at 1383. The evidence establishes that, despite his competent person training, Cordova lacked sufficient knowledge about excavation safety to carry out his duties as a competent person. There is no evidence Bolton ever inquired into Cordova's actual knowledge

and comprehension of proper excavation safety practices. An employer cannot fail to properly train and supervise its employees and then hide behind their lack of knowledge concerning dangerous working conditions. *A/C Electric Co. v.* OSHRC, 956 F.2d 530, 535 (6th Cir. 1991); *Danco Const. Co. v. OSHRC,* 586 F.2d 1243, 1247 (8th Cir. 1978). This lack of adequate training is sufficient to impute Cordova's actions to Bolton. *Pressure Concrete Corp.*, 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992). Knowledge is established. The Secretary has established a prima facie case.

Unpreventable Employee Misconduct Defense

Respondent asserts that any violation was the result of unpreventable employee misconduct. To establish the "unpreventable employee misconduct" defense, the employer must rebut the Secretary's showing of knowledge by proving: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *E.g., Precast Services, Inc.*, 17 BNA OSHC 1454, 1455, (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). To succeed in establishing this defense, the employer must demonstrate it adequately communicated its work rules to its employees. The primary method of communicating these rules is by adequately training its employees. As discussed above, the evidence demonstrates Bolton failed to adequately train Cordova to enable him to act as a competent person. Having failed to properly train its foreman, it cannot now assert that the failure of the foreman to follow its work rules was the result of unpreventable employee misconduct.

Additionally, the record reveals Cordova was not disciplined for violating Bolton's safety rules. Owner Bolton determined Cordova did not intentionally fail to provide proper protection for employees in the excavation, but made an error in judgment (Tr. V. 2, p. 43). Negligent behavior on behalf of a supervisor which results in risks to employees under his supervision is strong evidence of a lax safety program. *Brock v. L.E. Meyers,* 818 F.2d 1270, 1277 (6th Cir. 1987); *cert. denied*, 484 U.S. 989 (1987). The undersigned finds Bolton's policy toward safety enforcement was lax. This alone causes this affirmative defense to fail.

Willful Classification

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); *Georgia Electric Co.,* 595 F.2d 309, 318-19 (5th Cir. 1979); *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*., 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). The undersigned finds the Secretary has failed to prove willfulness for the reasons set forth below.

Central to the Secretary's assertion that the violations were willful is Holland's determination Bolton was in a rush to finish the job. In her opening statement, the Secretary asserted that by contractual agreement with the Southern Ute Tribe, all of Bolton's employees and equipment had to be removed from tribal land by December 22 to avoid interference with the elk and deer migrating season. The Secretary also asserts that because of weather delays and with the holidays approaching, employees were hurrying to get as much work done as possible by Dec. 22 (Tr. V. 1, p. 31). Holland testified he based his decision to recommend the citations be issued as willful, on the fact the walls were clearly over 5 feet high and because Bolton made a conscious decision not to provide any protective system for its employees because they were in a hurry (Tr. V. 1, p. 182).

Despite the Secretary's assertions, the evidence fails to establish the Candelleria worksite was on tribal land. The only evidence regarding this is Holland's testimony that both Myers and Cordova told him the site was located on land belonging to the Southern Ute tribe and they were required to remove all their equipment by December 22, 2010 (Tr. V. 1, pp. 67, 187). Holland never saw any signs to indicate he was either on tribal or private land (Tr. V. 1, p. 240). Further, Holland's notes do not reflect that either Myers or Cordova stated the site was on tribal land

(Tr. V. 1, p. 187, Exh. R-1). Both Myers and Cordova denied ever stating the Candelleria site was on tribal land (Tr. V. 2 pp. 141, 257). Significantly, a map of the area provides physical evidence supporting Bolton's assertion the Candelleria site was on private land (Tr. V. 1, p. 340, Ex. R-6). Cordova, Myers and owner Bolton each testified the Candelleria site was on private land (Tr. V. 2, p. 8, 141, 257). The evidence shows the cattle guard site was located on the border between private and tribal land, and that there was a nearby excavation site (which was not at issue in the inspection) which was on tribal land and which had to be vacated by December 22, not the Candelleria site as contended by the Secretary (Tr. V. 2, pp. 258, 263-264).

The only other justification for concluding that Bolton was in a hurry to finish work on the site was the approaching holiday season; employees would not return to work until January 3. Myers admitted they were trying to make up for time lost for bad weather, and they were trying to get as much work done as possible before the employees took their holiday break (Tr. V. 2, p. 252, 258). However, he stressed this was what businesses do, and denied they were in any bigger hurry on this job than they were on any other job he had ever been on (Tr. V. 2, 258). Myers also denied he told Holland work at the site had to be completed by December 22 (Tr. V. 2, pp. 251, 258). Owner Bolton testified there was no deadline requiring the work be finished by December 22, 2010 (Tr. V. 2, p. 10). He pointed out the employees were expected to return to work from the holidays on January 3, 2011, and work on the Petrox project was continuing at the time of the hearing (Tr. V. 2., p. 11, 15). This was confirmed by Cordova, who testified that, although they had to finish the job, they were in no big hurry to complete the project (Tr. V. 2, p. 142). Cordova also pointed out it took only fifteen - twenty minutes to bring the excavation to a proper slope (Tr. V. 2, p. 119). The evidence fails to substantiate Bolton was sacrificing safety for speed, as contended by the Secretary. Holland's testimony in this regard is discredited. While the undersigned finds he was testifying truthfully, the record is replete with instances where, due to the language barrier, forgetfulness, or simple misunderstanding, Holland's original observations were inaccurate. For example, Holland incorrectly believed Cordova was one of the two employees in the trench (Tr. V. 1, pp. 80, 215, 217); he erroneously believed the worksite to be on tribal land; he forgot he was on the site when the violation was abated (Tr. V. 1 pp. 163-164, 223, 225-227, V. 2, pp. 145, 252, Exh. R-10, pp. 4-5); and he

believed he was told there was a permit which was going to expire by December 22, when no such permit existed[10] (Tr. V. 1, pp. 184, 340).

Finally, the Secretary asserts the violation should be found willful because, by ordering employees into the excavation, Cordova ignored an obvious hazard and Bolton's own established safety procedures. The Secretary points out that Bolton's safety procedures require the competent person to evaluate and classify the soil type using at least one visual and one manual test (Exh. R-3, p.50). Cordova failed to conduct any manual tests of soil conditions (Tr. V. 1, p. 91). Also, Bolton's policy at the time encouraged employees to classify soil as Type C to take the guesswork out of soil classification (Tr. V. 1, pp. 326-327, Exh. R-3, p. 51). The safety manual also explained that the appropriate angle for sloping Type C soil is 1.5:1 (Exh. R-3, p. 51). Despite this guidance, Cordova took no steps to slope the excavation walls (Tr. V. 2, pp. 57-58). Also, contrary to both OSHA regulations and Bolton's own safety procedures, Cordova failed to provide a protective system, even though the trench was more than 5 feet deep. (Tr. V. 1, pp. 132, 155-156, V. 2 p. 91, Exh. R-3, p. 51). Finally, Bolton's safety manual requires that the competent person remain at the worksite at all times while employees are inside the excavation (Exh. R-3, p. 55). Nonetheless, Cordova left the worksite to retrieve tools after two employees entered the excavation (Tr. V. 2, pp. 98, 137).

Despite the Secretary's arguments, a preponderance of the evidence fails to establish Bolton acted with intentional disregard of OSHA requirements or plain indifference to employee safety. Disregard of a company rule does not automatically establish willful disregard of an OSHA requirement. *George Campbell Painting Corp.,* 18 BNA OSHC 1929 (No. 94-3121, 1999). The facts of this case do not establish that Cordova possessed a state of mind that, if he were informed of the standard, he would not care. Cordova's failure to take appropriate protective measures was not willful, but it was a mistake in judgment. *S.O Jennings Constr. Corp.,* 9 BNA OSHC 2055, 2057 (No. 79-0069, 1981)(ALJ). As discussed at length herein, Cordova, despite his competent person training, was inexperienced, uninformed and confused about how to protect employees working in anything other than a basic trench or excavation. When dealing with a trench intersecting an excavation, surrounded by three walls rather than the traditional two, he

[10] In his deposition, Holland testified that he was told that there was a permit that was going to expire on December 22, 2010 (Tr. V. 1, p. 184). However, he never saw a permit for the job and admitted that expiration of the permit was no longer an issue (Tr. V. 1, p. 184).

was not certain what needed to be done and thought the trench was safe. Accordingly, the undersigned finds that the Secretary failed to establish by a preponderance of the evidence that the violations were willful.

Serious Classification

Bolton asserts that the Secretary failed to prove that either of the violations was serious. 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 2201, 2214 (No. 87-2059, 1993).

One cubic yard of soil weighs up to 3000 pounds or more if wet (Tr. V. 1, pp. 73, 126). Had the excavation fully or partially collapsed when employees were inside, the result could have been fatal or resulted in broken bones, internal injuries, bleeding, and head injury (Tr. V. 1, pp. 126, 167). The Secretary has determined that "excavation work is one of the most hazardous types of work done in the construction industry [and] [t]he primary type of accident of concern in excavation-related work is [the] cave-in." *Mosser Construction*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010). The violations were serious.

Penalty

The Secretary proposed a combined penalty of $49,000 for what she alleged were willful violations. Having found that the violations are not willful, a substantial penalty reduction is required. The maximum penalty for a serious violation is $7,000. 29 U.S.C. §666(b), § 17(b) of the Act.

It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC at 1138 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). 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 (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 Construction Company*, 15 BNA OSHC at 2214. The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Id.*

The violation was of high gravity. The excavation was totally unprotected. It was near a road used by heavy equipment subjecting it to vibrations. The excavation was subject to freezing and thawing. Although Holland observed the employees in the excavation for five minutes, he stressed that even a 30-second exposure could lead to employees being caught in a cave-in (Tr. V. 1, pp. 167, 221). Had employees been caught in a cave-in, the result could have resulted in death or serious physical harm (Tr. V. 1, pp. 126, 167). Bolton is a small company with approximately 50 employees (Tr. V. 1, p. 168). It has no history of prior violations. Also, Bolton demonstrated good faith by immediately abating the hazard and instituting better training for its employees. Having considered the statutory factors, a penalty of $5,000 is appropriate for items 1a and 1b.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is ORDERED that:

1. Item 1a of Citation 1, alleging a willful violation of 29 C.F.R. § 1926.651(k)(2), is affirmed as a serious violation;
2. Item 1b of Citation 1, alleging a willful violation of 29 C.F.R. § 1926.652(a)(1), is affirmed as a serious violation;
3. A combined penalty of $5,000 is assessed for Citation 1, items 1a and 1b.

/s/ Sharon D. Calhoun
Sharon D. Calhoun
Judge

Dated: August 7, 2012
Atlanta, Georgia

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