UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Archon Construction, Respondent.	DOCKET NO. 10-0486

Appearances:

Lisa Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Carl E. Metz, Esq., Falk Metz, LLC, Chicago, Illinois
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of an Archon Construction ("Respondent") worksite in Downers Grove, Illinois, on January 13, 2010. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging serious, willful, and repeat violations of the Act with total proposed penalties of $74,000.00. Respondent timely contested the Citation. During a break at the beginning of the trial on December 7, 2010 in Chicago, Illinois, the parties settled Citation 1 Items 1, 2, 3, 4 and Citation 3 Item 1. (Tr. 53-54). The *Partial Settlement Agreement* was approved on January 11, 2011. Therefore, only Citation 1 Item 5 and Citation 2 Item 1 remain in dispute.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of the Act, the Complainant must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

A violation is "serious" if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. §666(k). Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm would result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶29,942 (No. 88-0523, 1993).

A violation is "willful" if it is "committed 'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.'" *Kaspar Wireworks, Inc.*, 18 BNA OSHC 2178, 2000 CCH OSHD ¶32,134 (No. 90-2775, 2000). This test describes misconduct that is more than negligent but less than malicious, or committed

with specific intent to violate the Act or standard. *Georgia Electric Co.,* 595 F.2d 309, 318-19 (5th Cir. 1979*); Ensign-Bickford Co. v. OSHRC,* 717 F.2d 1419, 1422-23 (D.C. Cir. 1983). The employer's state of mind is the key issue. *AJP Construction, Inc*., 357 F.3d 70 (D.C. Cir. 2004). Complainant must show that Respondent had a "heightened awareness" of the illegality of its conduct. *Id*. Heightened awareness is more than simple awareness of the conditions constituting the alleged violation; such evidence is already necessary to establish the basic violation. *Id.* Instead, 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." *Id.*

Stipulations

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act. (*Complaint* and *Answer*).
2. Respondent has an office and place of business located at 563 South Route 53, Addison, Illinois 60101 and is an underground utility contractor which may include excavation work. (*Complaint* and *Answer*).
3. Respondent performed work at or near 2625 Ogden Avenue, Downers Grove, Illinois, which in part included excavation. (*Complaint* and *Answer*).
4. Respondent at all times hereinafter mentioned was engaged in a business affecting commerce in that Respondent was engaged in handling goods or materials which had been moved in commerce. (*Complaint* and *Answer*).
5. Respondent at all times hereinafter mentioned was an employer employing employees in said business at the aforesaid workplace. (*Complaint* and *Answer*).
6. Pursuant to section 10(c) of the Act, Respondent duly filed, by mail, with a representative of Complainant, a notice of contest which contested the aforementioned Citation and Notification of Penalty and the penalty proposed

therein; and said notice of contest was thereupon duly transmitted to the Occupational Safety and Health Review Commission. (*Complaint* and *Answer*).

Additional Factual Findings

Three witnesses testified at the hearing: (1) Kevin Vojtech, OSHA Compliance Safety and Health Officer ("CSHO"); (2) Timothy Farrell, Respondent's jobsite Foreman; and (3) Eugene Duffy, Respondent's Productivity and Safety Supervisor. (Tr. 21, 129, 149). Based on their testimony and discussion of evidentiary exhibits, the court makes the following additional factual findings.

On January 13, 2010, CSHO Vojtech was driving by Respondent's worksite on Ogden Avenue in Downers Grove, Illinois, when he observed work activities in and around an open excavation. (Tr. 25, 101). CSHO Vojtech pulled over to observe and photograph the site for about 10 minutes, during which time he saw employees enter a trench to perform work. (Tr. 25-26). He then entered the jobsite and initiated an OSHA inspection. (Tr. 26, 101; Ex. C-22). At that point, the two employees had already completed their work and exited the excavation. (Tr. 34, 66, 118).

Respondent's crew was in the process of installing one-half mile of sewer line, approximately 12 feet underground, alongside Ogden Avenue. (Tr. 134-135; Ex. R-3). They had been working at this site for about a month prior to the OSHA inspection. (Tr. 140). Foreman Timothy Farrell was supervising Respondent's crew and serving as the designated competent person for the excavation. (Tr. 32-34, 130-132, 144). Respondent's Productivity and Safety Officer, Gene Duffy, was also present during the OSHA inspection, but had arrived at the jobsite only 5-10 minutes before CSHO Vojtech, and did not see the employees working in the trench. (Tr. 32, 172).

CSHO Vojtech measured the trench at various locations, and used an inclinometer to measure the angles of the excavation walls. (Tr. 39-40; Ex. C-26, C-22). The trench was 30 feet

long, 13 feet wide at the widest point, and 6 feet deep at the location where employees had cut the pre-existing pipe. (Tr. 40; Ex. C-22, C-26). The angles of the trench walls ranged from 75 degrees to 90 degrees. (Tr. 40, 62). CSHO Vojtech also noted the proximity of a dump truck and nearby vehicular traffic along Ogden Avenue. (Tr. 51; Ex. C-24).

Foreman Farrell told CSHO Vojtech during the inspection that he had directed employees Jason Farrell and Jerry Magellan to enter the trench to cut a pre-existing pipe that was in the crew's way. (Tr. 32-33, 36, 141-143). Foreman Farrell also told CSHO Vojtech that he had classified the soil in the excavation near the pre-existing pipe as Type C soil, but did not realize that the excavation at that location had exceeded the 5-foot depth referenced in the excavation regulations. (Tr. 32-33, 143). Foreman Farrell acknowledged that had he known the excavation was 6 feet deep at that location, he could have sloped the excavation walls or used the available trench boxes which Respondent had been using at the site for the past month. (Tr. 140, 146). However, no such methods of protection were used in the excavation where the employees had been working moments before OSHA arrived. (Ex. R-3, C-26).

In 2009, during a previous OSHA inspection at another jobsite, Respondent was cited for a willful violation of the same standard at issue in Citation 2 Item 1 in this case: 29 C.F.R. §1926.652(a)(1). (Tr. 70, 73; Ex. C-2, C-3, C-32). That violation was amended to a repeat violation and accepted by Respondent as part of an *Informal Settlement Agreement* executed on January 12, 2010, the day before OSHA's inspection in the present case. (Tr. 89, 121-122, 154; Ex. C-9). The court notes that the foreman and employees working at the 2009 jobsite were different than the foreman and employees working on the jobsite in this case. (Tr. 125, 145). In fact, the foreman involved in the 2009 inspection no longer works for Respondent. (Tr. 157). Respondent was also cited in 2008 and 2004 for two other violations of 29 C.F.R. 1926.652(a)(1), which it also accepted by way of *Informal Settlement Agreements*. (Ex. C-32). No specific factual information regarding the 2004 or 2008 inspections was introduced into the

record. The court notes that after the current OSHA inspection, Respondent provided Foreman Farrell with additional excavation safety training. (Tr. 175). The court also notes that Respondent is a relatively small employer, with 61 employees. (Tr. 94).

Discussion

Citation 1 Item 5

Complainant alleged a serious violation of the Act in Citation 1 Item 5 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: On January 13, 2010, employees were working in a trench that needed cave-in protection and had evidence of possible cave-in, and the competent person did not remove the employees from the trench, exposing the employees to a trench collapse.*

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.*

The cited standard mandates the action a designated competent person must take when he or she "finds evidence of" a possible cave-in or other hazardous condition in an excavation. The

standard clearly applies to the cited condition. Complainant argued that Respondent violated this standard because CSHO Vojtech identified "visible evidence of hazards" in the trench, yet Foreman Farrell had "failed to remove Jason Farrell and Mr. Magellan from exposure to these hazards." (Comp. Brief, p. 14).

The plain language of the subparagraph cited by Complainant requires proof that Respondent's designated competent person, Foreman Farrell, was personally aware of a hazardous situation in the trench which presented the possibility of a cave-in, or the failure of a protective system, but then failed to remove employees from the area until the condition could be remedied. The record is devoid of any such evidence. On the contrary, the court credits Foreman Farrell's testimony that, at the time, he did not know that the trench depth where the employees cut the pipe was 6 feet deep. There was certainly no evidence presented at trial which established his specific knowledge of the depth of the trench at that location, or that he recognized any possibility of a cave-in or failure of a protective system. Accordingly, Complainant failed to establish that the terms of the cited standard were violated. Citation 1 Item 5 will be VACATED.

Citation 2 Item 1

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

> *29 C.F.R. §1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section. On January 13, 2010, employees were working in a trench cutting a 6 inch sanitary pipe without cave-in protection exposing the employees to the hazard of a trench collapse. Archon Construction Co., Inc. was previously cited for a violation of this Occupational Safety and Health Administration standard or its equivalent standard 29 C.F.R.*

1926.652(a)(1) which was contained in OSHA inspection number 312600026, citation number 2, item number 1, issued on 12/21/2009, with respect to a workplace located at 6806 Lorraine Drive, Countryside, Illinois. Archon Construction Co., Inc. was previously cited for a violation of this Occupational Safety and Health Administration standard or its equivalent standard 29 C.F.R. 1926.652(a)(1) which was contained in OSHA inspection number 311253553, citation number 1, item number 1, issued on 11/05/2008, with respect to a workplace located at NW corner of Maple Ave. & 55th St., Downers Grove, Illinois. Archon Construction Co., Inc. was previously cited for a violation of this Occupational Safety and Health Administration standard or its equivalent standard 29 C.F.R. 1926.652(a)(1) which was contained in OSHA inspection number 308146539, citation number 1, item number 1, issued on 10/18/2004, with respect to a workplace located at 1520 Bond Street, Naperville, Illinois.

The cited standard provides:

29 C.F.R. §1926.652(a)(1): Requirements for protective systems. (a) Protection of employees in excavations. (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.

Respondent's crew was engaged in the installation of sewer lines 12 feet beneath the ground in an excavated trench. The cited standard clearly applies. The trench was 6 feet deep where two of Respondent's laborers had been working just moments before OSHA's arrival, with walls measuring between 75 degrees and 90 degrees. They were cutting previously installed pipe which, pursuant to Appendix A to Subpart P of Part 1926, required the surrounding soil to be classified as either Type B or Type C soil. The court accepts Foreman Farrell's on-site conclusion that the soil in the area was Type C soil. Regardless, trench walls ranging between 75 degrees and 90 degrees failed to meet the minimum requirements for either Type B or Type C soil at that depth and there was no evidence of any alternative method used to protect employees while they were cutting the pipe. The preponderance of the evidence establishes that Respondent failed to implement an acceptable excavation protection method for its employees as proscribed by 29 C.F.R. §1926.652(a)(1) and Appendix B to Subpart P of Part 1926. The cited standard was violated.

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 a violative condition. *Fabricated Metal Products*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997); *Gilles & Cotting, Inc*., 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶20,448 (No. 504, 1976). Laborers Jason Farrell and Jerry Magellan were exposed to the violative condition of the excavation for approximately 10 minutes while cutting pipe on the day of the inspection.

Foreman Farrell was present, observed the conditions of the excavation, and directed the two laborers to enter and cut the previously installed pipe. To establish employer knowledge, an employer does not have to possess knowledge that a particular condition violated the Act or its regulations, just knowledge that the condition existed. *Shaw Construction, Inc*., 6 BNA OSHC

1341, 1978 CCH OSHD ¶22,524 (No. 3324, 1978). His knowledge of the condition of the excavation is imputed through him to the Respondent. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991).

In determining whether a violation is serious, the issue is not whether an accident was likely to occur; it is rather, whether the result would have been death or serious harm if an accident had occurred. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). 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, Inc.*, 23 BNA OSHC 1044, 2010 CCH OSHD ¶33,049 (No. 08-0631, 2010). Failure to comply with the minimum levels of protection in the excavation standard could result in trench collapses and serious physical harm to employees. *Id.* The violation was serious.

CSHO Vojtech testified that this violation was willful because "the foreman and the competent person for the trench knew that the trench needed cave-in protection, that the employees were exposed to a hazard, and that he directed the employees to work in the trench anyways because he needed to get the job done. He was blocking the company's driveway, and he needed to get that section of pipe in that day." (Tr. 59). This testimony focuses on the *prima facie* elements required for any violation of the Act, not necessarily a willful violation. Numerous cases "make it clear that willfulness will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible." *Froedtert Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1510 (No. 97-1839, 2004). Thus a company cannot be found to have willfully violated a standard if it exhibited a good faith, reasonable belief that its conduct conformed to law, or if it made a good faith effort to comply with a standard or eliminate a hazard. *American Wrecking Corporation v. Secretary of Labor*, 351 F.3d 1254, 1262-63 (D.C. Cir. 2003). 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* 122 F.3d 437 (7th Cir. 1997).

The court credits Foreman Farrell's testimony that he did not know that the excavation was 6 feet deep at the location where the employees cut the pipe. His testimony is corroborated by OSHA's own investigative photographs, which reveal that the depths of the excavation at the time ranged from as shallow as 3 feet in some locations, to between 5 and 6 feet near the location of the pre-existing pipe. (Ex. C-22, C-26). Respondent's undisputed testimony establishes that for the previous month at this jobsite, Respondent's crew had been consistently using trench boxes to protect employees from excavation hazards, sometimes using multiple trench boxes stacked vertically when the depth of the trench warranted it. Considering the totality of the circumstances, the court is not convinced that Respondent's actions in relation to this violation demonstrated plain indifference to employee safety or a conscious disregard for the requirements of the Act. Complainant failed to establish that the violation was properly characterized as a willful violation.

Complainant alleged, alternatively, that Citation 2 Item 1 was a repeat violation, which requires proof that: (1) the same employer, (2) was cited at least once before, (3) for a substantially similar violation of the Act, and (4) the prior citation became a final order. *Bunge Corp. v. Secretary of Labor*, 638 F.2d 831 (5th Cir. 1981). Complainant makes a showing of "substantial similarity" by establishing that the past and present violations are for failure to comply with the same standard. *Potlatch Corp*., 7 BNA OSHC 1061 (No. 16183, 1979). The burden then shifts to Respondent to rebut that showing. *Monitor Construction Co*., 16 BNA OSHC 1589 (No. 91-1807, 1994). "In cases where the Secretary shows that the prior and present violations are for an employer's failure to comply with the same specific standard, it may be difficult for an employer to rebut the Secretary's *prima facie* showing of similarity." *Potlatch,*

supra.

Complainant established a rebuttable presumption that Citation 2 Item 1 was a repeat violation by proving that Respondent received a citation for a violation of the same standard in 2009, which became a final order on January 12, 2010 pursuant to Section 10(b) of the Act. Complainant also introduced undisputed evidence which established that Respondent had received citations for violations of the exact same standard in 2008 and 2004, both of which were resolved through *Informal Settlement Agreements* with local area OSHA offices. (Ex. C-32). Respondent failed to rebut the presumption that Citation 2 Item 1 was a repeat violation. *Potlatch,* supra. Accordingly, Citation 2 Item 1 will be MODIFIED from a willful violation to a repeat violation, and AFFIRMED.

Penalty

In calculating the appropriate penalty for affirmed violations, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. §666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993).

It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Allied Structural Steel,* 2 BNA OSHC 1457 (No. 1681, 1975); *Valdak Corp.,* 17 BNA OSHC 1135 (No. 93-0239, 1995). Based on the totality of the circumstances in this case, including the exposure of two employees to an unsafe trench for approximately ten minutes, Respondent's status as a small employer (61 employees), and Respondent's history of violating the provisions of 29 C.F.R. §1926.652(a)(1) three times

previously in 2009, 2008, and 2004, the court assesses the penalty for Citation 2 Item 1 at $40,000.00.

ORDER

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

1. Citation 1 Item 5 is VACATED; and

2. Citation 2 Item 1 is MODIFIED to a repeat violation, AFFIRMED as modified, and a penalty of $40,000.00 is ASSESSED.

Date: June 21, 2011
Denver, Colorado

/s/
PATRICK B. AUGUSTINE
Judge, OSHRC