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

SECRETARY OF LABOR, Complainant, v. E.R. ZEILER EXCAVATING, INC., Respondent.	OSHRC Docket No. 10-0610

ON BRIEFS:

Louise McGauley Betts, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Lisa Zeiler, President; E.R. Zeiler Excavating, Inc.; Temperance, MI
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

E.R. Zeiler Excavating, Inc. was hired to install a water main at a worksite in Maumee, Ohio. After an inspection of the worksite, the Occupational Safety and Health Administration issued Zeiler a two-item citation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, alleging willful violations of two provisions of the excavation standard, 29 C.F.R. § 1926.651(c)(2) (safe egress) and § 1926.652(a)(1) (cave-in protection). The Secretary proposed a penalty of $28,000 for each item.

Following a hearing, former Administrative Law Judge Stephen J. Simko, Jr. affirmed both items as serious and reduced the penalty to $3,000 for Item 1 (§ 1926.651(c)(2)) and $5,000 for Item 2 (§ 1926.652(a)(1)). At issue on review is only the characterization of and penalty

assessed for each of these citation items. For the reasons that follow, we affirm both citation items as serious and assess a total penalty of $10,000.[1]

BACKGROUND

On November 9, 2009, OSHA received a complaint from a fire department lieutenant who expressed concern over the safety of workers inside a trench in front of a fire station in Maumee, Ohio. Later that day, an OSHA compliance officer inspected the trench, which had been dug by Zeiler, a small excavation company[2] that was retained to install a 24-inch water main and connect it into an existing 36-inch water main. During the inspection, the CO observed a "fairly large trench opening" that was approximately 10 feet deep with five workers, including four Zeiler employees, in the trench. Believing that the workers were exposed to cave-in hazards, the CO asked all of them to get out of the excavation, which they did. A video taken by the CO shows two of the workers exiting the trench by first getting on top of the water main pipe and then ascending a dirt incline near where the CO was standing. After all the workers were out of the trench, the CO spoke with James Ridner, who identified himself as Zeiler's site foreman.

In the course of his inspection, the CO determined that the trench was dug in Type B soil, which is undisputed, and he took measurements of the trench walls. He observed that the east and west walls each had one "bench," the top of which was approximately 3.6 feet down from the original ground level, but the walls otherwise appeared vertical, including the approximately 6 feet from the bottom of the trench to the bench. He testified that the south wall was "near[ly] vertical" and some of the north wall had been sloped, near the top, but its bottom 5 feet or so was nearly vertical.[3] The north wall abutted a heavily traveled two-lane road, and the existing water main ran parallel to the road along the bottom of the north wall. The top of the water main was approximately 4 feet above the bottom of the trench—there were 8 to 12 inches between the

---

[1] We deny Zeiler's motion for oral argument as we find that the record and briefs provide a sufficient basis upon which to decide this case. *See, e.g., Manganas Painting Co.*, 21 BNA OSHC 1964, 1968 n.3, 2004-09 CCH OSHD ¶ 32,908, p. 53,386 n.3 (No. 94-0588, 2007).

[2] It is undisputed that four Zeiler employees were onsite the day of the inspection, and that Zeiler "employs between three and fifteen employees, based on [its] workload[.]"

[3] Section 1926.652(a)(1) requires protection from cave-ins "by an adequate protective system," which can include sloping or benching the trench walls. 29 C.F.R. § 1926.652(b). The maximum allowable slope for Type B soil is 1:1 (45 degrees). 29 C.F.R. § 1926 Subpt. P., App. B-1.2. If a single bench is used, the vertical portion may be 4 feet tall at the most, and the ground above the bench must be sloped at a 45 degree angle. *Id.*

bottom of the trench and the bottom of the water main pipe, and the pipe itself was 36 inches in diameter.

The day after his initial inspection, the CO spoke with Joseph Szajna, Zeiler's superintendent. Szajna stated that he had been present at the worksite the morning of the initial inspection and spoke with Ridner about digging the trench, but that he left before the excavation was complete. He said that once the crew got the top of the water main pipe exposed, he and Ridner had "discussed what we were going to do as far as shoring went, and at that time, I left the job site."

DISCUSSION

I. Characterization

"[W]illful violations [are] 'characterized by an intentional or knowing disregard for the requirements of the Act or a "plain indifference" to employee safety, in which the employer manifests a "heightened awareness" that its conduct violates the Act or that the conditions at its workplace present a hazard.' " *Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1868, 2004-09 CCH OSHD ¶ 32,877, p. 53,198 (No. 02-0865, 2007) (quoting *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1261, 2002-04 CCH OSHD ¶ 32,672, p. 51,451 (No. 98-0701, 2003)), *aff'd*, 296 F. App'x 211 (2d Cir. 2008) (unpublished). However, mere negligence or lack of diligence is not sufficient to establish an employer's intentional disregard for or heightened awareness of a violation. *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1264 (D.C. Cir. 2003).

Although the judge found here that Zeiler had demonstrated "a sloppy attitude towards its OSHA obligations," he nonetheless concluded that the Secretary failed to prove Zeiler was willful in violating either of the cited provisions. On review, the Secretary claims that the judge erred because the record establishes a willful state of mind based on Zeiler's deficient safety program, as well as Ridner's knowledge and actions at the worksite. Although we agree that the record before us raises a number of serious questions about Zeiler's safety efforts and Ridner's knowledge, those questions remain unanswered in certain key respects. Given these deficiencies in the record, as discussed below, we find that the Secretary has failed to prove the requisite state of mind for willfulness, and therefore characterize both violations as serious.

Willfulness based on Zeiler's safety program

We agree with the Secretary that Zeiler had a heightened awareness of the cited standards' requirements given its prior OSHA citation history. This prior history includes two

citations in 1981 for violating an earlier version of the egress standard, a May 2007 citation for four violations related to trenching, including one under the egress standard,[4] and an October 2009 citation for a repeat violation of the egress standard and a serious violation of the cave-in protection standard.[5] The Secretary argues that apart from sending employees to competent person training in 2007, Zeiler took no steps to prevent future violations after receiving these prior citations, pointing to Zeiler's failure to provide any documents in response to the Secretary's discovery request for evidence of preventative measures, as well as testimony from the CO about safety documents he requested, but did not receive. The Secretary alleges that this is proof such documents do not exist. *See, e.g.*, *North Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1474, 2001 CCH OSHD ¶ 32,391, p. 49,816 (No. 96-0721, 2001) (a party's deficient response to a request for documents within its own control is evidence that documents do not exist).

The discovery document the Secretary relies on was admitted into evidence, and it contains Zeiler's short responses to interrogatories and requests for documents. However, neither the questions nor the requests to which Zeiler was responding were introduced into evidence, making it impossible to determine the meaning of the company's responses. The CO's testimony is equally unavailing. He testified that the only documents he requested from Zeiler and did not receive related to "disciplinary actions." While the Secretary views Zeiler's failure to respond to the CO's request as some indication that Zeiler did not discipline its workers, it

[4] The May 2007 citation alleged that Zeiler's employees were exposed to fall hazards while climbing out of an approximately 13-foot deep excavation without the use of a ladder, ramp, or stairway. The three other items alleged violations as follows: § 1926.651(b)(4) (requiring that underground installations be protected or supported (unsupported plastic gas line crossing the trench)), § 1926.651(g)(2) (prohibiting more than two feet of material below the bottom of a shield system (trench box with a three and a half foot gap)), and § 1926.651(k)(1) (requiring daily inspections of excavations by a competent person for risk of hazardous conditions (competent person did not identify the gas line or trench box problems)). The citation was resolved with a settlement agreement in June 2007, in which Zeiler agreed to correct the violations and comply with the Act in exchange for a reduced penalty.

[5] The October 2009 citations alleged that Zeiler's employees were working in a 9-foot deep trench with no ladder or other safe means of egress, and that a wall of the trench dug in Type B soil was nearly vertical. Zeiler was also cited for a repeat violation of § 1926.651(k)(1), requiring inspections of excavations by a competent person. These citations were resolved with a settlement agreement, which was discussed at an informal conference held three days after the inspection in this case.

could simply reflect a failure to *document* such actions. Moreover, the CO never said that he requested Zeiler's disciplinary *policy* and another part of his testimony contradicts the Secretary's claim that Zeiler produced no documents at that time—according to the CO, he requested and received a copy of Zeiler's "safety program," which was not introduced into evidence. In this regard, we find the record does not establish that Zeiler failed to take disciplinary measures.

The Secretary also argues that Zeiler, appearing pro se throughout these proceedings, admitted in its brief on review that it took no preventative measures because it did not have to take any such action until it received guidance from OSHA, and it implemented a disciplinary procedure only as part of a settlement agreement with OSHA. We are not persuaded. First, the Secretary apparently views Zeiler's statement—that it implemented "specific training and procedural changes" recommended by OSHA at the informal conference held three days after the inspection in this case to discuss the October 2009 citation—as an acknowledgement that its safety program *lacked* these elements prior to the informal conference. However, this statement could also mean that, based on OSHA's recommendations, Zeiler agreed to add *new* safety policies to the program it already had in place. Indeed, as indicated above, the record is silent as to whether Zeiler had a disciplinary program prior to the inspection in this case. Without more, we simply cannot determine whether Zeiler's statement that "changes included … adding a disciplinary policy for employee safety violations" means that no disciplinary policy had previously existed, or that an existing one was modified.

Second, regarding Zeiler's statement that it implemented onsite inspections based on OSHA's recommendations at the same informal conference, the record is again silent as to the extent (if any) these inspections took place in the past or the extent to which supervisory personnel performed any type of monitoring. No witness was ever asked about or directly addressed these issues, although Szajna implied that Ridner was supervised at least to some extent in the past, and Szajna was at the site with Ridner from 7:30 a.m. until around noon on the day the inspection commenced. In sum, without evidence demonstrating that Zeiler disregarded the prior citations by failing to institute measures to prevent violations of the excavation standard, we cannot find that on this basis Zeiler showed plain indifference to employee safety.[6]

[6] To the extent Zeiler is arguing, as the Secretary claims, that it had no obligation to take corrective action absent instructions or guidance from OSHA, such an argument would be

The Secretary also asserts that Zeiler showed plain indifference by specifically ignoring or failing to detect Ridner's lack of competence with regard to trench safety during the 22 years he worked for the company. In response, Zeiler claims that it reasonably believed Ridner was competent in this area, citing his competent person training in 2007 and his clean safety record, which the company admits "mistakenly" led it to conclude that Ridner possessed sufficient knowledge to comply with the requirements of OSHA's excavation standards. Ridner, who the judge found credible based on his demeanor, confirmed that he had received competent person training in 2007, and he had never been disciplined by Zeiler for safety in 22 years of employment.

As we discuss below, the record does show that Ridner had a deficient understanding of the OSHA requirements. Nevertheless, the record is silent yet again as to how long Ridner had been a foreman for the company, whether Zeiler considered him a competent person prior to the training he attended in 2007, and how often supervisors were checking his work, let alone that of other employees. Ridner was not shown to have been involved in Zeiler's previous citations, and the record does not establish that he otherwise had a known history of violating safety standards.[7] The record is thus insufficient to establish a willful characterization based on Zeiler's failure to detect Ridner's deficient understanding of the standards. *See George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1983, 1995-97 CCH OSHD ¶ 31,293, p. 43,980 (No. 93-0984, 1997) (declining to characterize violation as willful where record was "poorly developed" on key evidentiary issue); *Access Equip. Systems, Inc.*, 18 BNA OSHC 1718, 1727-28, 1999 CCH OSHD ¶ 31,821, p. 46,784 (No. 95-1449, 1999) (same).

Finally, the Secretary claims that Zeiler was willfully blind in failing to detect Ridner's ignorance. To support such a finding, there must be evidence that Zeiler deliberately avoided opportunities to learn of Ridner's lack of proficiency. *See E. Smalis Painting Co., Inc.*, 22 BNA

---

meritless, since responsibility for compliance with the Act rests on the employer, not OSHA. *See, e.g., Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1815, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992). However, it appears Zeiler is making a different argument—that the lack of guidance from OSHA shows that its failure to institute additional changes was not willful, i.e., that it had not previously disregarded guidance from OSHA; in contrast, when OSHA suggested changes at the November 2009 informal conference, the company instituted them.

[7] While another explanation for not being disciplined could be that Zeiler had a deficient enforcement program, no evidence has been adduced to that effect.

OSHC 1553, 1572, 2009-12 CCH OSHD ¶ 33,030, p. 54,363 (No. 94-1979, 2009) (citations omitted). But as noted above, we do not know the extent to which Ridner was supervised or to what extent Zeiler was deficient in checking that he was knowledgeable in excavation standards, and there is evidence that Ridner was supervised at least to some extent in the past. As Szajna testified, he had no reason to believe Ridner would not properly slope or bench the excavation in the instant case because "he had done it before. . . ." Further, on the first day of the inspection, Szajna was present at the worksite all morning while Zeiler employees began digging the excavation, and Szajna gave Ridner instructions to bench or slope the excavation before leaving the site. *See George Campbell Painting, supra*.

For all of these reasons, we find that the Secretary has not established that Zeiler exhibited willfulness with regard to the violations at issue.

Willfulness based on Ridner

The state of mind of a supervisory employee may be imputed to the employer for purposes of finding that a violation was willful. *Branham Sign Co,* 18 BNA OSHC 2132, 2134, 2000 CCH OSHD ¶ 32,106, p. 48,263 (No. 98-752, 2000). On review, the Secretary argues that Ridner, as a supervisory employee, consciously disregarded the requirements of the cited provisions by deliberately choosing means other than those required by the cave-in protection standard to protect against a potential cave-in and by creating a method of egress that was obviously unsafe. We find, however, that the evidence falls short of proving Ridner knew these conditions violated the standards at issue.

Cave-in protection requirement

Although Zeiler's management had a heightened awareness of the cave-in protection requirement given its prior citation history, the Secretary has not shown that Ridner also had such awareness. *See Cranesville Block Co., Inc./Clark Division*, 23 BNA OSHC 1977, 1982, 2009-12 CCH OSHD ¶ 33,227, p. 56,013 (No. 08-0316, 2012) (consolidated) (finding supervisor lacked heightened awareness of standard where record failed to show he knew of prior citations at company's other plants). In fact, the Secretary concedes that "Ridner was unaware of the specific details of OSHA's trenching standards," but argues that he nonetheless acted with conscious disregard because he knew the OSHA standard required *some* sloping or shoring to protect against a potential cave-in, yet "chose instead to make the excavation larger than necessary and rely on the presence of the pipe to protect employees from a cave-in."

We disagree. The record shows neither that Ridner knew the sloping criteria nor what other methods of protection may be used under the standard. Ridner testified that he did not participate in OSHA's prior inspections of Zeiler, stating that he was only "aware that there was another [prior] inspection." Although he attended competent person training prior to the inspection in this case, Ridner was not asked at the hearing, and he did not address, whether the cited requirements were covered in the course. Ridner testified that when digging the excavation at issue, he "wasn't fully aware" of what was required for it to be in compliance. He also testified that since the inspection, he had learned that a 45-degree slope was required for protection in Type B soil (which is correct), but he was still unable to articulate OSHA's benching requirements.[8] Nor was he asked about his understanding of the standard's shoring requirements. Consequently, the record fails to show that "Ridner chose not to comply with OSHA's trenching standards" to the extent he relied on the pipe to protect the employees from the north wall, the limited benching/sloping to protect them from the east and west walls, and the size of the excavation to protect against the south wall.[9] We therefore find that the Secretary has not shown that Ridner consciously disregarded the cave-in protection requirement.

[8] Ridner testified that between the date of the subject citation and the hearing, he attended a 30-hour OSHA class that included some instruction on trenching.

[9] We note that the CO testified that during the inspection, Ridner said he had "been through the regulations," "was able to identify" the fact that the walls were not "benched or sloped adequately," was unable to adequately bench the excavation because of the presence of the roadside, and that employees were exposed to serious cave-in hazards—all statements that Ridner denied having made. The judge, however, did not resolve this conflict between the testimony of the CO and Ridner. Although the Commission would typically remand such an issue for resolution, the judge is no longer with the Commission, so we will complete the adjudication of the issue here. *See Sal Masonry Contractors Inc.*, 15 BNA OSHRC 1609, 1610-11, 199-93 CCH OSHD ¶ 29,673, pp. 40,206-07 (No. 87-2007, 1992) (resolving conflict in evidence where judge had failed to make requisite credibility determinations but was no longer with Commission).

First, we note the judge did make a demeanor-based finding that Ridner sincerely believed the excavation was safe, which the judge considered further evidence that Ridner was unaware of the requirements—a conclusion the judge found buttressed by Ridner's evident "confusion and lack of knowledge of the requirements" at the hearing. Indeed, the CO testified that Ridner also said that a protective system "wasn't needed." *See Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, p. 41,257 (No. 89-433, 1993) (citation omitted) (the Commission generally accepts a judge's credibility finding where it is based on "the judge's observation of a witness' demeanor."); *Hackney, Inc*., 15 BNA OSHC 1520, 1522, 1991-93 CCH

The Secretary also claims that Ridner acted with plain indifference to employee safety in "not do[ing] any sloping or benching whatsoever" on the south wall, arguing that Ridner's stated belief that the trench was safe was "objectively unreasonable" because the wall was nearly vertical and soil was sloughing off of it when the workers were exiting the trench, as shown in the CO's video. The violation would indeed be willful if Ridner was plainly indifferent to employee safety, i.e., "possessed a state of mind such that if [he] were informed of the standard, [he] would not care." *AJP Constr. Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citations omitted). But, as noted, the judge made a demeanor-based credibility finding that Ridner "erroneously, but honestly" believed the trench was safe and we find no basis to disturb that finding.

Ridner never specifically addressed the south wall in his testimony. When the Secretary asked him about the north and south walls, he responded only with regard to the north wall, saying he thought the pipe provided protection from that wall. The Secretary asked no follow-up questions about the south wall. Ridner testified about the trench in general, but that testimony is not supportive of the Secretary's contention—as noted above, he testified that he believed the excavation was safe in part because he thought the size of the excavation provided protection to the workers, which he said he made larger for that purpose, and because no work was being performed on the south side of the excavation. *See Special Metals Corp.*, 9 BNA OSHC 1132, 1134, 1981 CCH OSHD ¶ 25,018, p. 30,908 (No. 76-4940, 1980) (compliance with standard not required absent employee exposure to the hazard posed by noncompliance). As for the sloughing shown in the CO's video as the workers exited the trench, the record does not show if Ridner had ever seen any active sloughing, let alone whether he had seen (and could recognize)

OSHD ¶ 29,618, p. 40,106 (No. 88-0391, 1992) ("it is the judge 'who has lived with the case, heard the witnesses, and observed their demeanor' ") (citation omitted).

Second, we find that Ridner's purported statements (as described by the CO) do not necessarily manifest that he knew the requirements of the standard. His vague statement that he had "been through the regulations" does not establish that he had reviewed the specific provision at issue and understood it. As for the CO's assertion, reflected in both his testimony and his inspection notes, that Ridner identified the excavation as not being adequately benched or sloped and Ridner knew he was unable to adequately bench the excavation," these statements are also vague in that it is unclear if Ridner was referring to sloping and benching "adequately" in terms of what the standard required or what he viewed as safe. We find, therefore, that the CO's testimony regarding Ridner's purported statements is insufficient to show that Ridner knew the cave-in protection requirements at the time of the violation. *See also* n. 11, infra.

any indications of previous sloughing.[10] We therefore defer to the judge's credibility determination.[11] *See Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, p. 41,257 (No. 89-433, 1993); *L&L Painting Co.*, 23 BNA OSHC 1986, 1990, 2009-12 CCH OSHD ¶ 32,233, p. 56,096 (No. 05-0055, 2012) (deferring to judge's credibility finding that was based on the witness's demeanor and was sufficiently explained); *compare Brickfield Builders, Inc.*, 17 BNA OSHC 1084, 1084-85, 1993-95 CCH OSHD ¶ 30,697, pp. 42,600-42,601 (No. 93-2801, 1995) *citing Beta Constr. Co.*, 16 BNA OSHC 1435, 1442-43, 1993-95 CCH OSHD ¶ 30,239, pp. 41,649-50 (No. 91-102, 1993) (declining to defer to judge's credibility determination where contradicted by photographic evidence). In sum, we find that the Secretary has failed to establish that the cave-in violation was willful.

Safe egress requirement

Unlike the cave-in requirement, the record shows that Ridner had a heightened awareness of the requirement for a "safe means of egress" from the excavation. *See Thomas Indust. Coatings, Inc.*, 23 BNA OSHC 2082, 2091, 2009-12 CCH OSHD ¶ 33,200, p. 55,772 (No. 06-1542, 2012) (finding supervisor had heightened awareness of lifesaving skiff standard where he was aware of standard during previous projects). However, because the egress provision permits a means other than "a stairway, ladder, [or] ramp" if it is "safe," it is a performance requirement,

[10] Before the judge, the Secretary—referring to evidence that an excavator was atop the south wall, with its tracks partly extending past the plane of the wall and its boom extended to the base of the trench—asserted "that the close proximity of the excavator['s] boom to the near-vertical south wall increased the probability of a wall collapse." But the Secretary has not renewed this argument on review, nor has he argued that Ridner's asserted belief in the safety of the trench lacks credibility in light of the CO's testimony that the excavator's position increased the risk of the south wall's collapse, or in light of the apparent risk that the excavator could have fallen into the trench if the south wall had collapsed.

[11] As noted in n. 9, supra, the judge declined to resolve the conflict between the CO's recollection of certain statements he claims Ridner made during the inspection and Ridner's denial at the hearing that he made such statements. In fact, the judge specifically stated in his decisions that he did not view such discrepancies as significant and would rely instead on the evidence presented at the hearing. This would include Szajna's testimony explaining that he was only agreeing with the CO once the CO explained what was wrong with the excavation. Indeed, the CO acknowledged that the statements he attributed to *both* Ridner and the superintendent were in response to questions posed to them. In light of this and the judge's demeanor-based credibility determination in favor of Ridner on other testimony, we find that Ridner—like Szajna—was simply agreeing with the CO's assessment of the excavation rather than acknowledging what he knew prior to the inspection. *See Sal Masonry Contractors Inc.*, 15 BNA at 1610-11, 1991-93 CCH OSHD at pp. 40,206-07.

and as such is interpreted in light of what is reasonable. *See, e.g., Thomas Indus. Coatings*, 21 BNA OSHC 2283, 2287, 2004-09 CCH OSHD ¶ 32,937, p. 63,738 (No. 97-1073, 2007) (applying reasonableness test to requirement for "adequate" washing facilities), citing *Lowe Constr. Co.*, 13 BNA OSHC 2182, 2185, 1987-90 CCH OSHD ¶ 28,509, p. 37,797 (No. 851388, 1989) (describing test for compliance with predecessor egress provision, which required an "adequate means of exit," as "whether the facts show that the means of egress provided is reasonably safe. . . ."). Therefore, to establish that Ridner consciously disregarded the egress standard, the Secretary must show that he knew the trench lacked a safe means of egress. *See Branham Sign Co.*, 18 BNA OSHC at 2134, 2000 CCH OSHD at p. 48,263 (conscious disregard requires knowledge that conditions violate standard).

In deciding that the egress violation was not willful, the judge held—again based on his observation of Ridner's demeanor—that Ridner erroneously but honestly believed that he had complied with the cited provision, i.e., that having employees climb onto the water main pipe and then walk up a ramp was a safe means of egress. According to Ridner, he was able to walk in and out of the trench without difficulty, which he believed was all that the standard required, and, therefore, he did not use a ladder he had in his truck. The Secretary argues that Ridner's belief that this provided a safe means of egress was unreasonable, as evidenced by the CO's video showing employees (including Ridner) climbing on top of the water main pipe and then going up a dirt incline to exit the trench. The Secretary focuses on the part of the video that shows one employee stumbling slightly as he jumps up from the trench floor to the top of the pipe and a second employee rising from all fours as he ascends the top of the pipe.

Based on the uncontradicted testimony of Ridner, the judge found that the incline the workers are shown using to exit the trench was *not* the ramp Ridner had created for egress; rather, upon the CO's request for the workers to exit the trench, they exited toward the CO and not in the direction of the ramp. He therefore considered the CO's video only insofar as it depicts the employees pulling themselves onto the pipe. We agree with the judge. Considering all the evidence, including the video for its limited purpose as well as a photograph of the ramp Ridner did create for egress, we find that the record as a whole is not inconsistent with the judge's demeanor-based finding that Ridner believed, albeit mistakenly, that the trench had a safe method of egress. Though the pipe the employees had to climb was not the equivalent of a stairway, ladder or ramp, the evidence shows that Ridner and the other employee in the video

had little difficulty managing it, and the photographic evidence of the ramp Ridner created for egress is not clear enough to establish that Ridner's belief lacks credibility. We therefore accept the judge's credibility finding that Ridner believed this means of egress was acceptable under the standard and reject the Secretary's contention that Ridner possessed a willful state of mind.

In sum, we conclude that there is insufficient evidence to overturn the judge's findings that Ridner lacked knowledge of the cave-in requirements, and was truthful when he testified that he believed he had created a safe excavation with a safe means of egress. We also conclude that the record does not establish that Zeiler otherwise exhibited conscious disregard of the cited requirements or plain indifference to employee safety. Because both violations of the excavation standard present risks of death or serious injury if an accident were to occur, we therefore characterize the violations affirmed under Items 1 and 2 as serious.

II. Penalty

In assessing a penalty, the Commission must give due consideration to four factors: (l) the employer's size; (2) the gravity of the violation; (3) the employer's good faith; and (4) the employer's prior history of violations. OSH Act §17(j), 29 U.S.C. § 666(j). Gravity is typically the most important factor. *Capform Inc.,* 19 BNA OSHC 1374, 1378, 2001 CCH OSHD ¶ 32,320, p. 49,478 (No. 99-0322, 2001), *aff'd,* 34 F. App'x. 152 (5th Cir. 2002) (unpublished). Here, the Secretary proposed a penalty of $28,000 for each citation item, giving Zeiler the maximum reduction for size specified by OSHA's Field Inspection Reference Manual, but no other reductions.

Largely due to his re-characterization of both citation items as serious, the judge assessed a total penalty of $8,000: $3,000 for Item 1 (safe egress), and $5,000 for Item 2 (cave-in protection). He apparently accepted the Secretary's proposed reduction for size, since each assessed penalty was less than the $7,000 maximum for a serious violation. §17(b), 29 U.S.C. § 666(b). The judge explained that he assessed a higher penalty for the cave-in protection violation because "the failure to provide an adequate means of egress becomes most relevant in the event of a cave-in[,]" and therefore, the violation was of a higher gravity. In addition, he said that "should the sides cave-in, an adequate ramp would be of help to employees only if they could reach it before they are buried by the collapse."

We agree with the judge's findings regarding the penalty factors except gravity. While the Commission has reduced a penalty where it found that one violation was subordinate to

another, s*ee, e.g.*, *Propellex Corp.*, 18 BNA OSHC 1677, 1685, 1999 CCH OSHD ¶ 31,792, p. 46,593 (No. 96-0265, 1999), that is not the case here. In the preamble to the egress standard, OSHA stated that the requirement for safe egress is "intended to provide employees working down in a trench with a safe means of escape from the trench in case of an emergency." Occupational Safety and Health Standards—Excavations, 54 Fed. Reg. 45894, 45918 (October 31, 1989) (to be codified at 29 C.F.R. pt. 1926). In listing excavation-related accidents, OSHA explained that the emergencies faced by employees in an excavation are not limited to cave-ins, but can include fires, medical emergencies, and flooding. Occupational Safety and Health Standards; Excavations, 52 Fed. Reg. 12288, 12293 (proposed April 15, 1987) (to be codified at 29 C.F.R. pt. 1926). So, even if Zeiler had properly protected its excavation against the threat of a cave-in, the requirement for safe egress would not be moot, and both violations pose serious hazards. Under these circumstances, we find that a $5,000 penalty for Item 1 and a $5,000 for Item 2 are appropriate.

ORDER

We affirm Citation 1, Items 1 and 2 as serious, and assess a total penalty of $10,000.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: September 15, 2014

ATTWOOD, Commissioner, concurring:

Zeiler is a small 3 to 15-employee excavation company with a history of OSHA violations dating back nearly 30 years. Indeed, Zeiler received its first two citations for violating OSHA's excavation standards in 1981.

Following a lengthy period without any inspections, OSHA inspected a Zeiler worksite in May 2007, and cited Zeiler for four excavation violations. In a settlement with OSHA, Zeiler agreed to pay reduced penalties and to comply with the Act and its standards. OSHA next inspected a Zeiler worksite in October 2009, and cited Zeiler for three excavation violations, two of which were characterized as repeat violations. On November 9, 2009—only two weeks after issuing the previous citations—OSHA inspected the Zeiler worksite at issue in this case, and cited the company again for violating OSHA excavation standards. There is no dispute that Zeiler violated the cited standards; in dispute is whether it did so willfully.

The Secretary argues that Zeiler's violations were willful based on his contention that: (1) Zeiler had a heightened awareness of the standards and was plainly indifferent to employee safety; and (2) Zeiler's foreman knowingly disregarded the standards' requirements and also acted with plain indifference to employee safety. It is beyond question that, by the time of the inspection here, Zeiler had a heightened awareness of OSHA's excavation standards. The record before us, however, does not establish that following the May 2007 OSHA citation, Zeiler's "competent person" training was inadequate to address any deficiencies in its practices, or that Zeiler lacked a proper safety program. Nor is there evidence showing that Zeiler failed to adequately monitor its 22-year veteran "competent person" foreman, whose testimony revealed a remarkable ignorance of excavation safety requirements but whom the judge believed truthfully testified that he thought the excavation was safe. Finally, in light of the foreman's apparent ignorance of the most basic aspects of the excavation standards' requirements, there is not sufficient evidence on which to base a finding that the foreman knowingly disregarded the requirements of the standards.

Accordingly, I am reluctantly constrained to concur with my colleagues that, in this case, Zeiler's violations of the excavation standards cannot be affirmed as willful, and I agree that the $5,000 penalty for each of Zeiler's two serious violations is appropriate.

/s/
Cynthia L. Attwood
Commissioner

Dated: September 15, 2014

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

SECRETARY OF LABOR	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 10-0610
	:	
E. R. ZEILER EXCAVATING, INC.	:	
	:	
Respondent.	:	

APPEARANCES:

Mary Bradley, Esquire
Office of the Solicitor
U.S. Department of Labor
881 Federal Building
1240 East Ninth St.
Cleveland, Ohio 44199
For the Complainant.

Ms. Lisa M. Zeiler, President (Pro Se)
E.R. Zeiler Excavating, Inc.
125 West Substation Road
Temperance, Michigan 48182
For the Respondent

BEFORE: Stephen J. Simko, Jr.
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 November 9, 2009 E.R. Zeiler Excavating, Inc. ("respondent" or "ERZ") began a project at the Southwest Pumping Station for the Lucas County, Ohio Sanitary Engineer in Maumee, Ohio on the grounds of the Springfield Township Fire Department. It was contracted to install a 24-inch water main and connect ("tap") it into the existing 36-inch main. Lt. Daniel Ball of the Springfield Fire Department observed employees in the excavation and was concerned

about their safety. He expressed his concerns to one of respondent's employees and then made a call to the Occupational Safety and Health Administration ("OSHA"). An OSHA compliance officer ("CO"), Darin VonLehmden, arrived at the site and began an inspection (Tr. 19). As a result of that inspection, ERZ was issued a citation alleging two willful violations of the Act on the grounds that the employer failed to (1) provide a safe means of egress from a trench and (2) adequately shore, slope, or otherwise protect the excavation from a cave-in. The Secretary proposed a penalty of $28,000 for each violation, for a total proposed penalty of $56,000. ERZ filed a timely notice of contest and a hearing was held in Toledo, Ohio on October 14, 2010. Both parties have filed post-hearing briefs and this matter is now ready for disposition.

DISCUSSION

1. Compliance Officer's Credibility

A. *Respondent's Arguments*

As an initial matter, ERZ challenges the credibility of the CO. In this challenge, ERZ makes several assertions:

1. The CO's report (Ex. R-1) contains statements allegedly made by its foreman, Jim Ridner (Tr. 74-76). However, the CO's testimony casts doubt on whether Ridner actually made the statements or whether they only represented the CO's interpretation of what he was told (Tr. 98-110, 126-127). Indeed, Ridner denied that he made the statements. (Tr. 160-162) For example, the CO recalled that Ridner said that ERZ needed to get its work done "today" because the tapper was on the site. Ridner explicitly denied having made that statement (Tr. 161). Also, the CO's notes indicate that Ridner told him that "[w]e should have a ladder in the hole. We just jumped in there." (Tr. 75). Again, Ridner explicitly denied ever having made such a statement (Tr. 162).

2. The CO knew there were only four employees, yet tried to indicate his belief that there were, in fact, five employees. (Tr. 21) The fifth person in the trench was, in fact, an employee of a different employer. Later, when ERZ representative Lisa Zeiler pointed out that the inspection report stated that there were only four employees "the CO smiled at me and stated, 'I believe there were four employees if I'm correct' (Tr. 57) and then winked at me." (ERZ Brief at 6).[1] Respondent asserts that this is just an example of the "audacity" she had to deal with from the CO.

1. Regarding the allegation that the CO "winked" at Ms. Zeiler, suffice it to say that I did not observe this behavior and nothing of this matter was brought up at the hearing. Certainly, the CO has not had any opportunity to defend himself from this allegation. Therefore, I cannot draw any conclusions about the propriety of Ms. Zeiler's impressions

3. Respondent also argues that the CO's testimony should be discounted because he allegedly lied about his employment history. For example, the CO testified that he once worked for H&M Excavating and Ziacam (Tr. 70). In its brief, ERZ includes an affidavit from H&M stating that the CO never worked for the company. Respondent also contacted Ziacam. Mr. Ziacam allegedly told ERZ that he did not personally know the CO, but that his former partner did. Mr. Ziacam refused to contact his ex-partner because he did not want to get involved.

B. *Discussion*

That the CO's notes and recollections of his interviews do not agree with the recollections of the employees interviewed is a fairly standard occurrence. It is the experience of this Judge that these discrepancies are often the results of differences in perception rather than prevarication. That is why we hold hearings.

Respondent next suggests that the CO deliberately attempted to get this Judge to believe that ERZ had five rather than four employees exposed to the hazard. However, at the hearing, the CO admitted that he "misstated" the status of the fifth person in the excavation (Tr. 94). This fifth person was the tapper who was not an ERZ employee and who was the only employee who worked between the pipe and the north wall. This is seen as important to respondent because it is ERZ's contention that this tapper was the only person actually exposed to a hazard. As discussed, *infra,* this is an erroneous assumption. Moreover, ERZ dug the excavation and was responsible for ensuring that it complied with OSHA regulations. As the contractor that created and controlled the hazardous conditions, it was responsible for the exposure of all workers exposed to the hazard, not just its own employees. *Summit Contractors, Inc.* 23 BNA OSHC 1196 (No. 05-0839, 2010). Thus, there was nothing for the CO to gain by lying about the employment status of the tapper.

Finally, I cannot grant any weight to the affidavit by H&M Excavating's owner, John Morris, regarding the employment history of the CO. The affidavit states that there is no record of the CO ever having been employed by H&M. However, there may be many explanations for H&M's inability to find any record of the CO's employment. For one, the CO said he "worked for" H&M (Tr. 70). It is possible that he worked as a contractor rather than as an employee. Also, we don't know how far back H&M's records go. Without the CO having an opportunity to respond, or the Secretary to cross-examine Mr. Morris, these questions must go unanswered.

I find no reason to reopen the record to allow the matter of the CO's employment history to be pursued. There is no basis to assume that the CO made any intentional misrepresentation of his

employment history. Clearly, Mr. VonLehmden's background was sufficient to persuade the Secretary to hire him as an OSHA compliance officer. Furthermore, there really is no dispute that the OSHA excavation standards were violated. As discussed, *infra*, undisputed facts and OSHA precedent establish that respondent failed to comply with the cited standards and that all employees were exposed to a serious hazard. The only dispute is the degree to which these violations exposed employees to a hazard and whether the violations were willful. My findings regarding the allegation that the violations were willful are based on clear evidence adduced at the hearing and Commission precedent. None of these issues turn on the credibility of the CO or the veracity of employee statements recorded in his notes. Therefore, there would be nothing to be gained to reopen the record solely to determine his employment history.

2. The violations

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer could have known of the existence of the hazard with the exercise of reasonable diligence. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1 alleges a willful violation of 29 C.F.R.§ 1926.651(c)(2)2 on the grounds that:

> A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:
>
> a. E.R. Zeiler Excavating, Inc. worksite located near the intersection of Garden Rd. & Holloway Rd., Maumee, Ohio: On or about November 9, 2009, the employer did not ensure safe access/egress was provided while employees performed work in a trench approximately 10.00' deep. No ladder or other safe means was provided.

The excavation was approximately 10 feet deep[3] (Tr. 25, 31, 51, 54). Four of respondent's employees and an employer of another company were working inside (Tr. 21, 57, 165, 190, Ex.

2 The standard provides:
Sec. 1926.651 Specific excavation requirements.

* * *

(c) Access and egress

* * *

(2) Means of egress from trench excavations. 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.

3 Respondent argues that the west wall was only 8.75 feet in depth, that the north wall was only 9.25 feet deep and that

C-3). ERZ contends that the standard was not applicable because the ramp was above a 36-inch pipe and there was eight inches below the pipe for a total of 44 inches (Tr. 174). This was four inches below the four foot (48 inches) depth requirement that is required for the standard to apply (ERZ Brief at 5). The argument has no merit. At the outset, it is not clear what ERZ is arguing. Apparently, it equates the top of the pipe with the top of the trench. Respondent's argument would require us to ignore the nearly six feet of trench that existed above the pipe. If those six feet of trench collapsed, employees would have to somehow climb over the pipe to make a safe egress. Accordingly, the argument is rejected and I find that the standard applies.

The evidence establishes that there was no ladder in the trench (Tr. 57, 141, 160) and that egress was affected by climbing up the 36-inch pipe to a ramp which led out of the trench (Tr. 160, 162, Exs. C-3, C-7). Moreover, there was a ladder in the truck, but the foreman decided not to use it (Tr. 181).

ERZ argues that the trench had a ramp that provided safe egress. It points out that the 36-inch pipe was used to assist employees in reaching a landing where the ramp began (ERZ Brief at p.5). Foreman Ridner testified that exiting the trench via the ramp was not difficult (Tr. 160). However, Joseph M Szajna, respondent's site superintendent, testified that, while he was not sure that he told the CO that there should have been a ladder in the trench, he now was of that opinion (Tr. 141).

Exhibit C-3 is a video of the worksite when the CO first arrived. Five people are inside the trench. In response to the CO's request, employees exit the trench. The video clearly shows the first person slightly stumbling as he jumps from the trench floor to the top of the pipe. The second person to exit has to rise from all fours as he pulls himself to the top of the pipe[4]. The CO also testified, and exhibit C-8 depicts, that a third employee exited the trench with difficulty (Tr. 36).

---

there was no full measurement of the east wall. Only the south wall, it contends, where nobody was working measured at 10 feet deep (ERZ Brief at 5). Despite respondent's cites to the transcript and exhibits, I find nothing in the record to support these contentions. The CO clearly stated that the *average* depth was 10 feet. In any event, these measurements do not alter the results of this case since there is no dispute that the depth of trench was more than sufficient to trigger the requirements of both cited standards.

4 I note that, after jumping on top of the pipe neither employee continued up the ramp. Rather, because the CO was standing away from the ramp, they walked up the side near the CO without the ramp (Tr. 186). There is no dispute, however, that to access the ramp employees had to first climb on the pipe (Tr. 186-187). Therefore, in assessing this item, I consider Exhibits C-3 and C-8 only insofar as they depict the employees jumping onto the pipe and the difficulty they encountered as they rose to their feet.

Therefore, I find that the preponderance of the evidence establishes that the pipe and ramp combination did not provide a safe method of access or egress in the event of an accident or emergency as required by the cited standard (Tr. 57).

The evidence also establishes that respondent's employees were exposed to the hazard. The exhibits and the testimony support the CO's testimony that employees had to exert substantial effort to exit the trench and that they were exposed to hazard of slipping, tripping, and falling (Tr. 57). As noted, *supra*, the exhibits and testimony clearly demonstrate that four of respondent's employees were working in the excavation. In the event of a cave-in or other emergency, these employees were exposed to the hazard of death or serious physical harm due to ERZ's failure to provide a safe method of egress.

The record also establishes that ERZ knew, or with the exercise of reasonable diligence should have known of the violation. Foreman Ridner testified that there was a ladder at the site but that he chose not to place it in the trench (Tr. 160-162). Ridner also agreed that appropriate egress was not provided (Tr. 179). A foreman or supervisor is the employer's representative at the site and, as such his knowledge is imputed to the employer. *E.g.*, *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993); *Tampa Shipyards Inc.*, 15 BNA OSHC 1533,1537 (Nos. 86-360 and 86-469, 1992)(citing *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, (No. 85-369, 1991)) Therefore, ERZ had constructive knowledge of the violative condition.

Finally, a violation is serious if, in the event of an accident, the result would be death or serious physical harm. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000)(Consolidated). The CO testified that, in the event of an accident, employees attempting to exit the trench could trip, fall or slip resulting in broken bones, contusions and even death (Tr. 57-58). Accordingly, I find that the Secretary established that the violation was serious.

Item 2 alleges a willful violation of 29 C.F.R.§ 1926.652(a)(1)[5] on the grounds that:

5 The standard provides:
Sec. 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 a potential cave-in.

Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 C.F.R.§ 1926.652(b) or (c):

a. E.R. Zeiler Excavating, Inc. worksite located near the intersection of Garden Rd. & Holloway Rd., Maumee, Ohio: On or about November 9, 2009, the employer did not ensure employees were protected from cave-ins/collapse while working in an unprotected excavation approximately 10.00' deep. The north wall of the excavation was near vertical and composed of "B" soil.

The CO testified that, when he arrived at the site, he saw a large trench that was inadequately protected against cave-in. The trench was approximately ten feet deep (Tr. 25, 31, 51, 54). The west side of the excavation was 16-feet wide (Tr. 50) and the width of the east side was 22-feet (Tr. 50, Ex. C-16). The length of the exposed pipe was 12-feet wide on the north wall (Tr. 49-50, Ex. C-17) and the width of the north face was also 12 feet (Tr. 49). The width of the south end of the trench was approximately 16-feet (Tr. 49, Ex. C-18). There was a large spoil pile on one side of the trench. The north wall of the trench was nearly vertical (Tr. 33, 38, Exs. C-4, C-6, C-12). However, at the very top of the north side, there was a small amount of sloping (Tr. 85, Ex. C-5). Also, on the north side, was a heavily traveled two-lane road that subjected the trench to vibration (Tr. 20-21, 42). The excavator was sitting close to the south wall, which was near vertical (Tr. 31, 37, Ex. C-10). There was also sloughing on the south side (Tr. 31, 37, Exs. C-3, C-10). The CO did not observe a trench box or any shoring at the site (Tr. 55). The trench was dug in previously disturbed Type B soil (Tr. 24, 45, 47, 139, 148, 176). The CO testified that, to comply with OSHA requirements, the trench was required to be sloped at a 45 degree angle (Tr. 56). Respondent made an attempt to bench[6] the east and west sides of the excavation, but the CO found that the attempt was inadequate and failed to comply with OSHA requirements (Tr. 55). He testified that there was only one bench on each side (Tr. 91) and that the depth of the benches on both the east side west side of the trench was 3.6 feet (Tr. 52-53).

Although he denied that he ever said so to the CO, Superintendent Szajna did not dispute that the trench was not in compliance (Tr. 156). The CO testified that during the inspection, Foreman Ridner was aware that the trench was not properly sloped (Tr. 24). The CO also recalled that Ridner told him that he was unable to adequately bench the trench because it would have required removal of a large portion of the road (Tr. 88-89). This was denied by Ridner, who

6 Benching is a method of protecting employees from cave-ins by excavating the sides of an excavation to form one, or a series of, horizontal levels or steps, usually with vertical or near vertical surfaces between levels. 29 CFR § 1926.650(b).

testified that, in his opinion, the trench was safe (Tr. 162, 184, Ex. C-28, ¶ 15). Ridner testified that, to protect the trench they benched the east and west side and sloped it back on the north side (Tr. 162-163, 165). Ridner further testified that he did not measure the depth of the trench and was not sure of the dimensions. However, he did not dispute the CO's measurements (Tr. 175, 177). While he was not sure how far back the trench should have been sloped, he agreed it should have been sloped at a 45 degree angle (Tr. 177). Ridner explained that he did not bench or slope all but the top of the north end of the trench because he believed that the existing 36-inch water main provided stable protection. In his view the ground was not going to move the pipe. He noted that the crew was working on the south side of the pipe which would be a safe spot (Tr. 183). Ridner also testified that he was not aware of the sloping requirements at the time of the inspection (Tr. 178, 189).

I find it unnecessary to resolve the conflict over what Ridner told the CO during the inspection. The preponderance of the evidence plainly establishes that the trench was not sloped or otherwise protected in accordance with OSHA regulations. It is undisputed that a trench dug in Type B soil must be sloped at a 45 degree angle (meaning it is sloped back one foot for each foot rise) The north face of the trench was nearly vertical, except for a slight sloping at the very top. This slight slope was wholly inadequate to comply with OSHA requirements. Alternatively, an employer could bench or shore the trench, or use a trench box. It is undisputed that no trench box or shoring was used. Although there was an attempt to bench the trench, the preponderance of the evidence establishes that the degree of benching was wholly inadequate. Appendix B to Subpart B requires that a trench dug in Type B soil, 20 feet or less in depth may have multiple benches four feet deep or a single bench at the bottom, with everything above the bench sloped at a 1:1 slope (or 45 degree angle). Both the east and west side of the trench had a single bench, 3.6 feet deep, with the remainder of those walls unsloped and unsupported.

Although respondent does not dispute that the trench was technically in noncompliance with OSHA requirements, it argues that (1) employees were not exposed to any hazard and (2) it did not know of the violation.

ERZ contends that employees were not exposed to any hazard because they were not required to work between the vertical north wall and the 36-inch pipe. It argues that the pipe provided protection to employees working on the side opposite the trench north wall. Moreover, it contends that the tapper, who was working between the pipe and the north wall, was not an ERZ

employee and was not under its control. It also argues that employees were protected by the size of the trench and asserts that this was a planned precaution by Ridner. According to ERZ, in the event of collapse, the size of the excavation made it possible for them to get out of the way of danger (ERZ Brief at 4). I find no merit in any of these arguments and find that the preponderance of the evidence establishes that employees were exposed to the hazard of a potential trench collapse.

The person seen working between the pipe and the north wall is the tapper (Ex. C-3). Respondent asserts that it did not direct the work of the tapper, who was at the site on his own (Tr. 190). He was in the trench without permission and decided on his own to stand between the pipe and the trench wall (Tr. 164-165). However, as noted, s*upra*, as the contractor that created and controlled the hazard, it was responsible for the safety of the tapper. In any event, respondent erroneously assumes that the pipe provided adequate protection against the hazard of a cave-in. The pipe did not eliminate the fact that the trench was nearly 10 feet deep. Neither did the pipe lessen the effects of vibration from the nearby heavily travelled road. Although the pipe might have blocked some of the cave-in from the north wall, it could neither have stopped the collapse nor contained most of the debris from falling onto employees. Moreover, the pipe was only 36-inches wide and stood approximately eight inches off the ground for a total of 44 inches. By respondent's own figures, the north wall was 9.25 feet or 111 inches high. Subtracting the 44 inches from the 111 inch height of the trench leaves 67 inches, or five feet-seven inches of trench above the pipe. The standard requires protection for excavations over five feet deep[7]. Therefore, even assuming that there is any validity to respondent's argument that the pipe provided cave-in protection, the excavation was still in violation of the standard for that part of the trench above the pipe.

Furthermore, I find that, despite the large size of the excavation, employees were exposed to the hazard of a cave-in from all four walls. To establish that an employee is exposed to a hazard, the Secretary must demonstrate that it was reasonably predictable that employees had access to the "zone of danger" created by the cited hazard. *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1073 (No. 93-1853, 1997). The Secretary can establish "reasonable predictability by demonstrating that, either while in the course of their assigned duties, their personal comfort activities while on the

7 I note that the presence of vibration from the nearby roadway and the weight of machinery sitting near the edge of the excavation heightened the possibility of a collapse. *See e.g. Appendix A to Subpart P of Part 1926* at ¶(d)(1)(vii) and *Appendix B to Subpart P of Part 1926 a*t ¶(c)(3)(iii).

job, or their normal means of ingress-egress to their assigned workplaces, employees will be, are, or have been in the zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976); s*ee also Fabricated Metal Prods.*, 18 BNA OSHC at 1073; *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996).

There is no evidence that employees were instructed not to stray from the north wall or otherwise prevented from walking near any of the other trench walls. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2075-76 (No. 87-1359, 1991). Therefore, it was reasonably predictable that, while in the course of their assigned duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces the employees would approach any of the four faces of the excavation. In any event, the evidence demonstrates that had any of the four trench walls collapsed, employees working inside would have been exposed, at a minimum, to the hazard of being injured by falling debris (Tr. 63). That the large size of the excavation made it *possible* that employees might be able to escape debris falling from a collapsed wall may go to the gravity of the violation, but does not change the fact that employees were exposed to the hazard. Based on the preponderance of the evidence, I find that it was reasonably predicable that employees would come within the zone of danger of all four walls of the trench and, therefore, that they were exposed to the violative condition[8].

Finally, respondent contends that it did not know of the violation. Respondent asserts that when Superintendent Szajna left the job site, he had no reason to believe that Foreman Ridner would not properly bench or slope the excavation. It is not disputed that when Szajna left the site, respondent considered Ridner to be a "competent person"[9] and left him in charge of the site. Clearly, it was Ridner who decided not to properly slope, shore or otherwise protect the excavation. As discussed in item 1, as the foreman with supervisory responsibility, his knowledge is imputed to ERZ. *Danis Shook Joint Venture*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001), *aff'd* 319 F.3d 805 (6th Cir. 2003).

8 That the size of the excavation made it possible for employees to escape the debris falling from a cave-in does not vitiate the fact that they were exposed to the hazard. At most, it goes to the likelihood of injury and, therefore, the gravity of the violation.

9 A competent person is defined at 29 CFR §1926.650(b) as "one who is capable of identifying existing and predicable 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." Under 29 CFR §1926.651(k) the "competent person" is charged with making daily inspections of the excavation and protective systems for evidence of a situation that could result in a possible cave-in, failure of protective systems, hazardous atmosphere, or other hazardous conditions.

Accordingly, I find that the Secretary established by a preponderance of the evidence that ERZ failed to comply with 29 C.F.R.§ 1926.652(a)(1). Also, for the reasons set forth in item 1, the Secretary established that the violation was serious. Had an employee been caught in a cave-in, the results would likely have been contusions, broken bones, and even death (Tr. 63).

3. Willfulness

a. Arguments of the Parties

1. Secretary

The Secretary notes out that ERZ has been cited multiple times for trenching violations, dating back to 1981 (Exs. C-22, C-23). She contends that respondent had a heightened awareness of the excavation standards based on two recent citations, issued within the past three years, alleging violations of the same standards (Exs. C-24, C-25). In May 2007, ERZ was cited for a serious violation of 29 CFR §1926.651(c)(2) for failing to ensure safe egress from an excavation more than four feet deep (Tr. 60-64, Exs. C-24 & C-25). The May 2007 citation became a final order on June 12, 2007. A citation for a repeated violation of that same standard was issued on October 22, 2009 (Tr. 60-64, Exs. C-24 & C-25). Furthermore, on that date ERZ was also cited for violating 29 CFR §1926.652(a)(1) for failing to provide adequate cave-in protection (Tr. 60-64, Exs. C-24 & C-25). Finally, the Secretary points out that the instant violations were cited only two days before ERZ signed a settlement agreement making the October 22, 2009 citations a final order.

The Secretary also points out that ERZ considered its foreman to be a "competent" person although he only attended competent person training in 2007 (Tr. 162). At the hearing, he still could not articulate how to provide adequate protection to employees in an excavation, even though he attended a 30-hour OSHA class on excavation after the citation was issued (Tr. 169, 178). For example, the foreman asserted that the 36-inch pipe was a stable protector of the north wall, even though the north face was subject to vibrations from the cars traveling on the road above (Tr. 183). According to the Secretary, at the hearing the foreman had trouble differentiating between sloping and benching and continued to believe that he properly sloped the excavation (Secretary Brief at 17). Moreover, even though there was a ladder on the truck, the foreman failed to use it. The foreman also contended that the ramp was adequate, even though employees had to scramble up a 36-inch pipe "and then use their hands to claw and crawl up the walls of the

excavation to safety." (Secretary Brief at 17)(Tr. 184). It is the Secretary's contention that Respondent's placing a foreman in charge who did not know how to comply with the standards constituted "reckless disregard" of employee safety (Secretary Brief at 18). Given his experience and training, the Secretary characterizes the foreman's failure to protect employees as "unreasonable, ludicrous and not indicative of good faith." (Secretary Brief at 20).

The Secretary also points out that respondent failed to take any action even after Lt. Ball of the Springfield Township Fire Department expressed his concerns about the safety of the trench to one of ERZ's employees. Finally, the Secretary contends that respondent's failure to provide adequate cave-in protection was not an isolated event, but was part of a pattern of intentional disregard for the requirements for the standard or, at the very least, plain indifference to employee safety. In light of its long history of trenching violations, respondent was on notice that attention was required at the job site to prevent future violations (Secretary Brief at 20).

2. ERZ

ERZ argues that, even though the excavation was not in compliance with OSHA standards, it was sloped and benched and, therefore, provided some cave-in protection. Moreover, the CO did not take measurements of the slope of the north wall. Therefore, it cannot be determined how far it was out of compliance. Respondent asserts that Foreman Ridner has been employed by ERZ for 22 years and is a "competent person." He did not place anybody in a dangerous work environment. He was confident in his decisions and did not disregard safety standards. Indeed, he purposely made the excavation much larger than necessary to enable employees to get out of the way in the event of a collapse. Ridner also considered that the 36-inch water main provided additional protection from collapse and did not make additional cuts in the roadway because he determined that the roadway enabled the excavation to be more stable by not disturbing it. These decisions were made based on his evaluation of conditions, and did not constitute an intentional, knowing, or voluntary disregard of the requirements of the Act. Moreover, when Superintendent Szajna left the site, he had no reason to believe that Ridner would not properly bench or slope the excavation (ERZ Brief 4-5).

ERZ also argues that its citations issued prior to 2007 have no bearing on the current citation. It notes that the Secretary generally only considers citations issued within the prior three years (ERZ Brief at 5). It especially notes that the citation issued in 1981 should not be considered.

It points out that, in 1981, Ridner was only 14 years old and Szajna was not yet even born (ERZ Brief at 5).

3. Discussion

A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-239, 1995), 73 F.3d 1466 (8th Cir. 1996). The Secretary must differentiate a willful from a serious violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Valdak Corp.*, 17 BNA OSHC at 1136. The Secretary must show that, at the time of the violative act, the employer was actually aware 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. *Propellex Corp.*,18 BNA OSHC 1677, 1684 (No. 96-0265, 1999). The Commission has found heightened awareness "where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that the violative conditions exist." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2209 (No. 87-2059, 1993); *See also, E.L. Davis Contrac.*,16 BNA OSHC 2046, 2051-52 (No. 92-35, 1994)(employer allowed three employees to work in an unprotected excavation despite prior citations and a city inspector's warning).

I find that the preponderance of the evidence does not establish that the violations were willful. Before Superintendent Szajna left the site on the morning of November 9, 2009, he gave Foreman Ridner instructions to properly protect the excavation (Tr. 42). As he testified, he had no reason to believe that Ridner would not properly slope or bench the excavation. They operated that way before and Szajna considered Ridner to be a "competent person" (Tr. 138, 147). Although Ridner failed to properly protect the excavation, he made an attempt, albeit insufficient, to slope the north wall and to bench the east and west sides.

A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. *L.R. Willson and Sons, Inc.*, 17 BNA OSHC 2059, 2063 (No. 94-1546, 1997), *rev'd on other grounds,* 134 F.3d 1235 (4th Cir. 1998); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). The test of good faith for these purposes is whether the employer's efforts were objectively reasonable even though they were not totally effective in

eliminating the violative conditions. *General Motors Corp., Electro-Motive Div.* 14 BNA OSHC 2064, 2068 (No. 82-630, 1991)(consolidated).

Having observed Ridner's demeanor, I am persuaded that he had a good faith belief that he was protecting his employees. Ridner appeared to be testifying truthfully when he insisted that he was creating a safe excavation. Indeed, his insistence that he created a safe excavation, despite the clear evidence that it was not in compliance with OSHA standards, served only to undermine his status as a competent person and, therefore worked to his own detriment. I therefore conclude that he erroneously, but honestly, believed that the pipe provided a level of protection to employees, that he was providing protection by enlarging the excavation larger than necessary to perform the work, and that the ramp, accessed by climbing over the 36-inch water main, constituted a safe method of egress.

Moreover, while Ridner was clearly wrong in his assessment, it was not objectively unreasonable. The incomplete benching of the east and west walls did reduce the load on the walls and, therefore, reduced the likelihood of a cave-in. Similarly, the minor sloping of the north face, together with the presence of the water main did provide limited protection; and in the event of a collapse the large size of the excavation did provide the employees with some chance of avoiding being buried if they were able to escape to the middle of the excavation. Finally, the ramp, though inadequate, did provide some method of egress from the 10-foot deep trench.

Respondent's long history of OSHA violations, including recent violations of the excavation standards, though not rising to the level of willfulness, does demonstrate a sloppy attitude toward its OSHA obligations. That attitude is best evidenced by ERZ's decision to consider Foreman Ridner a competent person and by Superintendent Szajna's decision to rely on Ridner to bring the excavation into compliance. As demonstrated at the hearing, despite his years of experience and prior "competent person" training, Ridner demonstrated confusion and lack of knowledge of the requirements for bringing an excavation into compliance with OSHA regulations. However, there is nothing in the record to suggest that ERZ was aware that Ridner lacked the fundamental knowledge necessary to make him a "competent person." The record demonstrates that, despite his weaknesses, Ridner received "competent person" training in 2007, was an experienced foreman and, after 22 years of employment, has never been disciplined for a safety violation by ERZ (Tr. 162, 182). Furthermore, at the hearing, Ridner continued to maintain that he was a "competent" person, even after his lack of knowledge about OSHA excavation

requirements was exposed (Tr. 170). Given his background, relying on Ridner to act as ERZ's "competent person" at the site was a mistake, but did not rise to the level of a conscious disregard of or plain indifference to employee safety.

That Lt. Ball brought his concerns regarding the safety of the excavation to the attention of an employee does not require a different result. Lt. Ball's concerns were not expressed to Foreman Ridner, but to an employee, and there is nothing in the record to show that the employee conveyed those concerns to Ridner. Thus, there is nothing in the record to suggest that Ridner was aware of Lt. Ball's concerns.

Based on this record, I find that the preponderance of the evidence fails to establish that the violations were the result of an intentional, knowing or voluntary disregard for the requirements of the Act or that ERZ acted with plain indifference to employee safety.

4. Penalty

The Secretary proposed a $28,000 penalty for each of the two violations. Those penalties, however, were based on the Secretary's conclusion that the violations were willful. Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that, in assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *S & G Packaging Co., 19* BNA OSHC 1503, 1509 (No. 98-1107, 2001). The OSHA Form 1-B indicates that the Secretary considered the violations to be of high severity, with a "greater" probability that an accident could occur. Moreover, the Secretary granted ERZ the maximum deduction for its small size allowed by the Field Inspectors Reference Manual (FIRM, Section 8, Chapter IV(c)(2)(i)(5)(a)(1)). No credit was given for ERZ's history or good-faith (Tr. 65-68, Exs. C-26, C-27).

Considering these factors, I conclude that a penalty of $3000 is appropriate for item 1, for failure to provide an appropriate means of egress. I also find that a penalty of $5000 is appropriate for item 2, for failure to adequately slope, shore, or otherwise protect the sides of the excavation from a cave-in. I consider item 2 to represent a violation of higher gravity than item 1, since the failure to provide an adequate means of egress becomes most relevant in the event of a cave-in. Moreover, should the sides cave-in, an adequate ramp would be of help to employees only if they could reach it before they are buried by the collapse. As noted, supra, both violations were serious and would likely result in death or serious physical harm.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1. Citation 1, Item 1 for a willful violation of Section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R.§ 1926.651(c)(2) is AFFIRMED as a serious violation, and a penalty of $3000 is ASSESSED.

2. Citation1, Item 2 for a willful violation of Section 5(a)(2) of the Act for a failure to comply with the standard at 29 C.F.R.§ 1926.652(a)(1) is AFFIRMED as a serious violation, and a penalty of $5000 is ASSESSED.

SO ORDERED.

/s/
Stephen J. Simko, Jr.
Judge, OSHRC

Dated: March 25, 2011