UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
PIPING OF OHIO, INC.
Respondent.

OSHRC DOCKET
NO. 91-3481

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 4, 1993. The decision of the Judge will become a final order of the Commission on April 5, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 24, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, 3/18/93

Ray H. Darling, Jr.
Executive Secretary

Date: March 4, 1993

DOCKET NO. 91-3481

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

PIPING OF OHIO,

Respondent.

OSHRC Docket No. 91-3481

Appearances:

Christopher J. Carney, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Albert T. Brown, Jr., Esquire
Brown & Warnock
Cincinnati, Ohio
For Respondent

Before Administrative Law Judge James D. Burroughs

DECISION AND ORDER

Piping of Ohio, Inc. (Piping), specializes in underground construction (Tr. 122). In November of 1991, it was engaged in the replacement of a water line at the Armco Steel plant in Middleton, Ohio (Tr. 92). Compliance Officer John Boylan commenced an inspection of the plant on November 21, 1991. On December 3, 1991, Piping was issued a serious and a willful citation, which have been timely contested.

In item 1 of Citation No. 1 (serious), Piping is alleged to have violated § 1926.21(b)(2), for failure to instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his or her work environment. Item 2 charges Piping with a violation of § 1926.651(c)(2), for failure to provide a means of safe egress for employees from an excavation. Item 3 alleges a violation of § 1926.651(k)(1), for failure to have a competent person conduct daily inspections of the excavation. Citation No. 2 (willful) alleges a violation of § 1926.652(a)(1), for failure to provide an adequate protective system for employees working in the excavation. On May 8, 1992, the Secretary amended the complaint to allege, in the alternative, that item 1 of Citation No. 2 was either repeated or serious.

Piping denies that it violated any of the cited standards. It seeks dismissal of the allegations on the assertion that (1) the complaint was not timely filed, and (2) the Commission has no jurisdiction. It contends that it was not engaged in a business affecting commerce.

Facts

From November 19 to November 23, 1991, Piping was engaged in removing the old water line between steam pits Nos. 52 and 54 at the Armco Steel plant in Middleton, Ohio, and replacing it with a 14-inch feed line (Tr. 91-92, 210). Piping had an ongoing relationship with Armco. It had performed more than ten excavations for Armco in the past (Tr. 682-683). In order to replace the old water line, Piping had to excavate two trenches, one between steam pit No. 54 and steam pit No. 53 (the east trench), and the other between steam pit No. 53 and steam pit No. 52 (the west trench). The project had a November 23, 1991, deadline (Tr. 92).

The pipe replacement began at steam pit No. 54 and proceeded west to steam pit No. 52. The water line had to be pressure tested after it was installed, so the trenches were left open until the completion of the project (Tr. 97). A steam pipe ran along the entire length of the south wall of both trenches (Tr. 65-66, 269). Concrete pier caps were located intermittently around the steam pipe (Tr. 269, 540). There were no pier caps along the

north wall of the trenches. A nitrogen utility line was located at the base of the north wall. The existing water line was located between the nitrogen line and the steam pipe (Tr. 269).

Piping's contractual duty involved removal and replacement of an existing water line (Tr. 92). Each piece of pipe was approximately 21 feet long (Tr. 148-149). Piping would weld three pieces of pipe together above ground and then place the resulting 63-foot long section into the trench and weld it with a previously laid section of pipe. Two employees, Damon Auvil and Rob Yost, were required to weld connections in the trenches (Tr. 194-195). A third employee, Rick Lewis, was required to prime and tape weld connections while in the trenches. Lewis patched portions of the new pipe that had been scratched while being fished through the steam pits (Tr. 123, 125-131).

On November 20, 1991, George Kratzer, the business agent for Local 290 of the Ironworkers Union, observed an employee wearing a welding hood in the east excavation near steam pit No. 53 (Tr. 11, 16). Because Kratzer believed that the walls of the trench were not sufficiently sloped, he notified OSHA that he had observed a possible safety hazard (Tr. 21-22).

Jim Sweeney, an industrial hygienist with the Cincinnati, Ohio, OSHA area office, was at Armco's plant that day performing a health inspection. During his inspection, Sweeney received a message from his supervisor instructing him to inspect Piping's excavation as a possible imminent danger (Tr. 47). Sweeney went to the excavation site where work had ceased for the day (Tr. 52). Sweeney took three photographs of the site (Exhs. C-11, C-12, C-13), and then reported his findings to his area office (Tr. 67).

The next day, November 21, 1991, OSHA Compliance Officer John Boylan arrived at Piping's worksite and conducted an inspection (Tr. 257). On December 3, 1991, two citations were issued to Piping that gave rise to the present case.

The Late Filing of the Secretary's Complaint Is Not Grounds for Dismissal

At the beginning of the hearing, Piping moved to dismiss the Secretary's complaint on the grounds that it was untimely filed (Tr. 5). The motion was denied (Tr. 10). Piping raises the issue again in its post-hearing brief. Where an employer can make "a more

particularized showing of prejudice following a hearing on the merits," a renewal of the motion may be made. *See Texas Masonry, Inc.*, 11 BNA OSHC 1835, 1837, 1983-84 CCH OSHD ¶ 26,803 (No. 82-955, 1984). The adequacy of the evidence is insufficient to warrant a finding favorable to Piping.

Two citations were issued to Piping on December 3, 1991. Piping filed its notice of contest on December 10, 1991. The Secretary notified the Commission of her receipt of the notice of contest on December 26, 1991. In accordance with Commission Rule 2200.34(a), the Secretary had until 30 days after she filed the notice to the Commission (until Monday, January 27, 1992) to timely file a complaint. The complaint was filed on February 3, 1992, a week late. Secretary's counsel explained that the delay in filing was the result of a clerical error (Tr. 7-8).

Piping contends that the tardiness in filing is in itself sufficient reason to dismiss the complaint. The decision of whether failure of a party to meet a filing deadline merits a default judgment against that party is a discretionary ruling for the judge. Rule 2200.41(a) states that, when a party moves for dismissal against the other party for failure to comply with the rules, "the Commission or Judge, in their discretion, *may* enter a decision against the defaulting party" (emphasis added).

Motions to dismiss based on the late filing of the Secretary's complaint are not new to the Commission. While a multitude of such motions have been filed with the Commission and its judges, few have been granted. In the recent case of *Ford Development Corporation*, 15 BNA OSHC 2003, 1992 CCH OSHD ¶ ____ (No. 90-1505, 1992), the Commission reiterated the elements necessary for a favorable ruling on behalf of the employer. The Secretary failed to transmit Ford's notice of contest to the Commission within fifteen working days, as required by Commission rules. The notice of contest was transmitted seven days late. The judge found this delay to be the innocuous result of a clerical error, and he denied the motion. The Commission upheld the judge's denial.

The Commission stated: "A demonstration of prejudice to the employer and contumacious conduct by the Secretary are among the more significant factors to take into account." The case of *Texas Masonry, Inc., supra*, was cited for the proposition that the employer must establish prejudice to it or contumacious conduct on the part of the Secretary

before dismissal is warranted. The Commission considers dismissal a harsh sanction and will not grant a motion to dismiss without an adequate showing of these factors.

The Secretary's conduct is not properly characterized as contumacious. The delay has been attributed to a clerical error, not from any desire to deliberately delay the proceeding. The Commission's rules of procedure are designed to achieve prompt and orderly adjudication under the Act. It expects all parties to comply with the rules, but will not grant motions to dismiss for failure to follow the rules in the absence of a showing of prejudice or contumacious conduct.[1] The goal of the Act is to improve the safety and health of employees. Granting of such motion on procedural grounds defeats that purpose.

Piping has not shown that it was prejudiced by the delay. The motion is denied.

Piping Was Engaged in a Business Affecting Interstate Commerce

Section 3(5) of the Act provides that, among other things, an employer is "a person engaged in a business affecting commerce." Commerce, according to § 3(3) of the Act, "means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof . . . ." Piping contends that the Commission does not have jurisdiction over it because the company performed work only in Ohio and, thus, was not engaged in "commerce" within the meaning of § 3(3) of the Act. The use of the words "affecting commerce" indicates that Congress intended to exercise fully its constitutional authority under the commerce clause.

It is well settled that the Secretary has the burden of pleading and proving jurisdiction. Several Commission and judicial decisions make it clear that it is quite easy to prove that an employer is engaged in a business affecting commerce. In *Marshall v. Anchorage Plastering Co.*, 570 F.2d 351 (9th Cir. 1978), the ninth circuit found that an employer was engaged in a business affecting commerce because it hired employees at a union hall, used the telephone and mail, and purchased supplies from out of state. In *United States v. Dye Construction Co.*, 510 F.2d 78 (10th Cir. 1975), the record reflected that Dye

[1] The Commission and its judges, where justified, may impose other sanctions for failure to follow procedural rules.

had purchased several items of heavy equipment and trucks produced by out of state sources. The court concluded (510 F.2d at 83):

> The use of supplies which are part of commerce has been held sufficient. *See Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 11, 13 L.Ed.2d 20 (1964) *and Von Solbrig Hospital, Inc. v. NLRB*, 465 F.2d 173 (7th Cir. 1972). Since it is irrelevant then whether Dye itself was engaged in commerce, we are constrained to hold that its activities are such as to justify the regulation in question.

The court's conclusion recognizes that a business does not have to be engaged in interstate commerce to affect commerce.

In *Avalotis Painting Co.*, 9 BNA OSHC 1226, 1981 CCH OSHD ¶ 25,157 (No. 76-4774, 1981), the Commission found that the use of products manufactured out of state that had moved in commerce was sufficient to establish jurisdiction. The Commission stated (9 BNA OSHC at 1227):

> * * * It is sufficient to note that the record establishes Respondent's use of products manufactured out of state that had moved in commerce. An employer's use of goods produced out of state has been held to "affect" interstate commerce under the Act. *United States v. Dye Construction Co., supra. See also Katzenbach v. McClung*, 379 U.S. 294 (1964).

There is no logical way Piping can be construed as having a business not affecting commerce. It was fulfilling a contract with Armco which affected competition. The fact it was performing the job affected the market for others in the industry. Competition had to adjust to a diminishing market. Loss of a market for goods or services has a profound affect on commerce. Even activity that is purely intrastate in character may affect commerce among the states. Piping was performing work for Armco Steel, which is a major steel company, owned in part by a Japanese corporation (Tr. 110). Piping used the U. S. Postal Service and telephones in conducting its business operations. It made long-distance calls and forwarded letters to out-of-state businesses (Tr. 112-113). It owned a welding truck purchased in Kentucky and a boom truck purchased in Pennsylvania (Tr. 92-93). Piping's actions in performing work for an international company, and in purchasing equipment from out-of-state, indisputably affected commerce.

The motion is denied.

Citation No. 1

Item 1 - Alleged Violation of § 1926.21(b)(2)

The Secretary charged Piping with the violation of § 1926.21(b)(2) in that Rob Yost, Damon Auvil, Rick Lewis, and Rob Huntsberger were not adequately instructed in the avoidance of unsafe conditions and the standards for working in excavations. The standard provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

This standard requires, at a minimum, that employees receive instruction in safe work habits applicable to his work environment. This includes instructions on how employees may recognize and avoid unsafe conditions. *National Industrial Construction, Inc. v. OSHRC*, 583 F.2d 1048 (8th Cir. 1978).

Piping did not have a written safety program (Tr. 135-136). Boylan interviewed Piping's employees and ascertained that they were unfamiliar with changes in the excavation standard and that any safety training they had was inadequate for compliance with the standard (Tr. 320-324). Piping held informal Wednesday evening meetings at Tom Moore's house, at which the employees turned in their time cards. The meetings were not mandatory (Tr. 136, 171).

Rick Lewis was a laborer for Piping. Lewis had no prior experience in underground construction before he was hired by Piping (Tr. 122). When he was hired, he received no written safety rules (Tr. 135). Lewis described his verbal training: "I was told what to look for before I got in the ditch. . . . Cracked banks, loose dirt, and anything that was unsafe" (Tr. 138). When asked specifically what kind of training he had that taught him how to recognize an unsafe condition, Lewis replied, "Just that the bank was falling or cracking. You could look at it and tell" (Tr. 139). Lewis stated that he had no other safety training (Tr. 139). Lewis admitted that at the time of Boylan's inspection, he had not been informed by Piping of changes in the excavation standard (Tr. 141).

Robert Yost was a welder for Piping. Like Lewis, Yost had no previous experience working in underground construction before he started working with Piping (Tr. 161-162). Yost testified that his safety training at Piping consisted of being told "to watch and keep an eye for looseness and cracking or anything. If you see anything falling in, let them know. . . . It was just generally they would tell you to keep an eye on it all the time for any changes" (Tr. 169).

Damon Auvil, a welder with Piping, also had no previous experience in underground construction (Tr. 205). Like Lewis and Yost, Auvil stated that his training entailed being told to look out for dangers (Tr. 213). Auvil agreed that the training was "a common sense type of training" (Tr. 214). Auvil was vague when asked about the sloping requirements for different soil classifications (Tr. 221):

> Q.: When you are confronted with a Type C classification of soil, how sloped should the walls be? How should the walls be sloped?
>
> Auvil: Way, way back, I mean, way back where you should have a box or something in there.
>
> Q.: If the soil is classified as Type B soil, how should the walls be sloped?
>
> Auvil: You have to get on the job and learn it that way. That's what you have to do.
>
> Q.: Should the walls be sloped?
>
> Auvil: Yes, they should.
>
> Q.: How should they be sloped?
>
> Auvil: It is hard to say. It is just common sense. You could tell whether that ditch is safe or not.

Robert (Chief) Huntsberger was the equipment operator on the Armco Steel project (Tr. 603). He stated that he sometimes slopes trenches he is digging to a degree that he believes is safe, but that is less than what the excavation standard requires (Tr. 613-614).

The testimony of Piping's employees establishes the Secretary's case that they did not receive adequate instruction in the recognition and avoidance of safety hazards. They were

unaware of the requirements of the excavation standard. Piping's employees were relying on intuition, and not specific guidelines, to tell them whether or not a trench was safe. Telling employees to watch out for hazards is not the same as instructing them in the recognition and avoidance of hazards. Piping was in violation of § 1926.21(b)(2).

Item 2: § 1926.651(c)(2)

The Secretary alleged that Piping violated § 1926.651(c)(2), which provides:

> A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

The east and west excavations were each approximately 7 feet deep (Tr. 275-276), 11 feet wide at the top (Tr. 298), and 5 feet wide at the bottom (Tr. 296). Each trench was approximately 200 feet long (Exh. C-1; Tr. 193-194). Lewis, Yost, and Auvil were each in the east trench on November 20, 1991 (Tr. 125, 162-163, 207). No ladder was provided for egress from the trench (Tr. 134). The employees exited the trench by stepping onto the water line and hoisting themselves onto a pier cap along the south wall. The distance from the top of the water line to the pier cap was 3 to 4 feet (Tr. 133, 167, 212-213, 328).

On November 21, 1991, Auvil and Yost were working in the west trench, approximately 15 feet from steam pit No. 53 (Tr. 258, 261). Boylan observed them exit the trench by walking up the south side of the trench, which was sloped at a 34° angle (Tr. 264, 328). The initial step to the sloped portion of the south wall was 2 feet. Loose soil was on the south wall (Tr. 329). The ramp was inadequate to comply with the standard. The soil was loose, and the initial step in gaining egress from the trench was in excess of 2 feet.

The violation is affirmed.

Item 3: § 1926.651(k)(1)

Section 1926.651(k)(1) provides:

> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall

> be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

Section 1926.650(b) provides that "*Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

Thomas Moore is the secretary and treasurer for Piping (Tr. 91). He was the designated competent person at the site. The Secretary proceeded on the theory, based on Boylan's testimony, that Moore was not present at the site on November 20, 1991. (Tr. 336, 339). Moore testified that Boylan must have misunderstood him during their interview. Boylan stated that he was on the site on November 20, but not the entire day (Tr. 97-98).

In her post-hearing brief, the Secretary proceeds on the theory that, even if Moore was present every day of the project, he was not a competent person within the meaning of the standard. Moore told Boylan that he had not seen a copy of the 1989 excavation standard (Tr. 336). Moore was unaware of the changes in the standard (Tr. 338). "Evidence that the employees were unaware of particular safety requirements, because of a lack of specific instruction, establishes a violation." *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1390, 1992 CCH OSHD ¶ ___ (No. 91-282, 1992).

Moore had the authority to take corrective action to eliminate hazards. He conducted a visual inspection of the trenches every day (Tr. 686). Subpart P, Appendix A(c)(1), requires that the competent person classify the soil as either Stable Rock, Type A, Type B, or Type C soil. Appendix A(c)(2) requires the competent person to make the classification "based on at least one visual and at least one manual analysis." Moore classified the excavation soil as Type A. As will be discussed, *infra*, the soil was actually Type B. When asked if he had made any tests of the soil, Moore replied, "Other than visual, no, sir" (Tr. 701).

The Secretary has established that Moore was not a competent person within the meaning of the standard. He was not aware of changes made in the excavation standard, and he failed to follow the required procedure for the classification of soil.

The violation is affirmed.

Classification of Violations

The Secretary submits that the violations were serious within the meaning of section 17(k) of the Act. In order to prove a serious violation, the Secretary must show that there is a substantial probability that death or serious physical harm could result from the condition in question. The Secretary need not prove that an accident is probable. It is sufficient if an accident is possible and the probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Division*, 8 BNA OSHC 1055, 1980 CCH OSHD ¶ 24,275 (No. 76-3942, 1980). The Secretary must also establish that the employer knew or with the exercise of reasonable diligence should have known of the existence of the violation. The knowledge element is directed to the physical conditions which constitute a violation. *Southwestern Acoustics & Specialty, Inc.*, 5 BNA OSHC 1091, 1977-78 CCH OSHD ¶ 21,582 (No. 12174, 1977).

The failure to instruct in the recognition and avoidance of unsafe conditions exposed employees to the possibility of a trench collapse. In such an event, employees could suffer death from crushing or suffocation. The violation of § 1926.651(c)(2) would have denied employees a quick exit from the trench in the event of a cave-in. The violation of § 1926.651(k)(1) also exposed employees to a cave-in. The misclassification of the soil resulted in the walls being inadequately sloped. The violations were serious.

Citation No. 2

Item 1: § 1926.652(a)(1)

The Secretary charged Piping with a willful violation of § 1926.652(a)(1), which provides:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
>
> (i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Boylan took three soil samples from the excavation (Tr. 299). These samples were sent to OSHA's Salt Lake City laboratory, where they were analyzed and classified as Type B soil (Tr. 454). Table B-1 of Subpart P, Appendix B, establishes that the maximum allowable slope for an excavation in Type B soil is 45° from the horizontal. Boylan measured the north wall of the west trench and found its slope to be 52° (Tr. 264). The north wall of the east trench was 68° (Tr. 278).

The Secretary has established that Piping was in violation of § 1926.652(a)(1). She alleged that the violation was willful. A violation of the Act is willful if "it was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety." *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1595, 1984-85 CCH OSHD ¶ 27, 456, p. 35,572 (No. 82-12, 1985). Trial of the issue of willfulness focuses on the employer's state of mind and general attitude toward employee safety to a greater extent than would trial of a non-willful violation. *Seward Freight*, 13 BNA OSHC 2230, 2234, 1989 CCH OSHD ¶ 28,509, p. 37,787 (No. 86-1691, 1989). In *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶ 27,893 (No. 85-355, 1986), the Commission held:

> It is not enough to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation, serious or nonserious . . . A willful violation is differentiated by a heightened awareness--of the illegality of the conduct or conditions and by state of mind--conscious disregard or plain indifference. . . It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation. *Williams*, 13 BNA OSHC at 1256-1257, 1986-87 CCH OSHD at p. 36,589.

E. L. Jones and Sons, Inc., 14 BNA OSHC 2129, 2133, 1991 CCH OSHD ¶ 29,264 (No. 87-7, 1991). In *Calang Corp.*, 14 BNA OSHC 1793, 1991 CCH OSHD ¶ 29,080, p. 38,870 (No. 85-319, 1990), the Commission reiterated the standard of review for deciding allegations of willful misconduct (citations omitted):

> A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete. . . Also, a violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one--whether the employer's belief concerning the interpretation of a standard was reasonable under the circumstances.

Piping's violation of the cited standard does not rise to the level of willfulness. The Secretary has not shown that heightened awareness of the illegality of the inadequate sloping would ascend the violation to the realm of "willful."

In the alternative, the Secretary charged that the violation of § 1926.652(a)(1) was repeated. "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979).

Piping was cited for a violation of § 1926.652(b) on October 24, 1989 (Exh. C-16), for failure to shore or slope the sides of trenches in unstable or soft material 5 feet or more in depth. This violation of the standard is substantially similar to Piping's violation of § 1926.652(a)(1) in the present case. A settlement agreement affirming the citation as serious was entered on April 17, 1990 (Exh. C-17). A decision and order approving the settlement was issued and became a final order of the Commission on June 7, 1990 (Exh. C-17). The hazard presented by both violations is that of a cave-in. The violation will be affirmed as a repeated violation.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining an appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

At the time of the inspection, Piping had ten employees. Piping demonstrated good faith by fully cooperating with Boylan during his inspection (Tr. 364). Piping had been previously cited for a violation of the excavation standard (Exhs. C-16, C-17; Tr. 352). The hazard created by noncompliance with the provisions of the excavation standard was the possibility of a fatal cave-in. The gravity of each of the violations was severe.

Upon due consideration of these factors, it is determined that the following penalties are appropriate:

Citation No. 1

Item	Standard	Penalty
1	§ 1926.21(b)(2)	$2,000
2	§ 1926.651(c)(2)	2,000
3	§ 1926.651(k)(1)	2,000

Citation No. 2

Item	Standard	Penalty
1	§ 1926.652(a)(1)	$4,000

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is

ORDERED: (1) That item 1 of Citation No. 1, alleging a serious violation of § 1926.21(b)(2), is affirmed and a penalty of $2,000.00 is assessed;

(2) That item 2 of Citation No. 1, alleging a serious violation of § 1926.651(c)(2), is affirmed and a penalty of $2,000.00 is assessed;

(3) That item 3 of Citation No. 1, alleging a serious violation of § 1926.651(k)(1), is affirmed and a penalty of $2,000.00 is assessed; and

(4) That item 1 of Citation No. 2, alleging a willful violation of § 1926.652(a)(1), is affirmed as a repeat violation and a penalty of $4,000.00 is assessed.

/s/ James D. Burroughs
JAMES D. BURROUGHS
Judge

Date: February 22, 1993