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

SECRETARY OF LABOR, Complainant, v. KANDEY COMPANY, INC. Respondent.	OSHRC Docket No. 07-1871

Appearances:

Chaya Mandelbaum, Esquire
U. S. Department of Labor
New York, New York
For the Complainant.

Robert G. Walsh, Esquire
Law Offices of Robert G. Walsh, P.C.
Blasdell, New York
For the Respondent.

Before: G. Marvin Bober
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). On July 31, 2007, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Kandey Company, Inc. ("Respondent" or "Kandey") work site located at 9217 Main Street, Clarence, New York. As a result, on October 26, 2007, OSHA issued to Respondent a Citation and Notification of Penalty. Citation 1, Item 2[1] alleges a serious violation of 29 C.F.R.

[1]The Secretary withdrew Citation 1, Item 1, which alleges a serious violation of 29 C.F.R. § 1926.651(j)(1), in her Complaint.

§ 1926.1053(b)(1). A penalty of $1200.00 was proposed for this item. Citation 2, Item 1 alleges a willful violation of 29 C.F.R. § 1926.652(a)(1). A penalty of $49,000.00 was proposed for this item.

Respondent timely contested the Citations. An administrative trial was held in Buffalo, New York. Both parties have submitted post-trial briefs.[2]

Stipulations

At the trial, the parties agreed to the following stipulations (ALJ-1; Tr. 13-14):

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the [Act].

2. At all relevant times, respondent was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and was an employer within the meaning of section 3(5) of the Act.

3. Respondent timely contested the citation at issue herein and the penalties proposed, pursuant to the provisions of section 10(c) of the Act.

4. John Vito Ferraina was Respondent's foreman at the July 31, 2007 excavation that forms the subject of this Action (hereinafter "the excavation").

5. Eric Book and Randall Hinsken were employees of Respondent at the excavation.

6. The ladder in the excavation complied with 29 CFR § 1926.1053(a)(3)(I) in that the rungs of the ladder were spaced not less than 10 inches apart and not more than 14 inches apart.

Inspection Site

The excavation site at issue was located along the south side of Main Street, a very busy thoroughfare. (Tr. 41, 436). The north end of the excavation started near the curb, continuing south to two copper water pipes attached to a new building further to the

[2]Transcript pages are referred to as "Tr." The Complainant's exhibits are referred to as "CX." The Respondent's exhibits are referred to as "RX." Administrative Law Judge Exhibits are referred to as "ALJ."

south. (Tr. 500). The width of the excavation was between 9 and 10 feet. (Tr. 48). The side walls of the excavation were not benched or sloped, but the south end was sloped in a manner that provided ingress and egress for workers. (Tr. 50, 297-300). Behind the south end was a back hoe and the spoil pile, which consisted of all material dug out of the excavation. (Tr. 27, 36; CX-8). Lying width-wise across the bottom of the excavation was a large water main. (Tr. 33, 56; CX-8). Kandey's crew was tapping into this water main to connect the new building to the waterline. (Tr. 129). At the time of the inspection, Kandey employee Eric Book was inside the excavation, attaching a tapping saddle to the water main. (Tr. 291-92). Additionally, Kandey had placed a portable ladder within the excavation. (Tr. 35, 53; CX-3, CX-7).

Testimony[3]

Kimberly Mielonen

During the afternoon of July 31, 2007, Compliance Officer ("CO") Kimberly Mielonen was returning to the Buffalo, New York OSHA office when she "observed a gentleman looking into a hole in the ground, which led me to believe that there might be someone working down in there." (Tr. 24). The CO testified that, due to OSHA's National Emphasis Program for Trenching and Excavation, "if we see something that we may think can be a hazard we're required to stop and address it." (Tr. 25). She got out of her automobile and "observed a gentleman in an excavation with no cave in protection." (Tr. 25).

The CO took multiple photographs of the work site, all within minutes of her arrival. (Tr. 29, 34). She testified that CX-4 and CX-5 were photographs of Mr. Book working in the excavation near the water main with no cave-in protection. (Tr. 28-32). The CO also testified that: (1) photograph CX-7 showed "the side wall of the excavation [and] the position of the ladder when [she] first arrived on the site," (2) CX-8 showed "the excavation and the material inside the excavation: the position of the back hoe and the position of the spoil pile," (3) CX-9 showed "the position of the ladder when [she]

[3]All witnesses at the hearing were sequestered and did not hear each other's testimony.

first arrived on the site," and (4) CX-10 showed "Mr. Book working in the excavation after the trench box had been placed back inside the excavation." (Tr. 35-38). She departed the work site approximately forty-five minutes after arriving. (Tr. 34).

When the CO arrived at the excavation, she identified herself to John Ferraina. (Tr. 41). Mr. Ferraina informed her that he was both the foreman and the competent person at the work site. (Tr. 42). When she approached, Mr. Ferraina "took his tape measure off of his belt, pulled it out, extended it, dropped it into the excavation and said, 'I'm good. I'm five feet to the top of the pipe.'" (Tr. 43.) According to the CO, Mr. Ferraina acknowledged "that he needed the trench box or he needed to bench when the excavation was deeper than 5 feet." (Tr. 43-44). Mr. Ferraina also informed her that the crew "had attempted to bench the excavation but they got too close to the street and they needed to stop"; however, she "observed no attempt to bench the excavation or slope the excavation at the side walls." (Tr. 45). She testified that Mr. Ferraina told her he removed a trench box from the excavation "for convenience . . . about a half hour prior" to her arrival. (Tr. 51). When she asked why he had not returned the trench box to the excavation, he responded that "'it was the heat of the battle'" and told the CO "'I know that I'm not really doing what's recommended.'" (Tr. 52). The CO asked that Mr. Book exit the excavation and told Mr. Ferraina that cave-in protection was necessary before they could restart work in the excavation. (Tr. 52). A trench box was installed and the crew recommenced the project. (Tr. 38, 131).

The CO stated that she made three measurements of the excavation: two of its depth and one of its width. (Tr. 107-08). Describing her first depth measurement, which she took from within 1 foot of where Book had been working, the CO stated that she dropped the tape measure from the upper surface landing down to the bottom of the ladder. (Tr. 127-28). Although acknowledging that the conditions of the excavation led to a measurement with a "slight angle" because of the uneven level inside the excavation, she testified that "I held the tape measure straight from the bottom . . . I didn't take a measurement on an angle" and that she reached her hand out to take a straight

measurement. (Tr. 127, 188). The second depth measurement, taken standing directly over the water main on the western end of the excavation, reached 5 feet 6 inches from the top of the water main to the upper landing surface.[4] (Tr. 108). She measured a width of 9 feet for the excavation at a point north of the water main, but noted that the excavation was narrower in places. (Tr. 48, 99, 105, 121).

The CO also took two soil samples. (Tr. 53). The first sample, labeled "KC-1," was taken from the spoil pile after she received confirmation from Mr. Ferraina that the spoil pile was "representative of the material that had been removed from the excavation." (Tr. 53-54, 154; CX-3). The second soil sample, "KC-2," was taken from in front of the backhoe at the southern end of the excavation. (Tr. 54; CX-8). However, she testified on cross examination that she took the second soil sample "just to give the Employer the benefit of the doubt" and that that sample was "not relevant." (Tr. 143-44).

The CO testified that the Secretary proposed classifying this alleged violation as willful based on Mr. Ferraina's "knowledge of the requirements of the Standard[,] . . . his knowledge of the condition of the excavation," and his status as the competent person on site. (Tr. 57). However, she testified that this citation item should have contained two additional reductions in the penalty, dropping the proposed penalty to $35,000. (Tr. 61). These reductions were due to a mistake in assessing Respondent's prior history and for a miscalculation with respect to Respondent's size. (Tr. 58, 60).

With respect to the ladder, the CO testified that it did not extend at least 3 feet above the upper landing surface of the excavation, nor did it have any support system or grabbing devices attached to it for proper stabilization. (Tr. 61-62; CX-7, CX-9). It had only two rungs above the upper landing surface. (Tr. 164; CX-7). She noted that Mr. Book used the ladder to exit the excavation. (Tr. 63). She testified that the gravity-based penalty of $2000 had been reduced by 40 percent based on Respondent's size, but should have included a 10 percent reduction for Respondent's history, revising the proposed penalty to $1000. (Tr. 64-65).

[4]The water main had a 16-inch diameter. (Tr. 392.)

Clinton Merrell

Mr. Merrell, a chemist at the OSHA Salt Lake Technical Center, analyzed the soil samples the CO collected at the work site. (Tr. 195-98; CX-14). His analysis classified sample KC-1 as "sandy gravel, granular Type C" soil and sample KC-2 as "sandy, gravel[ly] clay, cohesive Type B" soil. (Tr. 198-99; CX-18 at pp. 21-22). Although 1.4kg (3 lbs.) is the "preferred" sample size, he testified that such a sample is not necessary for an accurate analysis, as was the case for these two samples. (Tr. 225-26).

John Vito Ferraina

Mr. Ferraina, the foreman and competent person for Kandey at the excavation site, presented cards indicating he had received an OSHA ten-hour course in December 2006 and completed an OSHA ten-hour course on construction safety and health in 2003. (Tr. 254-56, 309; RX-16). These courses included training in identifying types of soil. (Tr. 312).

Mr. Ferraina explained that Kandey contracted with the Erie County Water Authority to dig up the water main and connect it to two copper stub out pipes sticking out of the ground. (Tr. 280-82). These copper pipes ran to a building under construction near the excavation. (Tr. 280-81). The southern end of the excavation began at the copper stub outs and stretched north to the curb at Main Street. (Tr. 281, 290).

Dana Coffelt, an inspector for the Erie County Water Authority, was at the site at the same time as the CO. (Tr. 422). Mr. Ferraina testified that he took a "rough measurement" of the excavation's depth to see if he needed "extra parts" from Coffelt. (Tr. 424). This measurement covered a distance from the ground surface to a point inside the excavation that Mr. Ferraina described as "approximately" at the top of the tapping valve or "roughly" to the rock shelf where Mr. Book was performing the tapping procedure. (Tr. 427-34). When questioned, he explained that the top of the tapping valve was at "roughly" the same place as Mr. Book's foot on the rock shelf. (Tr. 434-35). He testified this measurement was "roughly" 4 feet 6 inches. (Tr. 427).

Mr. Ferraina conducted three soil tests he learned from his OSHA training - the thumb test, crumble test, and heel test - on the first 18 inches of excavation. (Tr. 315-18). He noted that he had conducted these tests many times in his 17-year career, 90 percent of which has been spent making excavations. (Tr. 320-21). Describing the thumb test, Mr. Ferraina explained "you dig down into whatever you're excavating, you take your thumb as hard as you can and push against the material and see how elastic or non-elastic it is . . . ." (Tr. 316). Based on this test, Mr. Ferraina concluded that the soil was Type A, describing it as "quite tight, hard." (Tr. 316). The crumble test consists of collecting a piece of soil and manipulating it "to either tighten up or fall apart in your hand." (Tr. 317). The results of this test also indicated the soil was Type A because it was "tight material, well compacted." (Tr. 317). Finally, he conducted a heel test, in which "you try and jam your heel in the ground." (Tr. 318). The heel test indicated that it was Type A soil as "it also was tight compacted and very stable ground." (Tr. 318-20). Below the 18-inch level, Mr. Ferraina explained he visually identified the soil as stable rock because the other tests cannot be used on such soil. (Tr. 320).

Based on these tests, Mr. Ferraina determined that cave-in protection was not required because "[i]t was a stable working environment." (Tr. 327). He agreed in his testimony that he was "cognizant of depth requirements," but believed he adhered to the OSHA requirements. (Tr. 330). Inside the excavation, the crew found a trench approximately 3 to 3.5 feet down that indicated the location of the water main. (Tr. 336). Bedding stone (i.e., gravel) had been placed around the main by its installers so it would not be damaged when larger backfill was used to bury it. (Tr. 336, 347). Thus, the material above the main was previously excavated. (Tr. 354, 365). However, Mr. Ferraina testified, the overburden in the area above the main was "tight packed" Type A soil. (Tr. 369). Mr. Ferraina also acknowledged that the two copper pipes that Kandey uncovered to tie-in to the water main had been previously installed and buried. (Tr. 375-76).

When the CO arrived at the site, Mr. Book was using a tapping machine to install a valve in the water main to tie-in the water pipes. (Tr. 391). Mr. Ferraina explained that

this procedure, which involves drilling into the active water main, must be completed without stopping once started. (Tr. 393, 400). The tapping process had already begun when the CO asked that Mr. Book exit the excavation, but Mr. Ferraina followed her request and signaled for Mr. Book to turn off the tapping machine and come out of the hole. (Tr. 409-10). Because he was worried about having interrupted the tapping process, Mr. Ferraina asked the CO whether they could complete the tapping. (Tr. 412). She permitted Mr. Book to reenter the excavation once the crew inserted the trench box. (Tr. 412). Because of the uneven ground in the excavation, the trench box had to be hung by chains off of a vehicle at one end of the excavation, which Mr. Ferraina felt was more dangerous than not having the box at all. (Tr. 416-17).

Contrary to the CO's testimony, Mr. Ferraina claims that he never told her that he knew what he was doing was improper. (Tr. 414, 416). Nor did he inform her that the trench box had been in the excavation a half hour before she arrived or that the excavation was greater than 5 feet. (Tr. 414, 416). According to Mr. Ferraina, the trench box was "at my disposal all day long" but had not been in the excavation "because we were above the limit." (Tr. 257-58, 414).

With respect to the ladder, Mr. Ferraina acknowledged placing it in the excavation, but testified that he did not use it for ingress or egress, instead using the back (southern) end of the trench which had been benched to produce a walkway to the upper surface. (Tr. 296-97). He noted that when he signaled for Mr. Book to exit the excavation upon the CO's request, Mr. Book used the ladder to come out by Mr. Ferraina. (Tr. 410). Mr. Book had not previously used the ladder for either ingress or egress. (Tr. 410).

Eric Book

Mr. Book, a laborer with Kandey for fourteen years, was present at the site to tap the water main. (Tr. 442, 448). He received an OSHA ten-hour training course in 2003, which included training on soil classification techniques. (Tr. 443-45). When questioned about his location within the excavation, he agreed that he was working "on the northeast corner just south of the main water line." (Tr. 452; CX-5). As to the depth of the

excavation, he testified that he is 5 feet 11 inches tall, and when he stood up inside the excavation, the ground surface was at his sternum. (Tr. 453).

After Mr. Ferraina directed him to exit the excavation, Mr. Book walked to the back of his truck, approximately 25 feet away from the CO. (Tr. 455-56, 462). Although his truck and an air compressor were between him and the CO, he testified that his view of her was unobstructed. (Tr. 462-63). Mr. Book saw the CO take a depth measurement standing at least two feet back "from the edge of the hole and kind of slid her tape measure down on an angle" of 70 to 80 degrees. (Tr. 456-57). According to Mr. Book, the material the CO took from the spoil pile for a soil sample was not representative of the excavation because "it's mixed up with top soil and whatever was on the surface that didn't come from the actual excavation itself." (Tr. 458).

With respect to the ladder, Mr. Book testified that, due to the passage of time, he could not recall the method he used to enter and exit the excavation, but he remembered that he could walk out of it. (Tr. 452). Upon cross-examination, he agreed with the statement that the ladder "was placed in the excavation, at least in part, as a means to enter and exit the excavation." (Tr. 461).

Randall Hinsken

Mr. Hinsken, an operator for Kandey, was on site to operate the machinery that dug the excavation. (Tr. 465). Digging down, he hit solid rock and moved away from the street to find the trench in which the water main was located. (Tr. 472). Other than the 24-inch-wide water main trench and the area where the copper pipes were located, Mr. Hinsken testified that the remaining soil had not been pre-dug because it was not "soft digging." (Tr. 472-73, 479-81). Mr. Hinsken explained that the soil became solid rock after the first 12 inches. (Tr. 476). He was able to "pop apart" the next 12 inches of rock using the bucket of his excavator, but then had to use his pneumatic jackhammer for the rest. (Tr. 476-78).

Mr. Hinsken observed Mr. Ferraina use both the crumble test and the thumb test, but was unable to do these tests below the 3-foot level. (Tr. 482). He also observed the

CO take soil sample KC-2 from the spoil pile. (Tr. 483). He testified that the sample was not representative of the excavation because "[i]t's not what we had dug to do our work." (Tr. 483-84). Before taking the sample the CO asked Mr. Hinsken if she could take a sample "from behind where the machine was sitting," but did not ask him which material came from the excavation near the water main or about the consistency of the spoil pile. (Tr. 483-84). Upon cross-examination, Mr. Hinsken acknowledged that there was only one spoil pile and that everything dug out by the crew went into the same pile. (Tr. 494).

Dana Coffelt

Mr. Coffelt, the construction inspector for the Erie County Water Authority, explained that Kandey subcontracted with the Water Authority to "perform large service tie-ins" connecting private water pipes to the public water main. (Tr. 516, 519-21).

Mr. Ferraina contacted Mr. Coffelt on July 31, letting him know that the tapping would take place later in the day. (Tr. 521). Kandey understood that Mr. Coffelt would be on site that day to observe the tap. (Tr. 522). The CO was already on site when Mr. Coffelt arrived. (Tr. 523). The two had a short conversation during which, according to Mr. Coffelt, the CO mentioned "that she thought [the Mr. Ferraina] was in violation and that he seems like an unsafe contractor." (Tr. 526).

Mr. Coffelt testified that the CO's opinion of Kandey was not consistent with his own opinion; he had observed Kandey crews on "[m]any" job sites and felt that the company "always followed safety practices, standards in construction." (Tr. 528-29). Pursuant to the contract, Mr. Coffelt had the authority to stop the job if he felt Kandey was proceeding in an unsafe and improper manner. (Tr. 531). But, he testified he saw no reason to stop the job. (Tr. 531). Mr. Coffelt testified that the excavation was Type A soil and stable rock, but he admitted not performing any soil tests. (Tr. 537).

DISCUSSION AND CONCLUSION

To prove a violation of an OSHA standard, the Secretary has the burden of proving that the standard applies, that the terms of the standard were not met, that employees had access to the violative condition, and that the cited employer had actual or constructive

knowledge (*i.e.*, either knew or could have known with the exercise of reasonable diligence) of the violative condition.[5] *Access Equip. Sys. Inc.,*18 BNA OSHC 1718, 1720 (No. 95-1449, 1999).

Serious Citation 1, Item 2: alleged violation of 29 C.F.R. § 1926.1053(b)(1)

The cited standard provides in pertinent part as follows:

> (1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting the ladder.

The record establishes that Kandey's foreman, Mr. Ferraina, placed a portable ladder in the excavation in a manner such that it could be used for accessing the upper landing surface. (Tr. 296-97, 461; CX-7, CX-9). Indeed, Mr. Book used the ladder to exit the excavation upon Mr. Ferraina's signal during the CO's inspection.[6] (Tr. 410, 455). The foreman's knowledge is imputable to Respondent, especially as he was the competent person on site. *Rawson Contractors Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-0369, 1991).

No evidence was produced indicating that the top of the ladder in the excavation was secured in a manner consistent with this standard. (Tr. 62). Thus, the only issue is whether the ladder side rails extended the requisite 3 feet. The parties stipulated that the ladder complied with § 1926.1053(a)(3)(I), such that the rungs of the ladder were spaced not less than 10 inches apart and not more than 14 inches apart. (ALJ-1; Tr. 14). Based on

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[5]In its Answer, Kandey asserts the affirmative defense of unpreventable employee misconduct for both citation items. However, Kandey appears to have abandoned this argument, as the defense was not mentioned in its post-hearing brief. Regardless, the record evidence indicates that Kandey did not take "all feasible steps to prevent" the violations. *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991) ("A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax.").

[6]Although Respondent argues that no one would have exited the excavation using the ladder "[b]ut for" the CO's request, both Mr. Ferraina and Mr. Book testified that the latter used the ladder only upon the foreman's direction. (Resp't Br. at 2; Tr. 410, 455).

the CO's testimony and several photographs entered into the record, the ladder only had two rungs above the upper landing surface when she first arrived at the site. (Tr. 35-37, 61-63, 164; CX-7, CX-9). Respondent does not challenge this assessment, noting only that the CO did not specifically measure the ladder during her inspection. (Resp't Br. at 21; Tr. 165). Regardless, she testified without rebuttal that the side rails of the ladder "did not extend at least 3 feet above the upper landing surface." (Tr. 61). Given the stipulation, the photographs do not contradict her testimony; at a maximum spacing of 14 inches between rungs, the ladder appears to reach significantly less than the requisite 36 inches. (CX-7, CX-9). Thus, the standard was applicable, the ladder's positioning did not comply with the standard, at least one Kandey employee was exposed to this hazard, and the foreman's actual knowledge of the violative condition is imputed to the Respondent. Accordingly, I find the Secretary established a violation of this standard.

The Secretary classified this violation as serious and proposed a penalty of $1200. A serious violation is one for which "there is a substantial probability that death or serious physical harm could result." Section 17 of the Act, 29 U.S.C. § 666(k). The CO testified that if an employee had fallen off the ladder where it was located that worker "would have fallen on the equipment" at the bottom of the excavation and suffered "[b]roken bones [and] severe lacerations." (Tr. 62, 165, 179-80). The bottom of the excavation near the base of the ladder included the stainless steel tapping machine as well as the copper water pipes. (Tr. 394-95; CX-4 to -7). Accordingly, I find the Secretary has established this violation was serious.

Under section 17(j) of the Act, when assessing a penalty the Commission must give due consideration to "the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). At the hearing, the CO testified that the penalty for this violation was incorrectly calculated. She explained that the Secretary reduced the penalty by 40 percent due to Kandey's size but should have further reduced the penalty by 10 percent based on the company's lack of violations in the preceding three years. (Tr. 64-

65.) Thus, the Secretary proposes a revised penalty of $1000.[7] (Tr. 64-65). Considering the statutory factors, I find the revised penalty to be appropriate.[8] A penalty of $1000.00 is assessed.

Willful Citation 2, Item 1: alleged violation of 29 C.F.R. § 1926.652(a)(1)

The cited standard provides:

> **§ 1926.652 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 potential cave-in.

The evidence in the record establishes that at the time of the inspection the excavation had no cave-in protection - it was not sloped or benched, nor were any of the prescribed types of other "protective systems" available under the standard used. *See* 29 C.F.R. § 1926.652(b)-(c) (describing the "adequate protective system[s]" permitted for protecting employees in excavations); 29 C.F.R. § 1926.650(b) (defining sloping and benching as methods of excavation that incline the side walls away from the excavation). (Tr. 39, 257; CX-4, CX-6 to -7). The CO testified that there was no trench box or protective shield in the excavation at the time of her inspection and that the side walls were vertical and not sloped or benched. (Tr. 39, 44-45, 50-51). The foreman acknowledged that the on site trench box had not been used in the excavation. (Tr. 257). Thus, Kandey did not provide the requisite protection to its employees working in the excavation.

[7]In her brief, the Secretary mistakenly calculates the proposed revised penalty as $1800. (Sec'y Br. at 14; Tr. 64-65).

[8]Kandey suggests that, if the Commission were to find a violation, it should be treated as "DeMinimus." (Resp't Br. at 3). However, the decision as to whether to issue a de minimis notice rather than a citation is within the discretion of the Secretary and not the Commission. Section 9(a) of the Act, 29 U.S.C. § 658(a).

Under this standard, cave-in protection is required *except when* either the excavation is dug "entirely in stable rock" or where the excavation is less than 5 feet in depth and a competent person finds no indications of potential cave-in. The party "claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim." *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522 (No. 90-2866, 1993); *see C.J. Hughes Constr. Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996) (shifting burden to employer in proving exceptions to § 1926.652(a)(1)).

With respect to the first exception, although the witnesses disagreed as to the specific composition of the soil in the excavation, all agreed that the excavation was not made "entirely in stable rock" as the standard requires. Mr. Merrell, the OSHA soil analyst, classified the soil at the site as Type B and Type C.[9] (Tr. 198-99; CX-18 at pp. 21-22). The foreman, Mr. Ferraina, who performed multiple soil tests at the site, found the top 18 inches of soil in the excavation to be Type A.[10] (Tr. 316-18). Although it had the opportunity, Kandey did not take and analyze its own soil sample. Thus, the first exception does not apply to the excavation.

With respect to the second exception, the CO testified to taking two measurements of the excavation's depth. (Tr. 49, 96-97, 104-09). Both measurements were taken on the western side of the excavation, because "[t]hat's where the Employee was working. That's where the exposure was." (Tr. 174). The first measurement resulted in a depth of 6 feet 6 inches. (Tr. 104). The second measurement, taken from the top of the water main to the upper landing surface, resulted in a depth of 5 feet 6 inches.[11] (Tr. 108, 192; CX-7).

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[9]Although questioned by Respondent, the evidence establishes that there was an unbroken chain of custody for the soil samples that Mr. Merrell analyzed. (Tr. 151-53).

[10]Moreover, *Appendix A to Subpart P of Part 1926-Soil Classification* states in pertinent part that no soil is Type A if *inter alia*: "The soil is subject to vibration from heavy traffic, pile driving, or similar effects" or "The soil has been previously disturbed." Evidence in the record indicates that the excavation was made feet from Main Street, a "truck route and . . . main thoroughfare" that is "very busy." (Tr. 436-37). Additionally, Kandey employees testified that at least some of the excavated soil had been previously disturbed to lay the water main. (Tr. 260, 264, 270-75, 336, 347, 372-73, 475, 479-80).

[11]As previously noted, the water main, the bottom of which nearly touched the floor of the excavation, has a 16-inch diameter. (Tr. 392). Thus, the excavation at that point was measured to be at least 6 feet 10

Mr. Ferraina testified that he took a "rough measurement" of the depth of the excavation, finding the depth was approximately 4 feet 6 inches. (Tr. 424). However, Mr. Ferraina repeated that this measurement was "rough," inexact, and "approximate[]" and that this measurement only reached the top of the tapping valve, which was above the top of the water main. (Tr. 424-35). Additionally, Mr. Book testified that, when he stood inside the excavation, the upper landing surface reached his chest. (Tr. 453). Mr. Book also testified that he saw, from behind a truck, the CO make a depth measurement at an angle, but the CO strongly denied this charge. (Tr. 127, 456-57).

In sum, contradicting the CO's tape measurements is only one inexact measurement that suggests a depth greater than 5 feet, Mr. Book's approximation of the depth based on his height, and his observation of a depth measurement by the CO. This testimony did not indicate that Kandey's avowed imprecise measurements were taken at the deepest point of the excavation. Although Respondent questions the propriety of the location of the CO's measurements based on Mr. Book's position inside the excavation, it is clear that "[t]he standard speaks of the depth of the trench, not of the position of the employees." *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2011 (No. 90-1505, 1992). (Resp't Br. at 8-9). Regardless of the CO's measurements, Kandey had the opportunity to measure the excavation itself, but chose not to. On this record, I credit the testimony of the CO over that of the Kandey employees and find that the excavation was over 5 feet in depth. Thus, the second exception does not apply to the excavation.

The Secretary established that the standard applied to the excavation and that the excavation, measuring at greater than 5 feet deep and not made entirely in stable rock, was in violation of the standard. Both Messrs. Ferraina and Book were working in the trench before the inspection and, therefore, were exposed to the hazard of trench collapse. (Tr. 265, 449-455). As mentioned *supra*, Kandey had imputed actual knowledge of the violation through its foreman (and competent person) who supervised the digging of the excavation and worked inside it before the CO's inspection. (Tr. 256, 265-68). *See*

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inches.

Rawson Contractors Inc., 20 BNA OSHC at 1080 (imputation of knowledge from foreman). Accordingly, I find the Secretary has established the alleged violation.

The Secretary has characterized this violation as willful based on Mr. Ferraina's knowledge of the requirements of the standard and of the conditions of the excavation as well as his status as the competent person on site. (Tr. 57). A willful violation is one where the employer has "an intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety." *Kaspar Wire Works Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (internal quotation omitted). This state of mind is established by showing that "the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1043 (No. 91-2834E, 2007) (consolidated cases) (internal quotations omitted). Unlike negligence, which is sufficient for affirming a non-willful violation, willfulness "is characterized by an intentional, knowing failure to comply with a legal duty." *Manganas Painting Co.*, 21 BNA OSHC 1964, 1991 (No. 94-0588, 2007); *Greenleaf Motor Express Inc.*, 21 BNA OSHC 1872, 1875 (No. 03-1305, 2007).

After careful consideration of the record, I conclude that this violation was not willful, but rather was caused by negligence. *See Beta Constr. Co.*, 16 BNA OSHC 1435, 1444 (No. 91-102, 1993) ("In order to establish a willful violation, the Secretary must show more than simple lack of diligence or carelessness on the part of the employer."). The Commission has previously stated that "simple failure to discover or eliminate a violation is not sufficient to demonstrate that the violation is willful in nature." *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1596 (No. 82-12, 1985); *see Sal Masonry Contractors Inc.*, 15 BNA OSHC 1609, 1612 (No. 87-2007, 1992) (finding knowledge of a standard's requirements alone insufficient to support willfulness).

Although Mr. Ferraina did not hew to the requirements of the standard, Kandey's actions and omissions do not rise to the level of disregard required to prove willfulness. *See Williams Enters. Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987) ("It is not

enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation."). Mr. Ferraina testified that he was the competent person on site and was trained in OSHA safety rules pertaining to excavations including soil classifications and how they relate to the requisite protective systems. (Tr. 256, 302-20). He tested the soil consistency in several OSHA-approved ways, which was corroborated by another employee witness. (Tr. 315-20, 482). Indeed, the tests he described are also delineated in the OSHA Technical Manual available on the Internet. *See* OSHA Technical Manual, § V, Chp. 2, ¶ V, *available at* http://www.osha.gov/dts/osta/otm/otm_v/otm_v_2.html. He also indicated that a trench box was available if needed. (Tr. 323). This evidence indicates that Mr. Ferraina was well-intentioned, but mistaken about the need for cave-in protection for the excavation.

Moreover, Messrs. Ferraina, Book, and Coffelt, the Erie County Water Authority inspector, all knew the requirements for cave-in protection, and each believed the excavation at issue was compliant. (Tr. 315-19, 460, 529-31). For instance, Mr. Coffelt testified that Mr. Ferraina contacted him to inspect the site during the tapping process and noted that he had the authority to stop the job if he had any safety concerns. (Tr. 521, 530-31). But, he testified, he had no reason to believe from his inspection that the excavation was unsafe. (Tr. 529-31). Finally, Mr. Ferraina and the other Kandey employees cooperated with the CO's instructions for Mr. Book to exit the excavation and to insert a trench box into the excavation before returning to the tapping process. (Tr. 460). Thus, once confronted with the possibility of noncompliance, Kandey's crew followed the CO's prescriptions and made the excavation compliant. The record evidence, in my view, does not support a finding that Kandey demonstrated plain indifference to employee safety, nor does it suggest that Kandey consciously or intentionally disregarded the Act.

The record establishes that the violation was serious. Had employees been caught in a trench collapse, the result could have been death or serious physical harm. (Tr. 171-72). *See Trumid Constr. Co.*, 14 BNA OSHC 1784, 1789 (No. 86-1139, 1990)

(characterizing cave-in protection violation as serious where trench depth was no more than 6 feet 2 inches). Accordingly, the proposed penalty is reduced to fit within the statutory framework set forth in section 17(b) of the Act, which provides, as pertinent, that "[a]ny employer who has received a citation for a serious violation . . . shall be assessed a civil penalty of up to $7,000 for each such violation." 29 U.S.C. § 666(b). As previously mentioned, section 17(j) of the Act provides, as pertinent, that "[t]he Commission shall have the authority to assess all civil penalties . . . giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j).

The Secretary proposed a high severity/greater probability gravity-based penalty of $49,000, but reduced it at the hearing through the CO's testimony to $35,000 because of miscalculations with respect to Kandey's history of violations and size. (Tr. 57-61). With respect to size, I admit as an exhibit a letter from Kandey's president, dated July 23, 2008, and its attachments, providing the company's quarterly Federal tax returns from the third quarter of 2006 to the third quarter of 2007. (ALJ-2). These tax returns indicate that 38 employees were working for Kandey at the time of the inspection. (ALJ-2). Under OSHA's Field Inspection Reference Manual ("FIRM"), an employer with between 26-100 employees receives the 40 percent reduction that the Secretary eventually applied. OSHA FIRM, CPL 2.103, Chp. IV § C.2.i.(5)(a). The CO also testified that Kandey received a 10 percent reduction for having no previous history of OSHA violations, resulting in a total penalty reduction of 50 percent. (Tr. 179). Considering the statutory factors, I find such a revision appropriate. Accordingly, the penalty is reduced to $3500.00.

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. § 1926.651(j)(1) and withdrawn by the Secretary, is VACATED;

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1), is AFFIRMED, and a penalty of $1000.00 is assessed; and

3. Citation 2, Item 1, alleging a willful violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED as serious, and a penalty of $3500.00 is assessed.

/s/
G. Marvin Bober
Administrative Law Judge

Dated: December 5, 2008
Washington, D.C.