United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. SAND CUT PROPERTIES, LLC, Respondent.	OSHRC Docket No. 09-0020

APPEARANCES:

James L. Polianites, Jr., Esquire, U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

William R. Donaldson, Esquire, Donaldson, Kershaw & Norris
Danbury, Connecticut
For the Respondent.

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under 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") inspected a work site of Respondent, Sand Cut Properties, LLC ("Respondent" or "Sand Cut") on May 28, 2008. The site was located in Brookfield, Connecticut. The inspection resulted in Respondent being issued a two-item

serious citation and a two-item willful citation. Both of the citations alleged violations of OSHA's excavations standard. Respondent contested the citations and the proposed penalties. The hearing in this matter took place in Hartford, Connecticut, on June 28, 2011. Only the Secretary has filed a post-hearing brief.

The OSHA Inspection

OSHA compliance officer ("CO") Charles Robert Colman went to Sand Cut's work site on May 28, 2008. He went to the site after his office received a complaint that employees had been riding in the bucket of an excavator. Upon arriving at the site, the CO saw an employee, later identified as Joe DeCarma, in an excavation. Mr. DeCarma was employed as a laborer at Sand Cut. He was standing in the middle of the excavation in front of the bucket of an excavator and near a concrete "swirl concentrator" ("concentrator"). The CO took a number of photographs at the site, which were admitted as S-3A through S-3O. Photographs S-3E and F show the employee in the excavation, and S-3F shows him holding an engineering rod. Photograph S-3F and others show the wire rope sling ("sling") the employee was trying to wrap around the concentrator. The CO estimated the excavation to be about 6 feet deep, where the employee was, and about 25 feet wide. The CO then saw Garrett Meade, the excavator's operator and Sand Cut's owner, who he knew from prior inspections. Mr. Meade told Mr. DeCarma that it was "time to get out." Mr. DeCarma got into the excavator bucket, and Mr. Meade lifted him out with the excavator. (Tr. 24-32, 53, 59, 78; S-1, p. 3, S-2, S-3A through S-3O).

CO Colman explained to Mr. Meade that he was there due to the complaint about employees riding in the bucket. The CO also pointed out to him the cave-in hazard, because of the excavation's depth and the spoil pile of excavated material that was on the

excavation's edge. The CO observed two spoil piles.[1] He marked the larger one and the smaller one with "B" and "C," respectively, on S-3L. He also marked the larger pile with "A" on S-3M, and the sling and where the employee had been standing with "B" and "C," respectively. The CO noted that the large spoil pile was undercut, overhanging the edge, and within two feet of the excavation's edge.[2] He further noted that the front edge of the excavation was also undercut, which made a depth measurement difficult.[3] Mr. Meade told him that when they first dug the excavation, it was circular and about 12 feet deep and 8 feet wide. It had expanded to a width of approximately 27 feet because it kept collapsing due to the extremely unstable soil. Mr. Meade also told him they had not been able to place the top piece of the concentrator over the bottom piece that was already in the excavation. United Concrete had brought the wrong truck and could not lift the top piece to place it on the bottom piece. Mr. Meade had sent Mr. DeCarma into the excavation to put the sling around the bottom piece so they could lift it out before the collapsing soil buried it. (Tr. 32-42, 48, 53-57; S-2).

During his inspection, the CO saw water seeping into the excavation, which made the soil even more unstable.[4] He was told that the employee was in the excavation to pull the concentrator out due to the fairly steady running water and constantly eroding and collapsing soil in the excavation. The CO also observed large sections of the excavation

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[1] CO Coleman testified that spoil piles were comprised of excavated material, mostly soil and rocks, dug from excavations and pushed up by earth moving equipment. Spoil piles are required to be set two feet from the edge of the excavation. (Tr. 33).

[2] The large spoil pile was about 15 feet high, at least 25 feet long, and on the back edge of the excavation. (Tr. 54-55).

[3] The CO testified that he measured the depth of the excavation with the engineering rod and the help of Mr. Meade. The depth where the employee was standing in S-3F was about 6 feet. The depth of the area in front of the wooden stake in S-3F was about 9 feet; that area was undermined almost all the way back to the stake. The CO noted that the feet showing in S-3H were those of Mr. Meade. (Tr. 40, 65, 67; S-3F, H).

[4] The CO testified that water running through the walls of an excavation erodes the excavation and makes it unstable. (Tr. 40).

wall and nearby spoil pile falling into the excavation, and he began videoing what he saw with his camera. As he did so, a large section of the soil right on the edge of the spoil pile fell into the excavation and landed very near to where the employee had been. After this occurred, Mr. Meade told the CO he would move the spoil pile back and slope the sides. Mr. Meade also told him he had been doing construction work for many years and that his work included excavation. Mr. Meade informed the CO that the work site was next to a wetlands area and the Still River. He further informed him that low-lying areas of the site had been filled in with sand to raise the elevation. The CO also learned, based on a survey done by the local county and the U.S. government, that the soil at the site was loose sand and fill or gravel. The CO determined the soil was Class C, especially since it was previously disturbed soil. (Tr. 36-49, 53, 56; S-3H, S-4, S-8).

CO Colman believed that the failure to move the spoil pile back and the failure to have any cave-in protection constituted willful violations.[5] Mr. Meade had been in the construction business for many years. He had actual knowledge of the conditions at the site, and those conditions were plainly hazardous. The soil was unstable, and areas of the excavation were undermined. And, soil from the spoil pile was continually falling down into the excavation. Further, Mr. Meade told him that he knew that cave-in protection was required for excavations over 5 feet deep. CO Coleman testified that he did not observe any methods at the site of the excavation to prevent cave-ins. There was no ladder set up so that an employee could enter and exit the excavation. CO Coleman testified that Mr. DeCarma was exposed to the danger of being pinned by a collapse

[5] Robert Kowalski, Area Director, Bridgeport Area Office, also testified that he reviewed this case and concluded that Citation 2's two items were both appropriately classified as willful violations due to the conditions documented by the CO. (Tr. 72-74).

while in an excavation where there was no cave-in protection. (Tr. 47-48, 51-58, 62; S-1 through S-2).

Jurisdiction

Respondent admitted in its answer that, at all relevant times, it was a corporation engaged as a developer with an office in Danbury, Connecticut. It also admitted that, in its business activities, it and its employees had received, handled and otherwise worked on, and with, goods and materials that had moved in interstate commerce. It further admitted that, during the relevant period, it was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *See* R. Answer, ¶¶ II, III. The Court finds that the Commission has jurisdiction of the parties and the subject matter in this case under section 10(c) of the Act, 29 U.S.C. § 659(c).

Serious Citation 1

Item 1 of Citation 1 alleges a violation of the general duty clause, § 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), in that an employee was observed riding in the bucket of the excavator at the site in order to exit the excavation. The proposed penalty for this item is $2,800.00.

Item 2 of Citation 1 alleges a violation of 29 C.F.R. §1926.651(h)(1), in that an employee was observed working in an excavation which was steadily accumulating water and there were no measures in place to control the accumulation of the water or mitigate the hazard. The proposed penalty for this item is $2,000.00.

At the hearing, Respondent advised the Court that it was not contesting Items 1 and 2 of Serious Citation 1 or their proposed penalties. (Tr. 16, 69, 75). Items 1 and 2 are accordingly AFFIRMED, and the proposed penalties for those items are assessed.

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) its terms were not met; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violation. *Astra Pharm. Prod., Inc.*, 9 BNA OSHA 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Willful Citation 2

Item 1 of Willful Citation 2 alleges a violation of 29 C.F.R. §1926.651(j)(2), in that an employee was observed working in an excavation which ranged between 6 and 9 feet in depth and had a large spoil pile (approximately 15 feet high) directly next to the edge of the excavation. The cited standard provides as follows:

> Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations or by a combination of both if necessary.

Item 2 of Willful Citation 2 alleges a violation of 29 C.F.R. § 1926.652(a)(1), in that an employee was observed working in an excavation which ranged from 6 to 9 feet in depth without any form of cave-in protection in place. The cited standard provides:

> 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.

The CO's testimony about his inspection is set out above. His testimony is supported by the photographs he took. It is also supported by the video clips showing the condition of the excavation and the soil falling into it. *See* S-3E-H, S-3J-M, S-4. Mr. Meade testified on behalf of Respondent. His testimony was not credible, however. He testified, for example, that once the concentrator was placed in the excavation, the excavation was only about 4 feet deep.[6] (Tr. 80-81). He also testified that Joe DeCarma, the employee in the excavation when the CO arrived, as shown in S-3E, was standing on top of the concentrator and that "[n]o one ever entered the bottom of the excavated hole." (Tr. 81). This testimony is belied by S-3F, which depicts the employee standing on the floor of the excavation and several feet away from the concentrator. Mr. Meade himself admitted that the hole had expanded, noting that "it just kept growing and growing in size, that's what they, that's what they do." (Tr. 83). Based on the record, the Court finds that the Secretary has shown all of the elements necessary to meet her burden of proof in regard to both of the alleged violations. The Court finds that there was no protection for the exposed employee, Mr. DeCarma, from cave-ins, as he worked to dislodge the concentrator. There was no proper egress from the excavation and Respondent made no attempt to bench or shore up the excavation or use a trench box. The Secretary has established knowledge through Mr. Meade, Sand Cut's owner, who had actual knowledge of the conditions at the work site. *See Lakeland Enters. of Rhinelander Inc. v. Chao*, 402 F.3d 739, 747-48 (7th Cir. 2005)(Willful violation upheld on plain indifference basis

[6] Mr. Meade testified that the excavation's depth at the point shown in S-3H, where he and the CO were measuring it, was 6 feet. (Tr. 82).

when supervisor knew that employee was in a trench without adequate protection from cave-in and did nothing to eliminate the obvious danger or to remove him from the trench). The alleged violations are affirmed.

Whether the Violations were Willful

As the Secretary notes, a willful violation is one committed with either an intentional disregard for the requirements of the Act or plain indifference to employee safety. "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference…" *Hern Iron Works, Inc.,* 16 BNA OSHC 1206, 1214 (No. 89-433, 1993) (citations omitted). S. Brief, p. 10.

The CO's testimony and his inspection narrative show that Mr. Meade was operating the excavator on the day of the inspection and that he had dug the excavation. Mr. Meade told the CO the hole was at first 12 feet deep and 8 feet wide, but had expanded as it kept collapsing due to the unstable soil. He also told the CO the site was next to a wetlands area and that areas of the site had been filled in with sand. Mr. Meade said he had sent the employee into the excavation to put a sling around the bottom piece of the concentrator so it could be removed before the collapsing soil buried it. He explained that United Concrete had brought the wrong truck to the site and had not been able to lift the top piece of the concentrator to place it on the bottom piece. He further explained that the bottom piece alone costs $5,000.00. Mr. Meade advised the CO he had been in the construction business for many years and that his work included excavation. He was not aware of the different classifications of soil, but he told the CO that he knew that cave-in protection was required in excavations over 5 feet deep. After the large

section of soil fell from the spoil pile into the excavation, Mr. Meade said he would move the spoil pile back and slope the sides. (Tr. 37-38, 42-49, 52-59; S-1, p. 3).

Respondent stated in its opening statement at the hearing that the willful classification did "not apply based on the lack of actual knowledge and the lack of pertinent experience in regard to this type of excavation."[7] Mr. Meade testified that he did not "know any of the exact OSHA rules and regulations" and that he had "never read anything about it." He further testified that he had never "come into contact or heard of [the cited provisions] before." (Tr. 79). In light of the CO's testimony, inspection narrative, and photographic evidence, the Court finds Mr. Meade's testimony was not persuasive and Respondent's arguments to that effect to be without merit.[8] The Court further finds that the spoil pile was not set back the requisite 2 feet from the excavation's edge and that the excavation was at least 6 feet deep. (Tr. 34-35, 37, 67). The Court finds that Mr. Meade intentionally exposed Mr. DeCarma to the risk of injury or death from the unstable adjacent spoil pile while working in an excavation where there were no protective systems. On the basis of the record, the Court finds that the Secretary has shown that the violations were committed with intentional disregard for the requirements of the Act and with plain indifference to employee safety. *See Lakeland Enters.,* 402 F.3d 739*; Globe Contractors Inc. v. Herman*, 132 F.3d 367, 373 (7th Cir. 1997)(ignoring obvious violations of OSHA safety standards amounts to "plain indifference" for

[7] Respondent chose not to make a closing statement at the hearing. (Tr. 87A).

[8] To establish knowledge, the Secretary must prove that an employer knew or could have known with the exercise of reasonable diligence of the "physical conditions constituting the violation." *Schuler-Hass Electric Corp.,* 21 BNA OSHC 1489, 1493 (No. 03-0322, 2006); *citing Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). She need not show that the employer understood or acknowledged that the physical conditions were actually hazardous. *Phoenix Roofing,* 17 BNA OSHC at 1079.

purposes of a finding of willfulness). Items 1 and 2 of Willful Citation 2 are AFFIRMED as willful. (Tr. 75-76).

Penalty Assessment

The Secretary has proposed a penalty of $70,000.00 for each of the two willful violations in this case. In its answer, Respondent asserted that the penalties proposed by the Secretary were excessive. *See* R. Answer, ¶ IX. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *See* section 17(j) of the Act, 29 U.S.C. § 666(j). In this regard, the Area Director ("AD") of the OSHA office that issued the citations testified that part of his job is to review proposed citations. He further testified that in this case, he eliminated all the adjustment factors and proposed the maximum penalty for the willful violations.[9] The AD noted that in cases where the proposed penalties are greater than $100,000.00, the regional OSHA office and a regional solicitor review the case, after which the director of construction in Washington, D.C. also reviews the case. The AD additionally noted that, after all the required reviews, the subject citations were approved to be issued. (Tr. 71-75). In view of the above, the Court does not find the fines proposed by the Secretary for the two serious items and Item 1 of Willful Citation 2 to be excessive and, instead, finds that the proposed penalties for these items are appropriate and are, accordingly, assessed by the Court as proposed by the Secretary. With regard to Item 2 of Willful Citation 2, the Court finds it appropriate to reduce the $70,000.00 penalty

[9] *See Ho*, 20 BNA OSHC 1361, 1379 (Nos. 98-1645, 98-1646, 2003)(extreme lack of good faith warrants assessment of the statutory maximum penalty). The Court finds that Mr. Meade's conduct at the site relating to Mr. DeCarma's presence in the excavation with a large, unstable spoil pile directly next to the excavation's edge exhibited an extreme lack of good faith.

proposed by the Secretary to $65,200.00 and a penalty of $65,200.00 is assessed by the Court for this willful violation.[10]

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 above Findings of Fact and Conclusions of Law, it is ordered that:

1. Item 1 of Serious Citation 1, alleging a violation of § 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), is AFFIRMED, and a penalty of $2,800.00 is assessed.

2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.651(h)(1), is AFFIRMED, and a penalty of $2,000.00 is assessed.

3. Item 1 of Willful Citation 2, alleging a violation of 29 C.F.R. § 1926.651(j)(2), is AFFIRMED, and a penalty of $70,000.00 is assessed.

4. Item 2 of Willful Citation 2, alleging a violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED, and a penalty of $65,200.00 is assessed.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC JUDGE

Date: October 2, 2011
Washington, D.C.

[10] *Id.* at 1379 (Commission has discretion to assess the penalties it finds appropriate).