UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. NORTHERN EXCAVATING CO., INC., Respondent.	DOCKET NO. 11-0638

Appearances:

Rachel L. Parson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Robert Lindberg, Owner, Pro Se, Northern Excavating Co., Inc., Jamestown, North Dakota
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This matter 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"). On August 3, 2010, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Northern Excavating Co., Inc. ("Respondent") worksite on the James Valley Grain Access Road in Oakes, North Dakota. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging two willful and two serious violations of the Act with total proposed penalties of $31,000.00. Respondent timely contested the Citation. A trial was held in Bismarck, North Dakota on November 15 and 16, 2011. The parties submitted post trial briefs.

Stipulations

At trial, the parties entered into the following stipulations:

1. Respondent employed nine to twelve employees at the time of the inspection.
2. The Commission has jurisdiction over this proceeding.
3. Respondent is in the business of trenching and excavation.
4. Respondent employed James Ova as a laborer at the worksite on August 23, 2010.
5. Ed Stickel Jr. was Respondent's foreman at the worksite on August 23, 2010.
6. Jarid McGough was Respondent's project superintendent at the worksite on August 23, 2010.
7. The parties stipulated to the admission of Exhibits C-15 through C-23.

(Tr. 22–25, 332)

Jurisdiction

Respondent does not dispute it was an "employer" insofar as it is engaged in business and has employees; however, Respondent disputes that it is engaged in a business affecting commerce.

Section 3(5) of the Act defines an employer as "a person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5). Section 3(3) of the Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof." 29 U.S.C. § 652(3).

"By enacting the OSH Act, Congress intended to exercise the full extent of the authority granted by the Commerce Clause." *Chao v. OSHRC*, 401 F.3d 355, 361–362 (5th Cir. 2005)

(citing *Austin Road Company v. OSHRC*, 683 F.2d 905, 907 (5th Cir. 1982)). "Accordingly, an employer comes under aegis of the [OSH] Act by merely affecting commerce; it is not necessary that the employer be engaged directly in interstate commerce." *Id.* The government does not need to show that individual instances of regulated activity substantially affect commerce to pass constitutional muster; rather, the Supreme Court has noted that if a federal statute regulates an activity that, in the aggregate, has a substantial effect on interstate commerce, then "the *de minimis* character of individual instances arising under that statute is of no consequence." *United States v. Lopez*, 514 U.S. 549, 558 (1995); *see also Slingluff v OSHRC*, 425 F.3d 861, 867 (10th Cir. 2005). Thus, even if the contribution of a single business to commerce is small and its activities and purchases are purely local, the combination of multiple, similarly situated businesses clearly affects interstate commerce. *U.S. v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002) (citing *Wickard v. Filburn*, 317 U.S. 111, 127–128 (1942)); *see also Clarence M. Jones, d/b/a C. Jones Co.*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). Complainant bears the burden of establishing this threshold jurisdictional fact. *Chao*, 401 F.3d at 361–362.

It is undisputed that Respondent was engaged in excavation at the time of the inspection. Excavation qualifies as "construction work" which is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1926.32(g). The construction industry as a whole affects commerce, and even small employers within that industry are engaged in commerce. *Slingluff v. OSHRC*, 425 F.3d at 866–67; *Clarence M. Jones, d/b/a C. Jones Co.*, 11 BNA OSHC at 1531. Furthermore, the record establishes that Respondent has purchased and utilizes: (i) telephones; (ii) cell phones; (iii) fax machines, (iv) ford trucks; (v) diesel fuel refined outside of North Dakota; and (v) trench shields that are manufactured outside North Dakota. (Tr. 119–120, 399–401). Respondent's purchase and use of these

products supports a finding that it is engaged in commerce for the purposes of establishing jurisdiction under the Act. *See Clarence M. Jones d/b/a C. Jones Co.*, 11 BNA OSHC at 1531. Based on the foregoing, the Court finds Complainant has met her burden of establishing that Respondent was engaged in commerce within the meaning of Sections 3(3) and 3(5) of the Act.

Background Facts

Six witnesses testified at trial: (1) Scott Overson, OSHA Compliance Safety and Health Officer ("CO"); (2) Travis Clark, the OSHA Assistant Area Director in the Bismarck, North Dakota office; (3) Tom Deutscher, the OSHA Area Director in the Bismarck, North Dakota office; (4) James Ova, Respondent's employee; (5) Edwin ("Ed") Stickel, Jr., Respondent's foreman; and (6) Jarid McGough, Respondent's superintendent and safety director. (Tr. 28, 165, 217, 274, 334, 373). Based on their testimony and discussion of evidentiary exhibits, the Court makes the following findings.

On August 3, 2010, CO Scott Overson and Assistant Area Director Travis Clark (collectively referred to as "Inspectors") conducted an inspection of Respondent's worksite. The inspection was initiated in response to an anonymous complaint received by OSHA on July 30, 2010 which alleged that four to nine of Respondent's employees were not provided with proper protection from cave-ins and falling object hazards while working in trenches and excavations. (Tr. 33–34, C-2). The anonymous complaint also stated that, on July 28, 2010, an employee suffered a fractured leg when he was struck by falling dirt while working in a trench. (Tr. 35, C-2).[1]

Upon arriving at Respondent's worksite, the Inspectors observed a number of employees working at the worksite. (Tr. 36). The Inspectors approached and talked with an employee

1. The inspection revealed that the employee was properly protected by a trench box when a trench wall caved-in and fell into the trench and onto the employee, breaking his leg. (Tr. 111, 180, 391). No citation was issued as a result of this accident.

working near the parking lot of James Valley Grain. (Tr. 37). The employee called over Scot Rhode, who was identified as a foreman. Rhode informed the Inspectors that Jarid McGough was the project superintendent and that he was working at another part of the worksite. (Tr. 37). The first trench ("T-1"), which was next to the James Valley Grain parking lot, had one employee working in it. (Tr. 37). According to CO Overson, the trench appeared "adequate" because the employee was protected by a trench box. (Tr. 37). No citations were issued as it related to work activities at T-1.

After the Inspectors left T-1 they walked over to a second trench near the scale house ("T-2") in order to speak with McGough. As they proceeded towards T-2, all of Respondent's employees left T-2 and went to the job trailer. The Inspectors were told that employees had been instructed by their supervisor that when OSHA is present, they should stop work and go to the trailer. (Tr. 38, 385). The Inspectors were not specifically denied entry or asked to produce a warrant. When the Inspectors asked McGough why employees went to the trailer, he informed them that they were instructed to do so to enable management to deal with OSHA. (Tr. 39). In response to CSHO Overson stating that such actions could be construed as a denial of entry, Mr. McGough stated that their actions should not be interpreted as such. (Tr. 39, 385).

T-2 was the trench where the July 28, 2010 accident referred to in the anonymous complaint had occurred. (Tr. 41). The Inspectors discussed the incident with McGough and Ed Stickel, who told them that the injured employee was working inside a double-stack trench box and that material had sloughed off and rolled underneath the spreaders on the trench box. (Tr. 38). At the time of the inspection, there was no work taking place in T-2. No citations were issued as it related to work activities at T-2. (Tr. 39).

The Inspectors proceeded to a third excavation ("T-3") by the access road. (Tr. 40). The

Inspectors observed a large excavation with a concrete manhole section in the center. (Tr. 46). The excavation varied in depth from approximately 7.5 to 12 feet deep and was 13.5 feet wide. (Tr. 54, 85–87, C-3). One side of the excavation was sloped and benched while the north side was benched but was otherwise fairly vertical. (Tr. 58, 251, C-6, C-7). The excavation was dug in Type C soil. (Tr. 94–95, 99, 224, 294–295, 397).

At the time of the inspection, no employee was working in T-3; however, the Inspectors observed numerous footprints at the bottom of the excavation. (Tr. 58–59). A packer machine was at the bottom of the T-3, and there were numerous packer marks along the east side of the manhole section. (Tr. 57, 64). The inspection revealed that at least two employees had been working in T-3: laborer James Ova and foreman Ed Stickel (Tr. 75–76, 290). No trench box or trench shields were in use, although there were several trench boxes at the worksite. (Tr. 62, 179). No ladder was observed in T-3. (Tr. 62, 265). Instead, employees exited T-3 by climbing up a sloped embankment. (Tr. 63, 106, 170, 287, C-9). As a result of the inspection of T-3, Complainant issued Respondent two citations, each of which alleged several violations of the Act.

Applicable Law

To establish a violation of an OSHA standard, Complainant 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).

A violation is "serious" if there was a substantial probability that death or serious

physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would occur; she need only show that if an accident occurred, serious physical harm would result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *See, e.g., Mosser Construction*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072, 2087 (No. 88-0523, 1993).

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 Constr., Inc*., 357 F.3d 70, 74 (D.C. Cir. 2004). Complainant must show that Respondent had a "heightened awareness" of the illegality of its conduct. *Valdak*, 17 BNA OSHC at 1136. Heightened awareness is more than simple knowledge of the conditions constituting the alleged violation; such evidence is already necessary to establish the basic violation. *AJP Constr. Co.*, 357 F.3d at 75. The Commission has found heightened awareness "where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that the violative conditions exist." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2209 (No. 87-2059, 1993); *see also E.L. Davis Contracting.*, 16 BNA OSHC 2046, 2051–52 (No. 92-35, 1994) (employer allowed three employees to work in an unprotected excavation despite prior citations and a city inspector's warning). Complainant must show that Respondent was actually aware of the unlawfulness of its action or that it "possessed a state of

mind such that if it were informed of the standards, it would not care." *Propellex Corp*, 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999).

Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> *29 C.F.R. §1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:*
>
> *(a) For the employee installing a collar on a manhole section in approximately an eleven foot deep unprotected trench, located along the access road to James Valley Grain in Oakes, North Dakota.*

The cited standard provides:

> *29 C.F.R. §1926.21(b)(2): The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.*

It is undisputed that James Ova worked in T-3. Therefore, under the standard, Respondent had an obligation to train Mr. Ova in the recognition and avoidance of hazards associated with working in an excavation.

To establish noncompliance with a training standard, Complainant must show the employer failed to provide instructions that a reasonably prudent employer would have given under the same circumstances. *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2126 (No. 96-0606, 2000) (citations omitted). "If the employer rebuts the allegation of a training violation 'by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided.'" *Id.* (citing *American Sterilizer Co.*, 18 BNA OSHC 1082, 1086 (No. 91-2494, 1997)).

Complainant asserts that none of the training records produced by Respondent listed Mr.

Ova as being present on the dates that training related to trenching hazards was conducted. (Tr. 187, 375–376). Complainant further argues that Ova attended only two toolbox meetings: August 2, 2010 and July 27, 2010.[2] (Tr. 194). The listed topic for the meeting on August 2, 2010 was "lock-out/tag-out," and the topic on July 27, 2010 was "hazardous materials." (Tr. 186–187, C-24).

Respondent contends that Ova had been trained with respect to trench construction and the associated hazards. Specifically, Ova stated, "Yeah, we had like a few short safety meetings and little talks about what if happens stuff like that. But no real long class. But, yeah, we did have some, a little training". (Tr. 183). Ova also testified that Respondent "talked a little bit about trenching at the shop, but no safety meetings. Like I said, the sign-in wasn't about trench safety, but we could have had some just generalization of trenching at that shop meeting we had." (Tr. 209). Although the weekly toolbox meetings had a primary topic, other topics were also discussed. (Tr. 196). Respondent's superintendent, Jarid McGough, testified that "there is always trenching safety involved in the discussion, just for a refresher to everybody's mind every Monday morning." (Tr. 376). In addition to more formalized training, Ova stated that there was a supervisor who was "teaching me some stuff" while he worked in the trench. (Tr. 175).

The Court finds the testimony of both Mr. Ova and Mr. McGough, on the issue of training, to be credible, consistent, and uncontradicted. Based on the foregoing, the Court finds that Respondent provided training to Ova on trench safety.

As noted above, where Respondent rebuts the allegation of a training violation by showing that it has provided the type of training at issue, the burden shifts to Complainant to

2. Respondent held safety meetings that specifically concerned trenching safety on May 3, 2010 and general safety matters on May 10 and 17, 2010. (Ex. C-24). Mr. Ova began working for Respondent in June 2010. (Tr. 192). Another meeting on trench safety was held after the inspection on August 9, 2010. Mr. Ova did not attend that meeting. (Tr. 185).

show some deficiency in the training provided. *N & N Contractors, Inc.*, 18 BNA OSHC at 2126. Complainant's contends that the training Ova received was insufficient because: (i) the training records showed that Ova attended only two safety meetings, (ii) none of the listed topics for the training Ova attended specifically related to hazards associated with trench safety, and (iii) Ova never received any handouts related to trench safety or took any test related to either general or trenching safety. (Tr. 183, 209). The Court finds, however, that the credible, uncontradicted testimony of Ova and McGough on the issue of training establishes that: (i) the listed topics for the safety meetings indicated only the primary subject addressed; and (ii) safety training as it related to working in excavations was always discussed at these meetings. In addition, while Ova does not recall ever receiving any written training materials (Tr. 183, 197) McGough testified that he provided training written materials at the Spring training meeting and at the Monday morning sessions. (R-3, Tr. 375) The Complainant presented no evidence to suggest the training Mr. Ova received was insufficient to provide him with the knowledge to recognize and avoid unsafe conditions while performing trenching and excavation work. Finally, there is no regulatory requirement for training to be effective that a test must be administered. Therefore, Complainant has failed to carry her burden to establish a deficiency in the training provided to Ova. Citation 1, Item 1 will be VACATED.

Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> *29 C.F.R. §1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees:*
>
> *(a) For the employees engaged in trenching activities in approximately an eleven foot deep unprotected trench, located along the access road to James Valley Grain in Oakes, North Dakota.*

The cited standard provides:

> *29 C.F.R. §1926.651(c)(2): Means of egress from trench excavation A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.*

The T-3 excavation was approximately 7.5 to 12 feet deep and was 13.5 feet wide. (Tr. 54, 84, 85–87, C-3). No evidence was presented establishing the length of T-3. Although there were ladders at the worksite, none were placed in T-3. (Tr. 107, 131, 170, 179, 182, 231, 265, C-7). Rather, Stickel and Ova climbed up a slope in order to exit T-3. (Tr. 63, 77, 233, C-9). Ova testified that: (i) to enter and exit T-3, he would use the bench that was cut into the excavation and then shimmy down the side along a section resembling a slide; and (ii) he was able to both enter and exit the trench while walking "regularly." (Tr. 170–71, C-5, C-7).

CSHO Overson testified that a slope can be an adequate means of egress. (Tr. 106). To satisfy the standard, employees must be able to enter and exit the excavation without restriction or obstruction. (Tr. 106); *see C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753 (No. 93-3177, 1996). CSHO Overson determined the slope used by the employees did not constitute an adequate means of egress because it was too steep. (Tr. 106). In support of Overson's determination, Complainant directs the Court to Ova's testimony that he was lowered and removed from the trench in the bucket of a backhoe and that he did not feel that the process was safe. (Tr. 181–82).[3] However, Ova was referring to the trench where the employee was injured on July 28, 2010 (T-2), which is not the subject of this citation. (Tr. 180).

A ladder is not the only way to satisfy the requirements of the standard. The standard specifically states that "[a] stairway, ladder, *ramp or other safe means of egress* shall be located

3. Ova also testified that, due to the nature of that particular trench, getting in and out of that trench from inside a bucket was the only logical way to proceed. (Tr. 182)

in trench excavations . . . ." 29 C.F.R. § 1926.651(c)(2) (emphasis added). A "ramp" is defined as "an inclined walking or working surface that is used to gain access to one point from another, and is constructed from earth or from structural materials such as steel or wood." *Id.* § 1926.650(b). Whether a particular means of egress complies with the standard is measured by whether the facts show that the means of egress provided is reasonably safe, given the particular circumstances existing at the site of the trench. *Cf. C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753; *see also Lowe Construction Co.*, 13 BNA OSHC 2182, 2185 (No. 85-1388, 1989).

In *C.J. Hughes*, the respondent left a slope at the end of a trench in order to enter and exit. *C.J. Hughes*, 17 BNA OSHC 1753. The compliance officer in that case asserted that the slope of the ramp was too steep; however, he admitted that he had neither measured the ramp nor attempted to use it himself. *Id.* The respondent's foreman, however, testified that he was able to enter and exit the trench without difficulty and that he was able to do so in an upright position. *Id.* The Commission found that the firsthand knowledge of the individuals who utilized the ramp was far more persuasive than the speculative testimony of the compliance officer. *Id.* Ultimately, the Commission held that a ramp that allows an individual to walk unobstructed into and out of a trench constitutes a "safe means of egress" according to the standard. *Id.*

Although CO Overson asserted that the slope was too steep to provide an acceptable means of egress, he had no firsthand knowledge of the difficulty of walking up the slope nor did he measure or testify as to the degree of the slope. Both Ova and Stickel, who actually used the slope to exit the excavation, testified that they were able to exit while walking "regularly" up the slope. Complainant failed to present any compelling evidence to the contrary. The Court finds Ova's and Stickel's testimony on how they entered the excavation to be credible and gives it great weight. At the time of the trial, Ova was no longer working for Respondent and, therefore,

had no reason to be dishonest in his testimony to protect his employer or his job. (Tr. 184); *C.J. Hughes Constr. Co.*, 17 BNA OSHC 1753. The Court finds that Complainant failed to prove a violation of the standard.[4] Accordingly, Citation 1, Item 2 will be VACATED.

Citation 2, Item 1(a)

Complainant alleged a willful violation of the Act in Citation 2, Item 1(a) as follows:

> *29 C.F.R. §1926.651(k)(2): Where the competent person found evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees were not removed from the hazardous area until the necessary precautions had been taken to ensure their safety.*
>
> *(a) For the employees engaged in trenching activities in approximately an eleven foot deep unprotected trench, located along the access road to James Valley Grain in Oakes, North Dakota.*

The cited standard provides:

> *29 C.F.R. §1926.651(k)(2): Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.*

Citation 2, Item 1(b)[5]

Complainant alleged a willful violation of the Act in Citation 2, Item 1(b) as follows:

> *29 C.F.R. §1926.652(a)(1): Each employee in an excavation was not*

4. In addition to the foregoing, the Court would also note that it was not entirely clear as to whether T-3 could reasonably be classified as a trench excavation. The regulations define a trench excavation as "a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet.". 29 C.F.R. § 1926.650(b). The record only shows that the trench was approximately 7.5 to 12 feet deep and was approximately 13.5 feet wide. Not only is the depth of this particular excavation less than its width, there is no evidence in the record that the employees had access to any part of the excavation that would require more than 25 feet of lateral travel to reach the side. Accordingly, the Court will refer to T-3 as an excavation.

5. The Court has combined its analysis of these two items to avoid a duplicative recitation of the facts, which are applicable to both items.

> *protected from cave-in by an adequate protective system designed in accordance with 29 CFR 1926.652(b) or (c):*
>
> *(a) For the employees engaged in trenching activities in approximately an eleven foot deep trench, located along the access road to James Valley Grain in Oakes, North Dakota.*

The cited standard provides:

> *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.*

Both Stickel and McGough successfully completed competent person training and were deemed "competent persons" by Respondent. (Tr. 99, 110, 221, 227–28, 250–51, 376, C-27). On the day of the inspection, Stickel was the foreman in charge of T-3 and directed the work of Ova. (Tr. 169, 219). McGough, the project superintendent, rotated between various locations on the project worksite. (Tr. 176–177). McGough was seen standing by T-3 with a group of employees when the Inspectors arrived. (Tr. 45, 392). McGough testified that he knew the crew at T-3 would be digging using hand shovels to locate the utility line. (Tr. 388–389).

Stickel completed a daily inspection report at 8:00 a.m. on August 3, 2010. (Tr. 223, Ex. C-26). The report listed the depth of T-3 as 9.5 feet. (Tr. 223, C-26). That said, neither Stickel nor McGough measured the excavation on August 3, 2010; instead, they relied on visual estimates. (Tr. 260–262, 390, 404). As noted earlier, the Inspectors determined that the depth of T-3 was approximately 7.5 to 12 feet deep and 13.5 feet wide. (Tr. 85–87, C-3). Stickel admitted that no shielding, shoring, or trench boxes had been placed in T-3 when employees

were working in the excavation on August 3, 2010, even though trench boxes and Speed Shore[6] shielding were available at the worksite. (Tr. 62, 136, 179, 225, 231, 268–270, 389). Stickel admitted that there had been a cave-in at another trench on this same worksite. (Tr. 237).

The Inspectors conducted a visual assessment and concluded that the excavation was dug in Type C soil. (Tr. 94–95, 99, 224, 294–295, 397). This conclusion was confirmed by subsequent lab tests. (Tr. 94–95, C-13). During the inspection, Stickel agreed that the soil was Type C. (Tr. 223–24, 295). Type C soil is granular and sandy and is considered the lowest (i.e. least cohesive) classification. (Tr. 84).

Respondent cut benches into the excavation. (Tr. 133, 142, 159, 210, 233, 251, C-5). One wall of the excavation was sloped, but the north wall was nearly vertical and had benches cut into it. (Tr. 58, 88, C-7). The north wall was approximately 10.5 feet high and had a bench cut into it that was approximately 5 feet high. (Tr. 133). The Inspectors testified that benching is not allowed in Type C soil because the soil is not sufficiently cohesive to support a bench. (Tr. 88, 295). Due to the instability of Type C soil, a bench has the potential to collapse or give way. (Tr. 160).

Excavations dug in Type C soil are required to be sloped at a ratio of 1.5 to 1, which means that for each foot of depth, the excavation must be sloped back 1.5 feet from the vertical.[7] (Tr. 86, 261). Therefore, at a minimum depth of 7.5 feet, the excavation should have been at least 22.5 feet wide.[8] (Tr. 87). On the side where Stickel was working, the excavation was approximately 12 feet deep. (Tr. 90). Although this portion of the excavation had been sloped, the CO estimated that the width was approximately 8 feet. In order to comply with the 1.5 to 1

[6] Speed Shore is a brand name for a shoring product.
7. Stickel admitted that he was aware of the 1.5:1 requirement for Type C soil. (Tr. 261).
8. This does not include the width of the bottom of the excavation, which would normally be added to the requisite width of a properly sloped excavation. (Tr. 87).

ratio, the CO testified that the width at this location should have been 18 feet. (Tr. 90).

Large tractor trailers, flatbed trucks and pickups regularly traveled on the access road that ran past T-3. (Tr. 64–65, 302, C-11). One employee told the CO that approximately 150 trucks went by each day including large tractor trailers. (Tr. 64–65). Although the CO could not confirm that estimate, he noted that several trucks passed by during the course of the inspection. (Tr. 65). Vibrations from these trucks can cause fissure lines and create the potential for a cave-in. (Tr. 79). With the larger trucks, such as the tractor-trailers observed by the CO, the vibrations increase and more weight is placed on the subsoil. (Tr. 65, 78–79). Dirt and gravel roads (like the access road in question) increase the hazard of cave-in because they cause greater vibration. (Tr. 302). In addition to the already loose and improperly sloped Type C soil in T-3, a spoil pile was located on the south side of the excavation that had sloughed into the excavation and fell next to the manhole. (Tr. 78–79, 293, C-8).

Neither the CO nor the Assistant Area Director observed any employees in T-3. (Tr. 136, 140). However, footprints were observed on the floor of the excavation, which indicated employees had been inside the excavation. (Tr. 46, 59, 75–76, C-8, C-9, C-10, C-12). Some footprints were located around the manhole while others were scattered near a pink stake. (Tr. 58, 286–289, C-7). The pink stake was placed in the excavation at a depth of seven feet ten inches. (Tr. 54, 85, 299, C-3). Stickel and Ova both admitted that they were in the excavation and that they made the footprints. (Tr. 75–76, 137, 190, 266). Ova testified that there was no protection in the excavation during the time he was working in the excavation. (Tr. 214).

Both Ova and Stickel testified that they were digging with shovels near the pink stake seen in Exhibit C-3. (Tr. 137, 174–175, 253, C-3, C-9). They were trying to locate a buried utility line. (Tr. 138, 168, 229, 253, C-4). The task started above ground, and they chipped their

way into the excavation trying to uncover the line. (Tr. 175). To accomplish this task, both Ova and Stickel estimated that they descended approximately 4-5 feet into the excavation. (Tr. 198, 231). The utility line was found at a depth of 5.5 feet. (Tr. 254). Ova testified that they began working in the excavation several hours before noon and that they spent several hours uncovering the utility line. (Tr. 174).

Stickel testified that he went deeper into the excavation by the manhole to remove a plug to facilitate the laying of pipe to the west. (Tr. 229). Stickel estimated that the manhole was 11.5 feet deep. (Tr. 260). Ova testified that he also went into the excavation to place a collar on the manhole but that the task only required him to be in the excavation for about one minute. (Tr. 172, C-6).

Discussion

Does the Standard Apply and was There a Failure to Comply

Citation 2, Item 1a

To establish a violation of 29 C.F.R. § 1926.651(k)(2), Complainant must establish that "the competent person found evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions." A "competent person" has to be knowledgeable about trenching and excavation requirements and capable of identifying hazards and how to correct them. 29 C.F.R. § 1926.650(b). Typically, the "competent person" is a supervisor and must have the authority to take prompt corrective action and stop activity within the excavation. *Id.* A competent person has the duty to remove an employee from an excavation or trench if he detects a hazardous condition. *Id.*

The excavation was neither properly sloped nor equipped with any safety devices such as

trench boxes or shields. Respondent constructed benches in the excavation; however, since the excavation was dug in Type C soil, these benches had the potential to collapse. Further, the evidence establishes that soil was sloughing off the spoil pile into the excavation. Large trucks regularly drove past the excavation on the adjacent access road, which subjected the excavation to vibration and exposed the workers to an increased hazard of a cave-in. Additionally, there had been a cave-in at another trench on the same worksite. (Tr. 237). The Court finds there is sufficient evidence to establish that a "competent person" would conclude that T-3 exhibited the potential for a cave-in.

Both Foreman Stickel and Superintendent McGough were designated "competent persons" with authority to take action to correct any hazards in the excavation. Nonetheless, neither Stickel nor Ova were removed to protect them from the hazard of a cave-in. When asked why he did not exercise his discretion to remove employees from the excavation, Stickel replied:

> When you walk up to a trench and you've got walls that are caving in, a lot of water down there that's unsafe, and depends on how deep it is, if it's benched or not, that's what I make a decision on. And the day—that day, why I did not is because it was 20 feet wide. It was benched on both sides. It was sloped on one side of it; it was benched good on the other side.

(Tr. 250–251). Stickel's criteria for employee removal are seriously deficient. The inadequacy of his criteria is highlighted by the failure of Stickel to address the hazards associated with the excavation. Soil was sloughing into the excavation. The excavation was subject to vibrations from heavy truck traffic on the adjacent road. Stickel seriously overestimated the width, which resulted in a slope that was approximately eight feet shorter than was required. Respondent also relied on benching, even though he was fully aware that benching is not allowed in Type C soil. (Tr. 261). Both Stickel and McGough, as Respondent's designated competent persons, should

have recognized that the excavation presented clear evidence of a situation that could result in a possible cave-in. Employers cannot take an ostrich-like "head in the sand" approach to avoid their safety responsibility. *See U.S. v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998). Complainant has established that 29 C.F.R. § 1926.651(k)(2) applies and was violated.

Citation 2, Item 1b

To establish that 29 C.F.R. § 1926.652(a)(1) applied to the T-3, Complainant must show that employees were working in an excavation more than five feet deep, unless the excavation was dug in stable rock. The depth of T-3 ranged from 7 feet 10 inches by the pink stake to approximately 12 feet deep by the manhole. It was dug in Type C soil. Therefore, 29 C.F.R. § 1926.652(a)(1) applies.

Secondly, 29 C.F.R. § 1926.652(a)(1) speaks of the depth of the excavation, not the position of the employees in it. The following discussion of the cited standard's requirements is instructive:

> 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 imperilled [sic] work force."

P. Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 109 (1st Cir. 1997) (citing *Ford Dev. Corp*., 15 BNA OSHC 2003, 2011, *aff'd*, 16 F.3d 1219 (6th Cir. 1994)). Merely because one of the employees may have been working at a depth that is less than the five feet indicated in the standard does not absolve Respondent of liability. The requirements of the standard are directed at the excavation itself, which was clearly deeper than five feet. *See Id.*; *see also* 29 C.F.R. § 1926.652(a)(1). Furthermore, both Ova and Stickel admitted that they had worked in the

excavation at depths greater than five feet. The evidence establishes that employees were working in the excavation without any form of shoring, sloping, or protective equipment to protect them in the event of a cave-in.

Respondent asserts that the excavation met OSHA requirements because it was benched on both sides and sloped on one side. (Tr. 251, 254, C-7). That contention is without merit. As noted, benching is not allowed as a protective measure in excavations dug in Type C soil. Indeed, this prohibition was acknowledged by Stickel at trial. (Tr. 261). Also, even assuming, *arguendo*, that one side of the excavation was sloped to the proper angle of repose, which is not supported by the record, Respondent's contention that this would sufficiently protect employees in the excavation is unpersuasive. The standard clearly requires that all sides of an excavation must be properly sloped or otherwise protected against cave-in. Complainant has established that 29 C.F.R. § 1926.652(a)(1) applies and was violated.

Exposure

Based on the foregoing, Respondent had a duty to either protect employees working in the excavation with appropriate protection against cave-in (Citation 2, Item 1(b)) or to remove the employees from the trench until the necessary precautions were taken (Citation 2, Item 1(a)). Complainant must also establish that Respondent's employees were exposed to the violative condition.

Respondent asserts that neither employee worked at the bottom of the excavation. Respondent asserts that Ova worked only on the benched area of the excavation and never worked deeper than 2–4 feet into the excavation. Similarly, it contends that Mr. Stickel only entered the excavation from the access road on a properly sloped area that was well within the guidelines of OSHA standards. Finally, Respondent argues that during Stickel's search for the

utility line he only worked at a depth of approximately 4.5 feet.

The Court finds Respondent's arguments unpersuasive. Although the Inspectors observed and photographed footprints at a depth of 4 feet 3 inches, other footprints were observed at a depth of 7 feet 10 inches, including footprints seen by a nearly vertical wall. (Tr. 58–59, C-8, C-9, C-10, C-12). Still other footprints were seen around the manhole which was 11.5 feet deep. (Tr. 260, 286, C-5, C-6). When the Inspectors pointed out these footprints to Ova and Stickel, both men confirmed that the footprints belonged to them. (Tr. 75–76, 190–91, 237, 252, 266). Ova testified that, as he was digging in the excavation by the pink stake, his head was even with the top of the excavation, which he estimated to be approximately 6 feet deep. (Tr. 206–207). Ova also testified he went to the bottom of the excavation to place a collar on the manhole. (Tr. 171–72). Stickel testified that he worked at the manhole to remove a cap. (Tr. 232, 252). In addition to the footprints, the Inspectors observed employee tools by the manhole, which is a strong indication that employees were working in that area.

"[I]n order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Products*, 18 BNA OSHC 1072, 1073–74 (No. 93-1853, 1997) (citing *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976)). Regardless of how far the employees descended into the excavation, Complainant established employee exposure for both Citation 2, Item 1(a) and Citation 2, Item 1(b). Stickel and Ova both worked inside an excavation greater than five feet in depth that exhibited signs of a potential cave-in, yet they were not provided with adequate shoring, sloping or other protective measures. Therefore, Ova and Stickel were exposed to the violative conditions each time they worked inside the unprotected excavation.

Knowledge

Finally, to establish a violation, Complainant must demonstrate that Respondent 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 at 2138. Stickel was not only a designated "competent person", but also a foreman at the site. Similarly, McGough was both a "competent person" and the superintendent at the site. The actual or constructive knowledge of the employer's foreman or supervisor is generally imputed to the employer. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994). Not only were Stickel and McGough aware of the conditions at T-3, Stickel exposed himself to the condition by working in the excavation without proper protection from cave-in. Accordingly, the knowledge of Stickel and McGough is properly imputed to Respondent. Complainant established Respondent's knowledge for both Citation 2, Item 1(a) and Citation 2, Item 1(b).

Serious Physical Harm or Death

Complainant 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 at 1046. A cubic yard of soil can weigh 3,000 pounds. (Tr. 79). Accordingly, falling soil from a trench collapse can cause crushing injuries, broken bones, and even death. (Tr. 80). Indeed, the inspection was initiated after an employee, working in a protective trench box at another trench, sustained a broken leg simply from dirt that rolled into the end of the trench box. (Tr. 180–181). Under Section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious if, in the event of an accident, the result would be death or serious physical harm. Beverly Enterprises, Inc., 19 BNA

OSHC 1161, 1188 (No. 91-3144, 2000) (consolidated). The Court finds the violations charged in Citation 2 could result in serious physical harm or death.

Willfulness

In support of her assertion that Citation 2, Items 1(a) and 1(b) were willful, Complainant presented evidence that Respondent has been cited for multiple violations of the trenching/excavation standards, including several willful violations that have become final orders of the Commission. Since 1997, Respondent has been cited for violations of 29 C.F.R. § 1926.652(a)(1) seven times, four of which were willful. (Tr. 340, 346). These include:

(1) A citation issued in September 2007, which was settled as willful in November 2008. (C-15, C-16)

(2) A citation issued in November 2005, which was settled as willful in June 2006. (C-18)

(3) A citation issued in April 2002, which was informally settled. (C-14, C-19)

(4) A citation issued in December 1997 that was not contested. (C-14, C-20).

Similarly, Respondent was issued a citation for a willful violation of 29 C.F.R. § 1926.651(k)(2) in April 2002 that was informally settled. (C-14, C-19).

Prior violations for the same or similar standards may, by themselves, be sufficient to establish a repeat violation, but not necessarily a willful violation. *Hartford Roofing Co.*, 17 BNA OSHC 1361, 1363 (No. 92-3855, 1995). "To prevent the distinction between repeated and willful violations from being blurred, there must be other evidence to support a finding of willfulness." *Id.* (citing *Beta Constr.*, 16 BNA OSHC 1435, 1445 (No. 91-102, 1993)). The Court finds that the record contains such evidence.

First, the inspection was initiated, in part, because an employee working in a trench box

suffered a broken leg when a trench caved in and he was struck by falling dirt. (Tr. 180). Thus, there existed evidence that at least one other trench or excavation at the worksite had experienced cave-ins.[9] (Tr. 237). This event should have placed the Respondent on heightened alert that the soil at the worksite was prone to cave-ins and protection was required.

Second, notwithstanding its violation history, Respondent completely failed to recognize very clear hazards that were present at T-3. These hazards include, but are not limited to: (1) the excavation was insufficiently sloped in light of the fact that it was dug in Type C soil; (2) a spoil pile was sitting at the edge of the excavation and was sloughing into the bottom; (3) the excavation was benched despite being dug in soil that was inadequate to support benching; and (4) the excavation was adjacent to a road that was heavily traveled by large trucks, which increased the likelihood of a cave-in. These conditions were clearly visible and should have provided a heightened awareness to a "competent person" that the excavation presented dangerous conditions that needed to be remedied before employees entered the excavation.

Third, both Stickel and McGough, as well as several others, were qualified as "competent persons" at the worksite and had authority to remove employees from hazardous excavations and order abatement of the hazardous conditions before employees were allowed to reenter. Indeed, Stickel testified that when he gets to a jobsite, it is his responsibility to make sure that the excavation is safe for employees to work in. (Tr. 221). Yet, in spite of all the evidence to the contrary, Stickel testified that, in his view, the excavation was safe.[10] (Tr. 251,

9. Stickel testified that the soil conditions at the other trenches were different, and that they were not composed of the same Type C soil. (Tr. 237). There is no evidence regarding the classification of the soil at these other trenches. The Court notes that the soil at the cited trench was Type C.

[10] To negate willfulness, the employer's good faith efforts or belief must be objectively reasonable under the circumstances. *Caterpillar Inc*., 17 BNA OSHC 1731, 1733 (No. 93-373, 1996 *aff'd* 112 F.2d 437 (7th Cir. 1997); *Aviation Constructors, Inc*., 18 BNA OSHC 1917, 1920, 1931 (No. 96-0593, 1999). A subjective good faith belief that a trench was safe will not negate willfulness. *Donovan v. Capitol City Excavating Company, Inc*. , 11 BNA OSHC 1581, 1582 (6th Cir. 1983). McGough's and Stickel's belief that the excavation was safe, based upon the facts presented, cannot be found objectively reasonable by the Court.

255–256, 264, 270). Stickel never took actual measurements of the excavation and testified that one of the reasons why he considered the excavation to be safe was that it was benched on one side even though he admitted that benching is not allowed on excavations dug in Type C soil because of its instability. (Tr. 251, 261). McGough also testified that he considered the trench to be both safe and OSHA-compliant. (Tr. 381, 386, 388, 402). Even though McGough was the superintendent on the worksite, Respondent's safety officer and a designated "competent person", he admitted that he never measured the excavation. Instead, he relied on Stickel's opinion that the excavation was safe as well as his own visual assessment of the conditions. (Tr. 404).

Fourth, notwithstanding his belief that his visual inspection of the excavation was adequate and that it was safe to work in, Stickel admitted that an excavation dug in Type C soil must be sloped at a ratio of 1.5 to 1 and that benching is not allowed in Type C soil. (Tr. 261). Neither Stickel nor McGough explained why one wall was allowed to be nearly vertical or why they relied on benching to render the excavation safe. There was no explanation as to why the excavation was not properly sloped or why Respondent impermissibly relied on benching, which only heightened the danger of collapse.

Fifth, once they began digging from the manhole to lay pipe, Stickel testified that he had intended to place a trench box inside the excavation, which demonstrates the recognition that the excavation required protective measures. (Tr. 226) According to Stickel, they did not use the trench box at the time of the inspection because a trench box cannot be placed on top of a utility line, which they were still attempting to locate. (Tr. 231). He also explained that they did not use shoring or shielding because the shielding was 20 feet long and there was not enough room to use it between the manhole and the utility line. (Tr. 231, 268). That, however,

does not obviate Respondent's obligation to provide protective measures such as shielding, trench boxes, or proper sloping. The failure of one method to make the excavation safe does not allievate the responsibility of the Respondent to use other viable means to make the excavation safe. *R.H. White Construction Co., Inc.*, 15 BNA OSHC 1877 (ALJ, June 19, 1992)..

Clearly, Respondent recognized the importance of using a trench box or shoring when it was stated that a trench box would eventually be placed in the excavation. Even if a trench box or trench shield was not feasible when employees worked on the manhole and uncovered the utility lines, the excavation should have been properly sloped. The evidence establishes that the work on the manhole performed by both Stickel and Ova was only expected to take a few minutes, and that they did not expect the work to uncover the utility line to require the employees to descend deep into the excavation. In light of the foregoing, the Court does not find Stickel and McGough's testimony that the excavation was safe to be persuasive

In other words, from the testimony received the anticipated duration of exposure was not worth the time and expense of implementing the proper safety measures. Respondent opted to place expediency over safety and allowed the work on the manhole and the uncovering of the utility line to take place before implementing the appropriate safety measures.

In conclusion, the evidence establishes that Respondent has several previous final citations for willful violations of the standards in question, was aware of the requirements of the standards, and knew that violative conditions existed at T-3. Despite this heightened awareness, Respondent placed expediency over safety and made a deliberate decision to neither remove employees from the excavation nor provide them with appropriate safety measures. The above findings constitute plain indifference to the requirements of the regulations and to employee safety. *See, e.g.*, *Lakeland Enterprises of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 748 (7th Cir.

2005). Accordingly, the Court finds that the violations were properly characterized as Willful. According, Citation 2, Item 1(a) and Citation 2, Item 1(b) will be AFFIRMED.[11]

Affirmative Defenses

The Respondent raised no affirmative defense in its post trial brief. Instead, the Respondent argued for all citations that the cited regulations did not apply or were not violated. Those positions have been addressed by the Court.

Penalty

Complainant proposed a combined penalty of $28,000 for Citation 2, Items 1(a) and 1(b). Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission must 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). With respect to these factors, the Commission has stated:

> These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. The gravity of a particular violation, moreover, 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.

J.A. Jones Constr., 15 BNA OSHC at 2214 (internal citations omitted).

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

[11] At the close of Complainant's case-in-chief, Complainant's counsel moved to amend the pleadings and Citation. (Tr. 367). Complainant requested that, if the Court did not find Citation 2, Items 1(a) and 1(b) to be willful violations of the Act, it should consider whether the violations were repeat or serious. (*Id*.). As the Court noted at trial, the Complainant's motion merely memorialized for the record what the Court already had the power to do. (Tr. 368). Nevertheless, the Court granted the Complainant's motion to amend. (Tr. 369). That said, because the Court finds that Citation 2, Items 1(a) and 1(b) are willful violations of the Act, it is unnecessary to address the Complainant's motion to plead in the alternative

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).

The Court also finds that the violations were of high gravity. The worksite had a previous instance of a trench collapse. As discussed above, the excavation was: (1) dug in Type C soil; (2) seriously out of compliance with OSHA standards; (3) improperly benched; (4) subject to heavy traffic vibration; and (5) subject to the additional load of a spoil pile that was sloughing soil into the excavation. Therefore, there was a substantial likelihood that the excavation would collapse.

The Court finds Respondent is not entitled to any credit for safety history. The evidence demonstrates a substantial history of violations, including willful violations of the cited standards. Also, these violations were willful in nature, and the Court locates nothing in the record to suggest that Respondent is entitled to credit for good faith for these willful violations. However, Respondent is a small employer and is entitled to credit for its size.

Considering the statutory penalty factors, the Court finds that the Complainant's proposed penalty of $28,000 is supported by the evidence.

ORDER

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

1. Citation 1, Item 1 alleging a serious violation of 29 C.F.R. §1926.21(b)(2) is **VACATED.**
2. Citation 1, Item 2 alleging a serious violation of 29 C.F.R. §1926.651(c)(2) is **VACATED**.
3. Citation 2, Item 1(a) alleging a willful violation of 29 C.F.R. §1926.651(k)(2) and

Citation 2, Item 1(b), alleging a willful violation of 29 C.F.R. §1926.652 (a)(1) are **AFFIRMED** and a combined penalty of $28,000 is **ASSESSED.**

SO ORDERED.

/s/
PATRICK B. AUGUSTINE
Judge, OSHRC

Date: June 1, 2012
Denver, Colorado