



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

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SECRETARY OF LABOR, :  
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Complainant, :  
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v. :  
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SWALLOW CONSTRUCTION CORP. :  
 :  
Respondent. :

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OSHRC DOCKET NO. 08-0174

Appearances:

Kevin Koplín, Esquire  
U.S. Department of Labor  
Chicago, Illinois  
For the Secretary.

Robert H. Brown, Esquire  
Law Office of Laner, Muchin,  
Dombrow, Becker, Levin and  
Tominberg, Ltd.  
Chicago, Illinois  
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”) 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 7, 2007, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Swallow Construction Corporation’s (“Respondent” or “Swallow”) work site at 1819 North Wilke Road, Arlington Heights, Illinois (“work site” or “job site”), after an accident at the work site resulted in the death of one of its employees by electrocution. Following the inspection, OSHA issued Swallow a four-item Serious citation and a two-item Willful citation for alleged violations of the Act. Swallow contested the citation items, therefore bringing this case before the Commission. All citation

items except for citation 2, item 2 were settled by the parties prior to the hearing.<sup>1</sup> The remaining citation item alleges a Willful violation of 29 C.F.R. § 1926.652(a)(1) for a failure to provide adequate protection against cave-ins for employees working in a trench. A penalty of \$33,000 was proposed for the violation.<sup>2</sup> The hearing in this matter was held in Chicago, Illinois, on July 1, 2008.<sup>3</sup> Both parties have filed post-hearing briefs and reply briefs.

For the reasons discussed below, the undersigned affirms the citation and assesses the Secretary's proposed penalty of \$33,000.

### **Background**

Respondent is a general contractor specializing in underground sewer and water construction (Tr. 172). In 2006, the village of Arlington Heights, Illinois, hired Respondent to install new sanitary sewers and water mains. (Tr. 97). Part of the contract involved installing two fire hydrants on North Wilkie Road in Arlington Heights. (Tr. 78, 97-98). The installation of the hydrants consisted of digging a trench with a backhoe (also referred to herein as a "crane" or "excavator"), hooking-up the hydrants to the water main, and then backfilling the trench. (Tr. 97-98). Alex Rendina, Respondent's vice-president ("VP"), assigned Swallow employee Philp Feltz to install the fire hydrants and named him the competent person at the work site. (Tr. 79, 96, 100, 149-150; Exhs. C-23 at 20, C-24 at 36, 46). Mr. Feltz was also in charge of the work site and work crew consisting of Chester Morris, excavator operator, and laborers Messrs. Carlos Medea and Robert Lozano. (Tr. 73, 79, 82, 146-147; Exhs. C-24 at 36, R-1 at 4). On August 7, 2007, during the installation of the second hydrant at 1918 North Wilke Road, Laborer Lozano was electrocuted when the backhoe came into contact with live, overhead power lines. (Tr. 49, 150, 166; Exhs. C-15, C-16).

At approximately 12:30 P.M. that same day, OSHA's Chicago North office received a call regarding the electrocution fatality at the work site. Approximately two hours later, Compliance Officer ("CO") Larken Akins arrived at the work site to conduct an inspection. (Tr.

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<sup>1</sup> The settled items were severed into a separate docket no. 08-1109.

<sup>2</sup> The Complainant amended the item to allege, alternatively, a repeat or a serious violation.

<sup>3</sup> Respondent's motion to dismiss orally made after the Secretary rested following presentation of her Case-in-Chief on the basis that evidence relating to the depth of the trench was ambiguous was denied by the Court. (Tr. 141-144).

47, 49, 116). CO Akins observed an open trench and spoils pile located approximately twenty feet from the edge of North Wilke Road (Tr. 49-52; Exhs. C-5 through C-7). The trench was uneven in shape and measured roughly 20 feet 8 inches long, and between 5 feet 1 inch and 8 feet 5 inches wide. (Exh. C-15). CO Akins took two soil samples from the spoils pile which she described as moist and damp. (Tr. 56). The trench walls were moistened with water and there was also standing water at the bottom of the trench. (Tr. 44, 51-52, 56; Exhs. C-5 through C-7, C-15). CO Akins also observed and assisted Arlington Heights Police Officer James Kehm measure the depth of the trench, using a steel measuring tape, from the top of the trench wall to the bottom of the trench. (Tr. 52-55). The measuring tape indicated that the trench was 5 and ½ feet deep. (Tr. 55). The trench was open for at least one hour before the electrocution and both Messrs. Feltz and Lozano worked in the area of the trench that was 5 and ½ feet deep for at least approximately 5 minutes. (Tr. 84, 89). The trench was not sloped or benched, and a trench box, even though there was one present at the work site, was not used. (Tr. 87; Exh. C-35 at 1).

#### **The Cited Standard**

Citation 2, Item 2, alleges a Willful - Repeat - Serious violation of 29 C.F.R. § 1926.652(a)(1).<sup>4</sup>

The cited standard provides as follows:

- (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.

#### **Jurisdiction**

The parties have stipulated that the Commission has jurisdiction of this matter. They have also stipulated that at all relevant times Swallow was engaged in a business affecting commerce and was an employer within the meaning of the Act. *See* Secretary's "Complaint" at

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<sup>4</sup> The citation states: "The employer does not protect each employee in its trenches by properly sloping the trenches or using using [sic] appropriate protective systems, such as but not limited to trench boxes or shoring. The violation was most recently observed at the site located at 1819 N. Wilke Road in Arlington Heights, Illinois."

1-2; Respondent's "Answer to Complaint" at 1; "Respondent's Pre-Hearing Submissions" at 1. I find, therefore, that the Commission has jurisdiction of the parties and the subject matter in this case.

**The Secretary's Burden of Proof**

To prove a violation of a specific standard, the Secretary must demonstrate by a preponderance of the evidence that (1) the cited standard applies, (2) the terms of the standard were not met, (3) employees had access to the cited condition, and (4) the employer knew, or could have known with the exercise of reasonable diligence, of the cited condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

**The Relevant Testimony**

**Robert J. Coniglio**

Mr. Robert Coniglio is a police officer with the Arlington Heights Police Department. He testified that on August 7, 2007, he was dispatched to 1819 North Wilke Road to respond to a call of a crane hitting a high tension wire. He arrived at the job site at 12:35 p.m., where he observed a trench with a fair amount of water at the bottom of it. (Tr. 39-40, 43-44; Exh. C-16). Officer Coniglio viewed photograph exhibits C-5 through C-7 and testified that they were an accurate depiction of the trench as it appeared on August 7, 2007. (Tr. 42).

**OSHA CO Larken Akins**

CO Akins has been an OSHA CO for 5 years. During that time she has conducted approximately 265 inspections, 31 of which involved excavations. CO Akins testified that on August 7, 2007, OSHA received a call regarding an electrocution fatality at a work site. CO Akins arrived at the work site at approximately 2:30 p.m., where she observed overhead power lines in close proximity. (Tr. 49). She also observed an open excavation and spoils pile. She identified Exhibits C-1 and C-3 as photographs she took of the work site showing the excavator used to dig the trench, as well as the spoils pile of dirt from the trench. (Tr. 50). She also identified Exhibits C-5 through C-7 as photographs she took of the trench twenty minutes after arriving at the work site at 2:50 p.m., August 7, 2007. (Tr. 51-52). CO Akins testified that she and Arlington Heights Police Officer Kehm measured the depth of the trench, using a steel measuring tape, from the top of the trench wall to the bottom of the trench. (Tr. 52-55). The measuring tape, which she observed to be straight with no bends, indicated that the trench was 5

and ½ feet deep in front of the fire hydrant. (Tr. 55; Exh. C-5). CO Akins testified that she took two soil samples from the spoils pile which she described as moist, damp, cool and wet. (Tr. 56; Exh. C-3). She further testified that the trench walls were moistened with water and appeared to be slick. (Tr. 56; Exh. C-6).

CO Akins testified that VP Rendina gave a statement under oath on December 6, 2007 in which he stated that: first, in accordance with the project's engineering specifications the hydrant was a six feet bury hydrant (Tr. 61-63; Exh. C-36 at 63-65); second, Mr. Feltz was the Respondent's supervisor and competent person at the work site (Tr. 99-100; Exh. C-24 at 36-37, 46); and third, he (VP Rendina) did not take any soil samples of the excavation. (Tr. 101; Exh. C-24 at 55).

She further testified that Mr. Feltz also gave a statement under oath on December 6, 2007 in which he stated that: first, he was the foreman or the person in charge of the work site (Tr. 78-79, 82; Exh. C-23 at 16-17); second, he was the competent person at the work site and was in charge of the crew's safety (Tr. 79, 82-83; Exh. C-23 at 20, 25); third, as the person in charge he should have completed and signed a Job Site Safety Sheet on August 7, 2007, but he did not (Tr. 81-82; Exh. R4 at 44); fourth, the trench was between 5 and 5-1/2 feet deep, and that neither he nor anyone else determined the type of soil that was present in the excavation (Tr. 84-85, 88-90; Exh. C-23 at 44-45); fifth, he was aware that OSHA required the use of a trench box for this excavation, and even though a trench box was present at the site, he failed to use it (Tr. 87, 89; Exh. C-23 at 46-47); sixth, he did not use the trench box because the ground looked firm and hard, and therefore he felt it was not needed (Tr. 88; Exh. C-23 at 46); seventh, both he and Mr. Lozano worked in the area of the trench that was 5 to 5 and ½ feet deep for about 5 minutes (Tr. 89; Exh. C-23 at 44, 49); and eighth, although he did not attempt to determine the type of soil in the trench, it appeared to him to be Type C soil.<sup>5</sup> (Tr. 85; Exh. 23 at 44-45).

CO Akins further testified that, upon arriving at the work site on August 7, 2007, she did not present her credentials, or speak, to any Swallow employees at the job site. She was told by

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<sup>5</sup> Type C soil is defined in Appendix A to § 1926.652 as:  
“(i) Cohesive soil with an unconfined compressive strength of .5 tsf [ton per square foot] (48 kPa[kilopascals]) or less; or (ii) Granular soils including gravel, sand, and loamy sand; or (iii) submerged soil or soil from which water is freely seeping ...”

the Arlington Heights Fire Department, police, Commonwealth Edison, and Arlington Heights Public Works Department personnel that there were no other Swallow employees present at the job site. On that date, she also did not try to contact any off-site Swallow employees by telephone. She testified that OSHA procedures require her to get in touch with representatives of employees found on the site. She stated that she spoke with Respondent's Safety Consultant, Peter Cruz, on the next day to arrange to interview Swallow employees. With Mr. Cruz's assistance, she interviewed a number of Swallow employees on August 9, 2007. (Tr. 116-119).

She also testified that she did not use a trench pole (also known as an "engineering rod") to measure the depth of the trench, which is one of the preferred methods OSHA Training Institute students were trained to follow, and that she did not document the measurements taken of the trench with photographs. (Tr. 122-124). She testified that Officer Kehm's measurement adjacent to the front of the fire hydrant was straight up and down with no angle. (Tr. 124-125). In response to a question at the trial of whether using a trench pole is more accurate than using a measuring tape, she said "no." (Tr. 125). CO Akins also testified that Officer Kehm's forensics report stated that the trench was "about 5 feet in depth," and that her own accident report stated that the trench was between 5 to 5 and ½ feet deep. (Tr. 127, 129; Exh. R-14 at 2).

She acknowledged she did not send the soil samples she took to the laboratory for testing. CO Akins also stated that during her investigation Mr. Feltz told her that he thought the trench was 4 feet deep.<sup>6</sup> (Tr. 130, 135). In determining the depth of the trench, CO Akins testified that she relied on Mr. Feltz's sworn statement that it was 5 to 5 and ½ feet deep, the Arlington Heights project specifications which required the hydrant to have a bury depth of 6 feet, and her observation of the measurement taken by her and Officer Kehm which showed the trench to be 5 and ½ feet deep. (Tr. 130-131, 140-141). CO Akins also testified that Respondent's excavator came in contact with a live, overhead wire. (Tr. 240).

#### Philip Feltz

Mr. Philip Feltz is an employee of Swallow. He testified that his job title with Swallow was as a "lead guy" on a "punchlist" crew. (Tr. 145-146). A punchlist crew, he explained, took care of the little things that needed to be done at the end of a job so that the job could be

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<sup>6</sup> The date and circumstances regarding when this statement by Mr. Feltz was made were not identified by CO Akins. There is no evidence that this was a sworn statement.

completed. (Tr. 146). He further testified that he was placed in charge, by VP Rendina, of the punchlist crew that was tasked with installing the two hydrants at North Wilke Road on August 7, 2007. (Tr. 147, 149-150). Mr. Feltz also testified that he was the competent person at the work site that day. (Tr. 150). He identified photograph Exhibit C-5 as accurately depicting the work site except for the quantity of water shown at the bottom of the trench. (Tr. 151-153). Mr. Feltz testified that it had rained in the morning. He further testified that the soil was clay, firm, hard and dry, and that he did not see any water accumulated at the bottom of the trench. (Tr. 151). He testified that he entered the trench to help Mr. Lozano connect the fire hydrant to the lead pipe. (Tr. 154). He guessed the trench was 5 and ½ feet deep, but admitted that he did not measure it. (Tr. 154). He also testified that the trench came up to about his shoulders, and being that he is roughly 6 feet 2 inches tall, would approximately make the depth of the trench about 58-59 inches deep. (Tr. 154-158). He testified that he did not know when he and Swallow employee Carlos Medea exited the trench on August 7, 2007. (Tr. 165). Mr. Feltz also stated that the backhoe used to excavate the trench was located near an overhead energized power line. (Tr. 166). Lastly, he also admitted that, in order to give himself room to work, the trench was dug beyond the bottom of the fire hydrant pipe and tee connection. (Tr. 167-168).

#### Alexander Rendina

Alexander Rendina is the VP of Swallow. (Tr. 169-170). He testified Swallow has approximately 18 employees, but that the number of employees is reduced to maybe 2 or 3 during the winter months of December through March. (Tr. 170-171). He testified that on August 7, 2007, he was present at the job site and described the soil to be Type B soil.<sup>7</sup> He classified it as Type B soil because that is what was present throughout the project and because it was very hard clay. (Tr. 178-179). VP Rendina further testified that he did not take any

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<sup>7</sup> Type B soil is defined in Appendix A to § 1926.652 as:  
“(i) Cohesive soil with an unconfined compressive strength greater than .5 TSF (48 kPa) but less than 1.5 tsf (144 kPa); or (ii) granular cohesionless soils including: angular gravel (similar to crushed rock), silt, silt loam, sandy loam and, in some cases silty clay loam and sandy clay loam. (iii) previously disturbed soils except those which otherwise would be classed as Type C Soil. (iv) Soil that meets the unconfined compressive strength or cementation requirements for Type A, but is fissured or subject to vibration; or (v) Dry rock that is not stable; or (vi) Material that is part of a sloped, layered system where the layers dip into the excavation on a slope less steep than four horizontal to one vertical (4H:1V), but only if the material would otherwise be classified as Type B.”

measurements of the trench until three or four weeks [June 3 through June 10, 2008] prior to the hearing and after the trench was already backfilled. (Tr. 180-181). He identified Exhibit R-15 as a photograph he took of the hydrant showing that it is a 5 feet 1/4 inch bury hydrant. (Tr. 182; Exh. R-15). He identified Exhibit R-16 as a photograph he took of the hydrant with the adjacent auxiliary valve. He testified that he placed a trench pole into the auxiliary valve, which extends vertically down from above ground level to the top of the six-inch diameter horizontal water pipe, and that it showed a measurement of 4 feet 6 inches. He also testified that the bury line of the hydrant was 8 inches above ground level. (Tr. 184-188, 206-207; Exhs. C-12, R-16, R-19). He identified Exhibit R-17 as a photograph he took of the work site showing the existing ground level in comparison to the original ground level when the trench was excavated. He testified that the original ground level in which the trench was dug was 8-10 inches below the existing ground level. (Tr. 185-187; Exhs. R-17, R-19). Based on these measurements, VP Rendina testified that the depth of the trench from the bottom of the pipe to the existing ground profile was about 3 feet 9 inches as of June 3-10, 2008. (Tr. 189-192; Exh. R-19).

He also testified that the approximate depth of the trench based upon his June, 2008 measurement was four feet. (Tr. 193). VP Rendina acknowledged that this measurement was less than the bury depth of 6 feet as required in the project specifications, but that the Village of Arlington Heights accepted it because the ground profile and contours made it impossible to achieve the bury depth of 6 feet. (Tr. 193-194). He also testified that a photograph of a ladder by which employees entered and exited the trench showed that the trench at the ladder's position was "a little bit more than 4 [feet]" deep. (Tr. 195; Exh. R-8). In response to a question of whether Swallow ever employed 32 workers as evidenced by Exhibit C-37, VP Rendina testified "no," and that the exhibit listing Swallow as having 32 employees must have been a typo. (Tr. 197, 207-208; Exh. C-37). VP Redina also testified that Type B soil is stiffer than Type C soil and that "Type C soil is considered like the worst-case scenario, which is pretty much what we treat everything as." (Tr. 255).

#### Manuel Ypsilantes

Manuel Ypsilantes is a construction safety and health consultant who was hired by Swallow as an expert witness. (Tr. 209). He testified that during a twenty-seven year career with the federal government he served as a CO, Supervisor, and Manager at the OSHA Training



Institute, where he served as Construction Branch Chief.<sup>8</sup> (Tr. 209-211). When asked whether the use of a tape measure to measure the depth of an excavation is a proper investigatory technique, Mr. Ypsilantes testified that an engineering rod is typically the most efficient and effective method of obtaining a vertical measurement of a trench. (Tr. 213, 225-226). When asked whether OSHA's reliance on a police officer's measurement of the trench, where no pictures were taken of the depth measurements, is a proper investigatory technique, Mr. Ypsilantes testified that it is the duty of the CO to take the measurements, and that a lack of photographs weakens OSHA's case. (Tr. 225-226). Based on his review of the evidence, Mr. Ypsilantes testified that the depth of the trench could have ranged from 4 and ½ feet to perhaps 5 and ½ feet deep. (Tr. 233). Mr. Ypsilantes also stated that OSHA Compliance Officers had used tape measures to measure the depth of trenches. (Tr. 234).

### **Discussion**

The first element of the Secretary's case is to show the applicability of the cited standard. The cited standard, 29 C.F.R. § 1926.652(a)(1), "applies to all open excavations made in the earth's surface . . . includ[ing] trenches." *See* 29 C.F.R. § 1926.652(a). Moreover, an "excavation" is defined as "any man made cut, cavity, trench, or depression in an earth surface, formed by earth removal;" and a "trench" is defined as "a narrow excavation (in relation to its length) made below the surface of the ground." *See* 29 C.F.R. § 1926.650(b). Here, it is undisputed there was an open excavation in "an earth surface" at the job site on August 7, 2007. I find, therefore, that the Secretary has shown the applicability of the cited standard.

The second element of the Secretary's case is to establish that the terms of the cited standard were not met. The cited standard requires employers to protect employees in excavations "from cave-ins by an adequate protective system designed in accordance with paragraph (b) and (c) of this section." Paragraph (b) of § 1926.652(a) addresses the design of sloping and benching systems. Paragraph (c) addresses the design of support systems, shield systems, and other protective systems. Here, Swallow admitted it did not use a trench box, sloping, benching or any other protective system in the trench. (Exh. C-35 at 1-2). I find, therefore, that the Secretary has established Swallow failed to comply with the terms of the standard.

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<sup>8</sup> Mr. Ypsilantes was allowed by the Court to testify as an expert in matters relating to Construction Safety and Health, including trenching. (Tr. 222-225).

The third element of the Secretary's case is to demonstrate that employees had access to the cited condition. The Secretary may show employee access through either actual employee exposure, or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). The test for whether an employee would have access to the "zone of danger" is "based on reasonable predictability." *Id.*; *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996) (citing *Capform, Inc.*, 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994)). Here, employee Phillip Feltz gave un-rebutted testimony that three Swallow employees, including himself, Carlos Medea and Robert Lozano, worked in the area of the trench that was 5 to 5 & ½ feet deep. (Tr. 89, 165; Exhs. C-23 at 47, 49, R-1 at 4). I find, therefore, that the Secretary has established Swallow's employees were exposed to the hazard of a cave-in.

The final element the Secretary must prove is that the employer either knew or should have known of the cited condition. The actions and knowledge of supervisory personnel are generally imputed to their employers. *Revoli Const. Co.*, 19 BNA OSHC 1682 (No. 00-0315, 2001)("Revoli"); *Tampa Shipyards*, 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992); *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994). "When a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proving knowledge without having to demonstrate any inadequacy in the employer's safety program." *Superior Electric Co.*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996) (citing *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 92-862, 1993))("Dover Elevator Co."). The Commission has also held, "that an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999). "It is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority." *Id.* at 1726 (quoting *Dover Elevator Co.*, *supra* at 1286).

Here, the record shows that Mr. Feltz was Swallow's supervisor for the work site and knew that a trench box or other protective system was required for the excavation at issue. Mr. Feltz had actual knowledge of the trench, including its depth, and knew that the trench lacked

cave-in protection. His actual knowledge of these conditions is imputed to Respondent. Swallow's VP, Alex Rendina, stated under oath that Mr. Feltz was the supervisor and competent person at the work site. (Tr. 99-100; Exh. C-24 at 36-37, 46). This testimony was corroborated by Mr. Feltz who acknowledged that he was the foreman or the "person in charge" of the work site; and that he considered himself to be the competent person at the work site. (Tr. 78-79, 82, 150; Exh. C-23 at 16-17, 20). Indeed, Swallow's own counsel admitted that Mr. Feltz's scope of employment included determining the depth of the trench. (Tr. 86). Mr. Feltz further stated that he was in charge of the crew's safety, and that although he knew a trench box was required for the excavation at issue, he failed to use one. (Tr. 82-83, 87; Exh. C-23 at 25, 46). He further testified that he was placed in charge, by VP Rendina, of the punchlist crew that was tasked with installing the two hydrants at North Wilke Road on August 7, 2007. (Tr. 147, 149-150). Respondent's Daily Field & Time Sheet Report for the Wilke Road job listed Phil Feltz as the "foreman" on August 7, 2007. (Ex. R-1, at 4). Mr. Feltz's crew consisted of Chester Morris, the backhoe operator, and Messrs. Carlos Medea and Robert Lozano, who were laborers. (Tr. 79; Exhs. R-1 at 4; R-14). Before starting work, Mr. Feltz explained to his crew what they would be doing that day. (Tr. 162). Mr. Feltz also supervised Mr. Morris' work on the site. (Tr. 99-100).

Because Mr. Feltz was Swallow's supervisor at the site, his actual knowledge of the cited conditions is imputable to Swallow. I find, therefore, that the Secretary has shown the knowledge element, and, as she has met all four elements in this case, she has proven that Swallow violated the cited standard.

Having found that the Secretary has proven that Swallow has violated the standard, I now turn to whether Swallow has established an exception to the standard. Explicitly written as an exception to the cited standard, Respondent has the burden of establishing that either the excavation was "made entirely in stable rock"; or the excavation was "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." See 29 C.F.R. § 1926.652(a)(1)(i) and (ii); *A.E.Y. Enterprises*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006) (emphasis added). See also *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522 (No. 90-2866, 1993)("[T]he party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim.").

Swallow argues that it "has satisfied its burden of showing [that the depth of the trench]

was less than five feet at all points where the employees were exposed.” (Resp’t Post-Hr’g Br. at 12).<sup>9</sup> In support of this argument, Swallow notes that CO Akins testified that during her investigation, Mr. Feltz told her he thought the trench was 4 feet deep; and that both VP Rendina and CO Akins testified that a photograph of a ladder, by which employees entered and exited the trench, showed the trench was “a little bit” in excess of 4 feet deep. (Tr. 130, 133, 135, 195; Exh. R-8). Furthermore, Swallow notes that Mr. Feltz testified that the trench came up to about his shoulders, and being that he is 6 feet 2 inches tall, would approximately make the depth of the trench a bit less than 5 feet deep; and that VP Rendina testified that based on his detailed measurements taken in June, 2008 at the site through the auxiliary valve, he concluded the depth of the trench was about 3 feet 9 inches. (Tr. 154-158, 189; Exh. R-19). Swallow further asserts that OSHA’s investigation of the trench depth was unreliable because CO Akins did not use a trench pole to measure the depth of the trench, which is one of the preferred methods advocated by the OSHA Training Institute, and that she did not personally measure the trench or document the measurements with photographs. (Tr. 122-124). Swallow also noted that CO Akins admitted that upon arriving at the work site, she did not present her credentials, speak to, or try to contact any employees or officials of Swallow Construction as required by OSHA procedures . (Tr. 116-117).<sup>10</sup>

The evidence from five different sources rebuts Respondent’s claim that the trench at its deepest point was less than five feet. First, there is CO Akins’ direct observation of the depth of the trench at five and one-half feet as measured by Officer Kehm of the Arlington Heights Police Department and CO Akins. Second, Phillip Feltz told OSHA in a sworn statement during the investigation that the trench was between five and five and one-half feet deep. Third, the police forensic report stated that the trench was “about 5’ in depth” and the attached “Diagram of Excavation” indicated that the “Excavation Depth” was “5’.” (Exh. C-15). Fourth, VP Rendina told OSHA that the fire hydrant had a six foot bury, meaning that there was at least six feet of pipe and shoe below the hydrant itself. Because the fire hydrant as installed is approximately ten inches above ground, there is at least five feet, two inches of the fire hydrant’s six feet bury that

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<sup>9</sup> It is not disputed that the trench was not dug in stable rock.

<sup>10</sup> This may be explained by the reported absence of any other Swallow personnel at the job site when CO Akins first arrived there.

is below ground. Counting an additional two inches of fill, the depth of the trench based on the height of the hydrant above ground is at least five feet, four inches. Fifth, Respondent's own expert testified at the hearing that the depth of the trench varied and could have ranged from 4 and ½ feet to 5 and ½ feet.

Although CO Akins admitted that Mr. Feltz told her at some point in time that he thought the trench was 4 feet deep, the record also shows that Mr. Feltz stated in his December 6, 2007 transcribed statement that the trench was between 5 and 5-1/2 feet deep. (Exh. C-23 at 44-45). Because Mr. Feltz's December 6, 2007 statement was sworn to and made in a formal setting, I find it more credible and give it more weight. Furthermore, I find the photographs of the ladder introduced by the Respondent to establish the depth of the trench to be inconclusive. On photograph exhibit R-8, the location of the ladder in the trench is indiscernible. Therefore, it is not clear whether the ladder was located in the lowest point of the trench or where Swallow's employees were working. Indeed, when asked at her deposition whether the photograph showed the trench to be a little bit in excess of 4 feet, CO Akins testified "yes, on this photograph," therefore indicating that her agreement was only to the point of the trench where the ladder was located as indicated by this particular photograph. (Exh. R-21 at 43).

I also find the testimony given by Mr. Feltz that the trench was less than 5 feet deep, based on the fact that it only came up to his shoulders, is unpersuasive and unreliable, especially since Mr. Feltz admitted that he never actually measured the trench. (Tr. 154). Likewise, I find that the measurements taken by VP Rendina through the auxiliary valve to be unreliable because they were done at a single spot ten months after the trench had already been filled and it is speculative, at best, whether the technique used accurately measured the depth of the trench at its deepest point as of August 7, 2007 or where the Swallow employees actually worked. (Tr. 181).

In addition, the record shows that CO Akins personally observed Officer Kehm as he used a steel measuring tape to measure the depth of the trench.<sup>11</sup> Officer Kehm measured the depth of the trench with CO Akin's assistance.<sup>12</sup> The measuring tape, which she observed to be

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<sup>11</sup> Officer Kehm and other Arlington Heights Police personnel measured other areas of the trench and determined that the trench was roughly 20 feet 8 inches long with the east width being 5 feet 1 inch at its widest point and the west width being 8 feet 5 inches at its widest point. (Exh. C-14, at 2).

<sup>12</sup> The trench as excavated was even deeper than measured by the Officer Kehm and CO Akins. Before they measured the trench, the crew had placed about two inches of gravel in the bottom of the

straight with no bends, indicated that the trench was 5 and ½ feet deep at its deepest point. (Tr. 55). This testimony is corroborated by Officer Kehm's forensics report which states the trench was "about 5 feet in depth." (Tr. 127; Exh. R-14). The fact that CO Akins did not use a trench pole or take pictures of the measurements does not make her findings inaccurate or unreliable.

It is of little or no consequence that the forensic report showed that the trench was 5 feet deep versus 5 and ½ feet deep since the trench measured over the threshold limit of 5 feet in depth in either instance. VP Rendina testified under oath in his deposition that the hydrant was a six feet bury hydrant. (Exh. C-24 at 63). Indeed, Swallow's own expert witness, Manuel Ypsilantes, admitted that the depth of the trench "could have ranged from 4 and ½ feet or plus to perhaps 5, 5 and ½ feet." (Tr. 233).

Lastly, the record shows that Respondent never measured the depth of the trench with a reliable measuring device when it was open. Using his body height as a standard, Mr. Feltz knew on August 7, 2007 that the trench was 5 or more feet at the end of the pipe where the hydrant was sitting. (Exh. C-23 at 44-45). Respondent's action in identifying the depth of the trench on August 7, 2007 was a poor substitute for using a reliable measuring device and actually measuring the depth. It's recurrent history of not providing cave-in protection put Respondent on notice that it would be prudent to measure the depth of the trench with a reliable measuring device. This it utterly failed to do at its peril. Based on the foregoing, I find the trench was 5 or more feet deep.

Swallow next argues that its designated competent person, Mr. Feltz, examined the soil and found it to be firm, hard, and dry, and therefore provided no indication of a potential cave-in. (Resp't Post-Hr'g Br. at 4-5, 11-12). Mr. Feltz's testimony at the trial in this regard is not credible as there is ample evidence to the contrary. On December 6, 2007, Mr. Feltz gave sworn testimony that the soil was Type C soil. VP Redina also testified that Swallow treats all soil as Type C soil. However, having found that the trench, which was not dug in rock, was more than 5 feet in depth, I conclude that the exemption to the standard was not established, regardless of

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trench. The measurement of five and one-half feet therefore understated that depth of the trench as excavated by about two inches.

the type of soil involved.<sup>13</sup> Respondent has not met its burden of proving that the trench was less than five feet deep and that a competent person examined the ground and determined that there is no indication of a potential cave-in. Accordingly, Item 2 of Citation 2 is affirmed.

### Characterization

The Secretary alleges that the violation is serious because a cave-in of the trench walls could have seriously injured the employees working at the bottom of the trench (Sec’y Post-Hr’g Br. at 17). Under section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious if there is “a substantial probability that death or serious physical harm could result.” This provision “does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, than a serious injury is the likely result should an accident occur.” *Pressure Concrete*, 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992). The record shows that Messrs. Feltz, Medea, and Lozano all were in the unsloped, unshored trench that was more than 5 feet deep. (Exhs. C-23 at 49, C-35 at 1). Had the employees been caught in a trench collapse, the result could have been death or serious physical harm. Therefore, I find the Secretary has established the violation was properly classified as serious.

The Secretary also alleges that the violation is Willful because the Respondent knew the standard’s requirements applied, but chose not to slope, bench or shore-up the trench. (Sec’y

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<sup>13</sup> Assuming *arguendo* that the trench was not more than 5 feet deep, I conclude Swallow has still failed to establish an exemption to the standard. The record shows that neither Swallow’s competent person at the worksite, Philip Feltz, nor anyone else determined the type of soil that was present in the excavation (Exh. C-23 at 44-45). Moreover, there is no evidence in the record that Mr. Feltz determined that there was no potential for cave-in as required to prove the exemption to the standard. See 29 C.F.R. § 1926.652(a)(1)(i) and (ii). I also find that Mr. Feltz’s testimony that there was little or no water at the bottom of the trench to not be credible since there is overwhelming evidence to the contrary. (Tr. 44, 79, 151, 165). Officer Coniglio observed a fair amount of water in the bottom of the trench resembling the amounts of water depicted in photographs taken later in the day. (Tr. 44-45). Nothing was moved in the trench between the time Officer Coniglio arrived at the scene at 12:35 p.m. and the time that the photographs were taken at approximately 2:35 p.m. (Tr. 42, 44-45). Officer Kehm also noted water in the bottom of the trench. (Exh. C-14, at 2). CO Akins also observed and photographed the bottom of the trench containing standing water. (Tr. 51-52; Exhs. C-5 through C-7).

Post Hr'g Br. at 18-19). The Respondent, on the other hand, asserts that the Secretary failed to show that the violation was Willful because Mr. Feltz believed the soil was firm and that the trench was less than 5 feet deep. (Resp't Post-Hr'g Br. at 13-14). Although the Act does not define the term "willful," courts have held that "a willful violation of the Act constitutes an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements." *Conie Construction, Inc. v. Reich*, 73 F.3d 382 (D.C. Cir. 1995) citing *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422 (D.C. Cir. 1983). A willful violation is "one committed 'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employees safety.'" *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2140 (No. 04-0475, 2007) (quoted cases omitted). The Secretary must demonstrate "the employer had a 'heightened awareness' of the illegality of the conduct." *Diamond Installation, Inc.* 21 BNA OSHC 1688, 1692-93 (No. 02-2080, 2006) (consolidated); *Revoli, supra*, at 1686 (four prior citations for violating the same standard gave employer heightened awareness of requirements of standard establishing plain indifference to employee safety.). To do so, she must show that "the employer was actually aware of the unlawfulness of the action or that it 'possessed a state of mind such that if it were informed of the standards, it would not care.'" *Id.* at 1692-93 (quoted case omitted).

Respondent knowingly violated the standard. As discussed above, although Mr. Feltz told CO Akins at one time that he thought the trench was 4 feet deep, I find his December 6, 2007 statement under oath that the trench was between 5 and 5-1/2 feet deep to be more credible. Furthermore, although Mr. Feltz testified that the soil looked firm and hard, and therefore he did not use the trench box because he felt it was not needed; he also admitted that neither he nor anyone else determined the type of soil that was present in the excavation. (Tr. 85; Exh. C-23 at 44-45). The trench was not sloped or benched in accordance with any of the sloping ratios specified in OSHA's trenching standard at 29 C.F.R. §1926.652. (Exh. C-35, Request No. 3).

I find Mr. Feltz's failure to examine the soil to determine whether there was a potential for cave-in negates his subjective, gut feeling that the soil looked firm and hard. The soil sampled by CO Akins from the spoil pile was moist and the walls of the trench appeared slick and moistened with water. (Tr. 56; Exh. C-6) Moreover, Mr. Feltz's testimony that he failed to use a trench box even though he was aware that one was present and required for this excavation,



shows that he committed the violation with knowing disregard for the requirements of the Act and with plain indifference to employee safety. (Exh. C-23 at 46-47). I find that Mr. Feltz, and through him, Swallow, were actually aware on August 7, 2007 that the trench was more than five feet deep and that it was unlawful to not use a trench box at the job site.

I also find heightened awareness here since Swallow had seven prior citations for violating the same standard, including two Willful and two Repeat citations. Respondent's failure to provide cave-in protection to employees on August 7, 2007 was not an isolated incident; it was part of a pattern of intentional disregard for the standard and plain indifference to employee safety. *See Chao v. Greenleaf Motor Express, Inc., et al.*, 262 Fed. Appx. 716, 2008 WL 313066, at \* 2 (C.A. 6 Feb. 4, 2008). During a fifteen-year period, Respondent has repeatedly violated OSHA's cave-in standard. As the Commission noted in *Revoli, supra*, a pattern of repeated prior violations of the same standard "is strong evidence of willfulness." *Id.* at 1686. *See Reynolds, Inc.*, 21 BNA OSHC 1581, 1590 (No. 05-0023, 2006)(extensive history of citations involving the same standard for lack of cave-in protection may be indicative of the employer's indifference to its safety obligations under the Act.). Respondent's failure to take remedial steps to prevent recurrences of violations of the same standards compels a finding of willfulness in this case. *See Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892-1893 (No. 92-3684, 1997). Respondent's knowing, repeated, and/or continued violations of the same standard demonstrate Respondent's willful state of mind. I find that Mr. Feltz made a conscious decision not to utilize cave-in protection at the job site. I further find that Feltz's conscious decision to not provide any cave-in protection to be reckless and unreasonable.

The Respondent also asserts that the Secretary failed to show that the violation was willful because "Feltz was not an agent of Swallow whose actions can be imputed to the corporation." (Resp't Post-Hr'g Br. at 14-15). However, as discussed above, the record shows that Mr. Feltz was Swallow's supervisor for the worksite, and therefore his actions are imputed to Swallow. Accordingly, I find the Secretary has established the violation was properly classified as Willful. Respondent also argues that even if Feltz's action can be imputed to Swallow, Feltz in good faith believed that there was no reason to install additional protection in the trench. The test of good faith is an objective one - whether the employee's belief concerning a factual matter was reasonable under the circumstances. *See Williams Enterp., Inc.*, 13 BNA

OSHC 1249, 1256-1257 (No. 85-355, 1987). I find that any belief by Mr. Feltz that there was no reason to use cave-in protection at the job site to be unreasonable, frivolous and not in good faith. In light of Respondent's poor track record of not providing cave-in protection when appropriate, the proper course of action would have been for Respondent to have used a measuring device to measure the depth of the trench. Instead, Mr. Feltz testified under oath on two separate occasions that he eyeballed the trench to be somewhere between four feet, ten inches and five feet, six inches.<sup>14</sup> (Tr. 89, 154-158; Exh. C-23 at 44). With its long history of trenching violations, Respondent was alerted that special attention was required at the job site to prevent future violations of the cave-in protection standard. *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1188 (Nos. 89-2883 and 89-3444, 1993).

The Secretary also alleges that the violation is Repeat, based on a citation issued by the Secretary to Swallow on August 17, 2005. (Sec'y Post Hr'g Br. at 17; Exh. C-28). A violation is considered a repeat violation "if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). "A prima facie case of substantial similarity is established by showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Co.*, *supra* at 1638. As the Secretary notes, the record shows that Item 1 of Citation 1 of the August 2005 citation charged a violation of § 1926.652(a)(1), the same standard at issue in this case. (Exh. C-28). Moreover, the parties entered into an Informal Settlement Agreement on September 6, 2005, where no modifications were made to the citation, but the parties agreed to a slight reduction in the penalty (Exh. C-28). Furthermore, the record also shows that Swallow was issued six other separate citations, for violations of the same standard at issue in this case. (Exhs. C-29, C-31 through C-34). The parties entered into settlement agreements (informal or otherwise) in five of the six cases, where no modifications were made to the citations, except that the parties agreed to a reduction in penalties in all but one

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<sup>14</sup> Additionally, a good faith belief that a condition was not hazardous is not a defense to willfulness. *See Donovan v. Capitol City Excavating Co., Inc.*, 712 F.2d 1008, 1010 (6<sup>th</sup> Cir. 1983), 11 BNA OSHC 1581, 1582; *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124 (No. 88-572, 1993)(employer's "objective" good faith belief must have been "nonfrivolous.").

instance.<sup>15</sup> Respondent has not shown that the prior and present violations were substantially dissimilar. Accordingly, because any one of seven prior violations was of the same standard, I find the Secretary has established the August 7, 2007 violation was properly classified as Repeat. Accordingly, the Court affirms all three characterizations of Citation 2, Item 2 - Willful, Repeat and Serious.

### Penalty

The Secretary has proposed a penalty of \$33,000.00 for the one item. (Sec’y Post Hr’g Br. at 19-20). The Respondent argues that this proposed penalty is “grossly excessive.” (Resp’t Post-Hr’g Br. at 14-15). 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. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993)(“J.A. Jones Constr. Co.”). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones Constr. Co.*, *supra* at 2213-14.

The Respondent asserts that the gravity of the violation was not high because the exposure of two employees to the violation was for only 5 minutes. The record shows that the trench was open for an hour or more before employees evacuated the trench at approximately 12:30 p.m. (Tr. 151). At least three Swallow employees were exposed to the hazard for about an hour or more.<sup>16</sup> At least Messrs. Feltz and Robert Lozano worked in the area where the trench was between five and five and one-half feet deep for approximately 5 minutes. (Tr. 84, 89).

I find that the gravity is high because Swallow admitted it did not take any precautions to protect its employees from a cave-in; and because the record shows that there was a high likelihood that the trench, which was more than 5 feet deep, would cave-in. Second, the Respondent asserts that it has shown good faith through its use of a safety consultant and its extensive safety program. However, as discussed above, I find that Swallow’s indifference to

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<sup>15</sup> Respondent withdrew its contest of the citation issued on October 2, 1992 relating to a violation that occurred on September 3, 1992.

<sup>16</sup> It is also predictable that a fourth Swallow employee, Mr. Morris, would have been exposed to the trench hazard on August 7, 2007.

employee safety by not providing cave-in protection at its work site shows a lack of good faith. Third, although the Respondent admits it has a prior history of violation, it notes that the citation at issue was the first one it had in two years. However, as noted above, I find Swallow's compliance history to be dismal, having been cited numerous times in the past for the same standard as the one at issue. Before August 7, 2007, Respondent violated OSHA's trenching standard numerous times by failing to protect its employees working in trenches from cave-in hazards. On September 3, 1992, Respondent willfully violated 29 C.F.R. § 1926.652(a)(1) by failing to provide cave-in protection to employees working in a trench. (Exh. C-33, at 6). On April 18, 1994, Respondent violated 29 C.F.R. § 1926.652(a)(1) by failing to protect employees working in a trench from a cave-in. (Exh. C-33, at 5). On July 16, 1998, Respondent willfully violated 29 C.F.R. § 1926.652(a)(1) by failing to protect employees working in a trench from a cave-in. (Ex. C-31). On or about November 17, 1999, Respondent violated 29 C.F.R. § 1926.652(a)(1) by failing to protect its employees in a trench from a cave-in. (Exh. C-32, at 3-4). On April 15, 2003, Respondent violated 29 C.F.R. § 1926.652(a)(1) by failing to protect its employees in a trench from a cave-in. (Exh. C-34). On May 3, 2005, Respondent committed a Repeat violation of 29 C.F.R. § 1926.651(a)(1) by failing to use cave-in protection. (Exh. C-29). On August 2, 2005, Respondent committed a repeated violation of 29 C.F.R. § 1926.652(a)(1) by failing to protect its employees from cave-ins. (Exh. C-28). VP Rendina signed the settlement agreement on Respondent's behalf. As part of the settlement agreement, Respondent agreed to comply with the Act and applicable standards. (Exh. C-28).<sup>17</sup>

Respondent was aware of OSHA's cave-in protection standard before August 7, 2007. (Exh. C-35, response no. 7). Respondent's safety manual incorporated OSHA's trenching requirements, including the cave-in protection requirements. (Tr. 56-57; Exh. C-17, at. 63-69). The safety manual was in effect on August 7, 2007 and had been in effect for approximately one year. (Tr. 56-57). Lastly, Respondent asserts that Swallow is a small employer as evidenced by VP Rendina's testimony that it has only 18 employees during the height of the construction season. I have considered the size of Respondent's business in my penalty assessment. The

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<sup>17</sup> Six days after August 7, 2007, Respondent committed a repeated violation of 29 C.F.R. § 1926.652(a)(1) by failing to provide adequate cave-in protection to employees working in a trench. (Exh. C-26).

record shows that Swallow's own document dated September 7, 2007 shows a maximum number of 32 employees.<sup>18</sup> (Exh. C-37). I find that Respondent had a maximum number of employees in excess of twenty-five within a year of the date of the violation. Accordingly, I find the proposed penalty of \$33,000 for Citation 2 Item 2 is appropriate, and the proposed penalty is assessed. In view of Respondent's history of multiple violations of the same standard, this penalty is necessary to induce future compliance. See *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1395 (No. 97-0755, 2003)(affirming high penalty assessment where employers eight prior violations had not had the necessary deterrent effect); *Quality Stamping Products Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994)(“*Quality Stamping Products Co.*”)(finding the employer's “extensive prior history [of violations] outweigh[ed] the gravity factor and support[ed] the penalty assess[ed]”).<sup>19</sup>

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

All finding of fact and conclusions of law relevant and necessary to a determination of the contested issue have been found and appear in the decision above. See Federal Rule of Civil Procedure 52(a).

### **ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Item 2 of Citation 2 alleging a Willful - Repeat - Serious violation of 29 C.F.R. § 1926.652(a)(1) is AFFIRMED, and a penalty of \$33,000.00 is assessed.

//s//  
Dennis L. Phillips  
U.S. OSHRC Judge

Date: February 9, 2009  
Washington, D.C.

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<sup>18</sup> The Court was not persuaded by VP Rendina's conjecture that the “Maximum Number of Employees” shown on Respondent's document as 32 was a typo or his blanket assertion that Respondent never employed thirty two employees.

<sup>19</sup> “The Commission has stated that “[t]he purpose of a penalty is to achieve a safe workplace, and penalty assessments, if they are not to become simply another cost of doing business, are keyed to the amount an employer appears to require before it will comply.” *Branham Sign Co.*, 18 BNA OSHC 2132, 2136 (No. 98-752, 2000)(quoting *Quality Stamping Products Co.*, *supra* at 1929).