Maryland
DEPARTMENT OF LABOR

DIVISION OF LABOR & INDUSTRY
Office of the Commissioner
1100 North Eutaw Street, Room 600
Baltimore, MD 21201

October 15, 2020

VIA ELECTRONIC MAIL AND U.S. MAIL

Brent I. Clark
Seyfarth Shaw, LLC
233 S. Wacker Drive, Suite 8000
Chicago, Illinois 60606-6448

RE: R.F Warder, Inc.
MOSH No.: A7469-117-18

Dear Mr. Clark:

Enclosed is the Final Decision and Order of the Commissioner of Labor and Industry issued today in the above-captioned manner.

Sincerely yours,

Christina Schaefer
Administrative Officer
Division of Labor and Industry

Enclosure

cc: Jenny Baker/Sarah Harlan, Assistant Attorneys General
Catherine Bellinger, MOSH Assistant Attorney General
Hilary Baker, MOSH Assistant Attorney General
Judge Jana Burch, Office of Administrative Hearings
MOSH Office of Review

IN THE MATTER OF	*	BEFORE THE
R.F. WARDER, INC	*	COMMISSIONER OF LABOR
	*	AND INDUSTRY
	*	MOSH CASE NO. A7469-117-18 OAH CASE NO. 41-19-02461
	*	

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FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, Annotated Code of Maryland. The Maryland Occupational Safety and Health Unit ("MOSH") issued eight (8) citations to R.F. Warder, Inc. ("R.F. Warder" or "Employer") and assessed penalties totalling $277,050.00 following an accident investigation at the Clifton Park Pool in Baltimore, Maryland. Four of the citations were classified as willful serious; two were classified as serious and two were classified as other than serious. R.F. Warder contested the citations and a hearing was held over the course of fourteen (14) days between May 6, 2019 and July 3, 2019 at the Office of Administrative Hearings in Hunt Valley, Maryland before Administrative Law Judge Jennifer A. Nappier ("ALJ"). The parties filed post-hearing briefs. On November 4, 2019, the ALJ issued a proposed decision recommending that six of the citations and proposed penalties be upheld and that one serious citation and one willful serious citation be vacated. R.F. Warder filed a timely request for review and the Commissioner also ordered review. A review hearing was held before the Commissioner of Labor and Industry on June 18, 2020. Based upon a thorough review of the record, the relevant law and the arguments made by both parties, the Commissioner affirms the six citations that the ALJ recommended be

upheld,[1] affirms one of the citations the ALJ recommended be vacated and vacates one of the citations. The Commissioner affirms penalties totalling $276,000.00

FINDINGS OF FACT

R.F. Warder is a mechanical contracting company which had a contract with Baltimore City to perform repair and maintenance services for some of the City's plumbing and heating systems. (Tr. 305-306.) During the week of May 27, 2018, the City of Baltimore received a substantial amount of rain. (FF 53.)[2] On May 29, 2018, R.F. Warder received a service call from the City to jet blast the backwash drainage line at the Clifton Park Pool in order to unclog the line. (FF 54.) On May 30, 2018, Kenneth Walko, a journeyman plumber employed by R.F. Warder, and Kyle Hancock, a helper employed by R.F. Warder, went to the pool to assess the job. (FF 55.) Mr. Hancock drove a company vehicle to the pool with a jetter in tow. Mr. Walko and Mr. Hancock filled the jetter with water and took the hose to the pool house where they believed the clog was located. They tried to unclog the line with the jetter but it was not successful.

After notifying an employee at the pool that they were not successful, they examined several manholes in the vicinity of the pool house to see if they were filled with water. (FF 57.) Mr. Walko discovered that two of the manholes were completely filled with water and that water needed to be pumped out of the first manhole in order to further assess the situation. A Clifton park employee gave Mr. Walko permission to have the water pumped out of the manhole. Mr. Walko contacted Joseph Hren, R.F. Warder's general foreman, to request a pump truck. Later that day, a pump truck arrived and water was pumped out of the first manhole. Mr. Walko

[1] The Commissioner affirms the Administrative Law Judge's conclusion that MOSH satisfied its burden of proof for Citation 3, Items 1 & 2.
[2] "FF" refers to the ALJ's Findings of Fact in the November 4, 2019 decision.

attempted to send the jetter hose through the sewer line but was unable to get it all the way through. (FF 61.) After removing the jetter hose from the manhole, Mr. Walko and Mr. Hancock walked into a field adjacent to the pool house with the hose in hand. Mr. Walko noticed a soft spot of earth that was slightly sunken. Based on this observation, Mr. Walko concluded that the clog may have been the result of a collapsed line. (FF 62.) Mr. Walko informed Dale Stonesifer, R.F. Warder's service manager, about his suspicions and advised that he needed to use a camera to look inside the pipe. Mr. Stonesifer approved the request and Mr. Hancock entered the manhole to direct the camera into the pipe. Due to the amount of water in the pipe, they were not able to get a clear image. Mr. Walko informed a Clifton Park Pool employee that the job was more complicated than simply cleaning out the line and advised that resolving the issue would require digging. (FF 64-69.)

Mr. Walko spoke with Mr. Hren about the need to perform a dig at the work site. He advised Mr. Hren that the crew would need an excavator and a skid-steer loader for the job. Mr. Walko further advised Mr. Hren that he expected the excavation to be about 15 feet deep.[3] When Mr. Hren asked how he determined that, Mr. Walko stated that his estimate was based on looking down the manhole. Mr. Walko contacted Miss Utility to mark the underground utility lines so Warder could avoid hitting them during the dig. (FF 71-72.)

The dig began on June 4, 2018. Mr. Hren rented a John Deere Model 135G excavator, a Bobcat Skid Steer Model S530, and a dumpster. Mr. Hren instructed Pat Owens, another R.F. Warder employee, to report to the work site to operate the excavator. Mr. Hren further instructed

[3] Counsel for both MOSH and R.F. Warder pointed out that the ALJ's Finding of Fact 4 is not correct. The Commissioner agrees and the record reflects that prior to the June 5, 2018 accident, R.F. Warder performed a few excavation jobs that involved a depth of more than 5 feet but none of the magnitude of the Clifton Park Pool project. (Tr. 3380-83).

Mr. Walko to call him when he saw water or reached the pipe during the dig. Mr. Walko and Mr. Hancock arrived at the jobsite around 7:00 a.m. Mr. Owens arrived around 8:00 a.m. The utility companies arrived around 9:00 a.m. and marked the utility lines. The excavator was delivered to the jobsite by approximately 11:30 a.m. (FF 77-82.)

During the afternoon, Mr. Owens used the excavator to dig the excavation and Mr. Walko used the Bobcat to move dirt that had potentially been contaminated by sewer water into a dumpster. At various times during the day, Mr. Hren communicated with Mr. Walko about the status of the job. At one point, Mr. Hren asked Mr. Walko how deep the excavation was and how much deeper he expected it to be. Mr. Walko replied that it was about five or six feet deep and he anticipated that it would be about fifteen feet deep. At around 2:30 p.m., Mr. Walko texted Mr. Hren pictures of the excavation which showed water at the bottom that had the appearance of black oil. Mr. Walko advised Mr. Hren that they would need the pump truck to come out again. At the end of the day on June 4, 2020, the excavation was about eight feet deep, fifteen feet wide and 20 feet long. The crew put orange safety fencing around it and parked the machines. (FF 83-87.)

On June 5, 2018, Mr. Walko and Mr. Hancock arrived at approximately 7:00 a.m. They removed the orange fencing and began waiting for the pump truck. At around 7:30 a.m., Mr. Wallace Stephenson, the Facility Maintenance Coordinator for Baltimore City, visited the jobsite and met with Mr. Walko and Mr. Hancock. He remarked on how big the excavation was. Mr. Walko advised that the sewer line was much deeper than they anticipated and, as a result, they had to make the excavation much wider. As Mr. Stephenson walked around the excavation, Mr.

Walko advised him not to get near certain areas that were soft and breaking apart. Before departing the jobsite, Mr. Stephenson took photos. (FF 89-93.)

The pump truck arrived around 9:00 a.m. and it took approximately 45 minutes to pump the water out of the excavation. Mr. Owens arrived at the jobsite around 10:30 a.m. and began to dig using the excavator. Mr. Hren arrived around 10:45 a.m. at which point Mr. Owens had begun sloping and benching the excavation. Upon his arrival, Mr. Hren looked at the excavation and asked Mr. Walko if he needed anything. At that point, the excavation was approximately 20 feet wide (running north to south), 20 to 25 feet long (running east to west) and 10 feet deep. Mr. Hren observed that the east wall was not sloped in the same manner as the other walls of the excavation. Shortly after Mr. Hren arrived, Mr. Owens stopped digging and spoke with Mr. Hren about the job together with Mr. Walko and Mr. Hancock. Mr. Hren asked about the excavation and what the crew was doing to secure it. He asked Mr. Owens when they were going to start sloping the east wall and advised Mr. Owens that they needed to "cut that back." (FF 94-100.) During the course of discussing the excavation, Mr. Owens pulled up a website on his phone and showed Mr. Hren that the sloping needed to be done at a ratio of 1.5 to 1. Despite showing Mr. Hren the proper ratio, Mr. Owens did not accomplish this and the east wall was left vertical.

Mr. Hren was at the jobsite for approximately 30 minutes. He did not inspect the jobsite to make sure it was safe. Before he left, he asked the crew if they needed another dumpster but they indicated they didn't need one. As Mr. Hren walked back to his truck at approximately 11:20 a.m., he called John Habitch, the Recreation and Parks Facility Maintenance Coordinator. Mr. Hren advised Mr. Habitch there was a large hole and Mr. Habitch asked if they needed a trench box. Mr. Hren said they had not reached the pipe and were still excavating. Before

ending the call, Mr. Habitch again told Mr. Hren to let him know if he needed a trench box. (FF 101-102.)

After Mr. Hren left, the crew resumed work and Mr. Owens began digging with the excavator again. At around noon, Mr. Hren called Keith Sutton of Sutton Solutions to work on the job as a minority contractor. While excavating the hole, Mr. Owens hit the top of a terracotta pipe with the bucket of the excavator, breaking the pipe. Sewage water began to flow into the hole from the broken pipe. Using the excavator, Mr. Owens began to dig around the sides of the pipe to create a channel for the sewage water. Shortly thereafter, Mr. Owens got out of the excavator, checked the ground for cracks and moved the excavator away from the hole. After conferring with Mr. Walko and Mr. Hancock, they decided to enter the hole and dig the channel by hand. After finding pieces of pipe dug up by the excavator, the crew examined the hole to determine whether it was safe to enter the hole. (FF 103-108.)

Mr. Walko was the first person to enter the excavation. At that time, the excavation was at least 15 feet deep. At ground level, the excavation was about 40 feet long and 24 feet wide. The bottom of the excavation was 10 to 12 feet long and about 6 to 8 feet wide. There were two benches on the north wall, each about six feet high and four to five feet wide, with one located above the other. The south side of the excavation was benched in a substantially similar manner. The top level benches were about six feet from ground level and there were ramps that gradually inclined from the surface of the bench to the ground level. The west side of the excavation was sloped at an angle that allowed people to walk down the slope and for the excavator to be driven down it. The east side of the excavation was nearly vertical. (FF 109.)

Mr. Owens and Mr. Hancock joined Mr. Walko in the excavation and began digging around the pipe with hand shovels. For a period of time, water from the broken pipe was flowing into the excavation until they were able to create a channel. (FF 105.[4]) After exposing both ends of the pipe, the men dug a channel from one end of the broken pipe to the other to allow the water to flow from the west side of the excavation to the east. There was about one half to two inches of water constantly flowing through the channel.

Mr. Sutton arrived at around 1:45 p.m. Before entering the excavation, he looked around the jobsite and remarked that it was not safe and there was nothing to stand on. He asked if there was plywood that he could stand on and was advised that there wasn't any. Mr. Walko advised everyone in Mr. Sutton's presence that they should not stand in the ground area near the east wall. At one point, Mr. Owens asked Mr. Hancock and Mr. Sutton to get out of the hole so he could remove more dirt from the north side of the hole where the broken pipe was located. At the instruction of Messrs. Walko and Owens, Mr. Sutton and Mr. Hancock continued to dig in an effort to clean the area all the way around the pipe. Even after the channel was complete, Mr. Sutton and Mr. Hancock had to dig to keep the water in the channel. (Tr. 2116.) Mr. Hancock stood on the traffic cone while he dug on the east end and Mr. Sutton stood on the pipe with one

[4] The Commissioner amends Finding of Fact 112 and concludes that after exposing both ends of the pipe, the three men dug a channel from one end of the broken pipe to the other, to allow the accumulating water to flow from the west side of the excavation to the east side. The channel allowed for the water to stop puddling in the excavation. (Tr. 2975.) Finding of Fact 115 is amended to provide the soil in the excavation was dry after being pumped out in the morning but the area around the channel was wet where the pipe was broken. (Tr. 3004; 3075.) Finding of Fact 116 is amended to provide that when the channel was working, it prevented the water from accumulating inside the excavation, but there were periods of time when the water was outside of the channel and Mr. Sutton and Mr. Hancock had to dig to divert the water from the excavation back into the channel. (Tr. 2116.)

foot over the other on the west end. At one point, Mr. Hancock stepped off the traffic cone into the muck and when he tried to lift his food, his boot came off. (FF 126.)

Mr. Walko called the office to ask for the use of the jetter to make sure the pipes were clear. He was advised to call Mr. Vaughan to bring it out. At around 2:45 p.m., Mr. Vaughan arrived with the jetter. Mr. Walko got out of the hole and went to the pool house with Mr. Vaughan where they filled up the jetter and brought it back toward the jobsite. It was placed about 15 yards north of the excavation. Mr. Vaughan then pulled the jetter hose off the reel and affixed the attachment to the hose before climbing down the north bench to hand it to Mr. Hancock and Mr. Sutton. The crew jetted the east end of the pipe first to make sure the water could flow out constantly. After sending the jetter hose about 100 feet down the pipe, they found there was no blockage and water flowed out of the pipe. Then, they attempted to jet the west end of the pipe but it hit a blockage about 20 feet into the pipe. They tried to get the hose out but were unsuccessful so they turned the jetter off. At approximately 3:15 p.m., Mr. Sutton had finished clearing his side of the pipe and was looking at Mr. Hancock on the east side of the excavation when he noticed the east wall start to give way. He yelled for Mr. Hancock to run but the wall collapsed and buried Mr. Hancock. Mr. Sutton ran up the west slope and out of the excavation. Mr. Sutton went to his vehicle and called 911 and then Mr. Hren. (FF 127-133.)

At the time of the collapse, Mr. Walko was standing on a first level bench on the south side of the excavation and Mr. Vaughan was standing on a first level bench on the north side of the excavation. Mr. Owens was on the ground level at the jetter machine. All three men jumped into the excavation and began digging by hand in an effort to rescue Mr. Hancock. (FF 134-135.)

When the Baltimore City Fire Department ("BCFD") arrived, they ordered all R.F. Warder employees out of the excavation and determined that it was unsafe. When the BCFD Incident Commander arrived at approximately 3:50 p.m., there was a small pool of water in the hole. Mr. Hren arrived at about the same time as the Incident Commander. (FF 137-138.)

MOSH Safety Compliance Officer Chuck Allan arrived at the site at approximately 4:13 p.m. He was the principal accident investigator. MOSH Compliance Officer Drew Dorbert arrived at about the same time as Mr. Allan. When he arrived, Mr. Allan observed someone operating the excavator and pulling dirt around one edge of the hole. Mr. Allan spoke with Mr. Hren and conducted an opening conference. Mr. Hren stated that he worked for R.F. Warder but had just arrived and was not on site when the accident occurred. (FF 140-143.)

Mr. Dorbert began to interview individuals at the site and to interview R.F. Warder employees with the hope of getting information that would assist with the rescue and recovery efforts. Most of the R.F. Warder employees indicated that they were too upset to provide a statement. MOSH Regional Supervisor David Thorsen arrived at 5:35 p.m. Mr. Thorsen and Mr. Dorbert took pictures of the site during the rescue and recovery operations. The rescue and recovery operations continued through the early morning of June 6, 2018. At approximately 1:30 a.m., Mr. Hancock's body was recovered. It was buried about 18 feet down in the excavation under 3 feet of dirt. He died of asphyxia. Mr. Allan took photos of the site each day between June 5, 2018 and June 8, 2018. On June 8, 2018, Mr. Allan took three soil samples from the site which he sent out for testing. The results for all three came back as "Type B" which is cohesive and has the texture of sandy clay. (FF 145-156.)

On June 13, 2018, MOSH Compliance Officers Chuck Allan and Brendan Kinna interviewed R.F. Warder employees at the union hall while R.F. Warder's attorney listened by telephone. They interviewed Kenneth Walko, Victor Vaughan, and Pat Owens. They also interviewed Mr. Sutton on June 15, 2018 and September 17, 2018; Mr. Hren on June 20, 2018 and August 15, 2018 and Mr. Warder on June 20, 2018.

On November 19, 2018, the citations were issued.

STANDARD OF PROOF

In order to establish a violation of the Act, the Commissioner must find that MOSH has demonstrated by a preponderance of the evidence that (1) the standard at issue applies; (2) the employer failed to comply with the standard; (3) employees were exposed to the violative condition; and (4) the employer knew or with the exercise of reasonable diligence should have known of the condition. *See Secretary of Labor v. Dun-Par Engineered Form Co.*, 12 O.S.H. Cas. (BNA) 1962 (1986); *Secretary of Labor v. Astra Pharmaceutical Products, Inc.*, 9 O.S.H. Cas. (BNA) 2126 (R.C. 1981), *aff'd in part in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Willful Violation

MOSH classified four of the citations against R.F. Warder as willful serious violations. A willful violation is "an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements." *Dayton Tire v. Secretary of Labor*, 671 F.3d 1249, 1256 (D.C. Cir. 2012) quoting *Ensign-Bickford Co. v. OSHRC*, 717 F.2d. 1419, 1422 (D.C. Cir. 1983); *Calang Corp.,* 14 BNA OSHC 1789, 1791 (No. 85-319, 1990). MOSH does not need to demonstrate that R.F. Warder acted with malice. *Intercounty Construction Co. v. OSHRC*, 522

F.2d 777 (4th Cir. 1975), *cert. denied,* 423 U.S. 1072 (1976).[5] R. F. Warder argues that because it made a good faith effort to comply with the cited standards, the citations should not be classified as "willful." It suggests that it simply misunderstood the scope of its obligations under the Act. There is no "generic good faith defense for violations of the Occupational Safety and Health Act." *Stark Excavating Inc. v. Perez,* 811 F.3d 922, 928 (2016), *citing United States v. Ladish Malting Co.,* 135 F.3d 484, 491 (7th Cir. 1998). An employer who consciously disregards an OSHA standard is acting willfully even if it has a good faith belief that the violation does not present a hazard to its employees. *Secretary of Labor v. Kilby & Gannon Construction Services, LLC,* 24 O.S.H. Cas. (BNA) 1212, 1227 (2012), *citing Secretary v. Capital City Excavation Co., Inc.* 712 F.2d 1008, 1010 (6th Cir. 1983). A willful violation may stand if an employer knowingly fails to comply with the Act's requirements even if the employer had "a good faith belief that the area remained safe." *Intercounty Construction Co.*, 522 F.2d at 780.

The evidence refutes a finding of a good faith belief on the part of R.F. Warder. The company's safety and health plan failed to even address excavation work. The project manager and person in charge of safety for the job site, Mr. Hren, had no excavation safety training or knowledge of Subpart P of the standards. As found by the ALJ, R.F. Warder provided no excavation safety training to its employees other than handouts that were placed in their mailboxes with no follow-up by the Employer to verify that the employees had reviewed or understood the contents of the handouts. Moreover, R.F. Warder relied on training by former employers and on the job training to cover hazards that were well outside the scope of normal

[5] Like this case, the *Intercounty Construction* case involves the failure of an employer to protect employees working in a trench from the hazards of a cave-in.

operations. This evidence does not support a finding that R.F. Warder could have had a good faith reasonable belief that its conduct complied.

At the review hearing, R.F. Warder argued that the ALJ failed to consider the *Dayton Tire* case in recommending that three of the citations (Citation 2, Item 1; Citation 2, Item 3 and Citation 2, Item 4) be affirmed as willful serious. In *Dayton Tire*, the Secretary of Labor personally served Dayton Tire with a citation alleging 100 willful violations of the OSH Act and assessed penalties of $1.975 million dollars. The citation alleged violations of the "Lockout/Tagout" standard covering the service and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment or release of stored energy could cause injury to employees. 29 C.F.R. §1910.147(b), (c)(7)(1)(A) & (B). The standard requires that employers establish a program for affixing appropriate lockout or tagout devices to energy generating devices, conduct periodic inspections to insure compliance and train employees on the purpose and function of the program. The standard requires that certain "authorized" employees who perform maintenance and service receive more rigorous training.

From 1969 through 2006, Dayton maintained a facility in Oklahoma City where it employed a separate company to service and maintain the equipment. When the lockout/standard went into effect in 1989, Dayton's then safety manager conducted an assessment of job tasks at the plant and determined that Dayton's employees were only "affected" employees and not "authorized" employees within the meaning of the standard. In 1992, a subsequent Dayton safety manager reviewed her predecessor's assessment and determined it was still valid.

In 1993, a Dayton employee died from injuries he sustained when a machine activated unexpectedly. Federal OSHA sent an inspector to the plant and concluded that Dayton had

willfully violated the lockout/tagout standard by failing to train its employees to the "authorized" level. Dayton appealed the citation to the Occupational Safety and Health Review Commission where it was referred to an ALJ for a hearing. The ALJ concluded that Dayton's actions were consistent with a good faith belief and effort to comply with the lockout/tagout standard but, nevertheless, characterized 37 of the citations as willful because Dayton knew that its parent company, Bridgestone, had been cited under the standard for similar violations. Both Dayton and the Secretary of Labor petitioned the Commission for review. Thirteen years later, a divided Commission affirmed all but one of the violations and went beyond the ALJ's decision and found all of the violations willful and based on different reasons than those of the ALJ. Dayton appealed and the D.C. Circuit Court of Appeals reversed the Commission's decision. The Circuit Court of Appeals determined that "the linchpin of the Commission's willfulness determination is its finding that [the subsequent safety manager] either knew Dayton was non-compliant or was unwilling to investigate for fear of uncovering Dayton's non-compliance." The Court concluded that this finding was "based more on speculation than evidence" accordingly the Court concluded that the willfulness characterization did not withstand review.

The Commissioner does not find the ALJ's failure to cite the *Dayton Tire* case in her decision problematic. *Dayton Tire* is one of many cases addressing willfulness and, as set forth above, is readily distinguishable from this case. The Commissioner will address the evidence supporting willfulness for each of the relevant citations below.

Employer Knowledge

On review, R.F. Warder argues that the ALJ properly found that Mr. Owens and Mr. Walko were not supervisors and that Mr. Hren was responsible for supervising the Clifton Park

job.[6] The Employer also asserts that the ALJ erred in finding that R.F. Warder had constructive knowledge of the violative conditions. It contends that an employer cannot be expected to have a supervisor on site at all times and that supervisors and employees can be in touch by phone. MOSH argues that the ALJ erred in finding Mr. Owens and Mr. Walko were not supervisors who would impute actual knowledge to the Employer. MOSH also contends that the ALJ properly concluded that R.F. Warder had constructive knowledge because it did not exercise reasonable diligence to discover the hazardous conditions at the jobsite.

To establish knowledge, MOSH must prove that an employer knew or could have known with the exercise of reasonable diligence of the conditions constituting the violation. In determining whether an employer has actual knowledge, the knowledge of a supervisor or foreman may be imputed to the employer. An employee "who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Dover Elevator Co.,* 16 O.S.H. (BNA) 1281, 1286 (1993). As noted by the Occupational Safety and Health Review Commission ("the Commission") in *Dover,* "[i]t is the substance of the delegation of authority that is controlling, not the formal title of employee having authority; an employee who is empowered to direct corrective measures be taken is a supervisory employee." *Id.* The Commission has held that supervisory status is not dependent on job titles, but may be established by other indicia of authority which reflect the

[6] As counsel for MOSH noted at the Review hearing, R.F. Warder seeks to have it both ways with respect to several aspects of this case. For purposes of imputing knowledge, R.F. Warder argues that Mr. Owens was not a supervisor, yet for purposes of Citation 2, Item 3, the Employer argues that Mr. Owens was the competent person on the jobsite. A competent person is one who is capable of identifying existing and predictable hazards in the workplace and who has authorization to take prompt corrective action to eliminate them.

employee exercising authority over a worksite. *Rawson Contractors, Inc.*, 20 O.S.H. (BNA) 1078, 1080 (2003).

While the record is clear that Mr. Owens and Mr. Walko did not have the title of foreman or supervisor and did not have the ability to hire or fire employees, case law makes it clear that an employee's title is not dispositive of supervisory status. Rather, one must examine the scope of the employee's authority at a particular job site to determine whether an employee is acting in a supervisory capacity within the meaning of the occupational safety and health law.

In determining whether an employee has supervisory status, the Review Commission has examined who controlled the method and manner of how the work was performed as well as who was responsible for assigning tasks to other employees. *See M.C. Dean, Inc.* 23 O.S.H. (BNA) 1800, 1803 (2011). Mr. Sutton, who was a subcontractor and not an employee of Warder, testified that Mr. Owens and Mr. Walko were directing the work. (Tr. 2125 & MOSH Ex. 23.) Mr. Owens instructed Mr. Sutton upon arrival at the work site to go into the excavation and assist Mr. Hancock. (Tr. 2077.) Mr. Sutton also stated that Mr. Walko told him and Mr. Hancock to exit the excavation to facilitate further digging and also directed them not to stand above the east wall because it was saturated. (Tr. 2083 & MOSH Ex. 23.) Mr. Walko repeatedly apprised Mr. Hren of the progress of the job but did not seek direction nor did Mr. Hren provide it. (Tr. 2909-10 & 2920-21.) After his initial investigation of the job, Mr. Walko advised Mr. Hren that he needed an excavator and a skid-steer loader. (Tr. 831.) When the R.F. Warder employees at the job site hit "black gold", Mr. Walko did not seek direction but rather informed Mr. Hren that he would get it "pumped out." (Tr. 2920.) Mr. Walko decided that a pump truck was needed and proceeded to secure one. *(Id.)* Mr. Walko directly communicated with the Clifton Park Pool

employee after his initial investigation of the problem and reported that the line had collapsed and that R.F. Warder would dig to resolve it. He then let Mr. Hren know that they would be digging and contacted Miss Utility. (Tr. 2909.) He also communicated with Wallace Stephenson of the Baltimore City Department of Recreation and Parks regarding the plan going forward. (FF 77.) Mr. Walko requested that Mr. Vaughan come to the job site and bring a jetter. (Tr. 3096 & MOSH Ex. 20.) Mr. Walko showed Mr. Vaughan where to set up the jetter. (Tr. 3096.)

Meanwhile, Mr. Owens was operating the excavator which was the central component of the job. Mr. Owens stated in his interview that he made the decision on whether to use a trench box or shoring materials and did not discuss the decision with anyone else. (MOSH Ex. 21 at p 8; Tr. 3301.) He also testified that R.F. Warder never instructed him that he couldn't tell other employees what to do at the jobsite. (Tr. 3413.) When Mr. Hren visited the job site on the morning of the accident, he consulted with Mr. Owens regarding the slope of the excavation. Having had no training on excavations himself, Mr. Hren had to rely on Mr. Owens for the method of this critical piece of the work. All of these actions by Mr. Walko and Mr. Owens demonstrated that they controlled both the method and manner of the work while also directing the other employees on tasks to be performed.

The fact that R.F. Warder did not formally designate Mr. Walko and Mr. Owens as supervisors does not negate that the facts collectively demonstrate that Mr. Walko and Mr. Owens were essentially the working foremen running the job. During the hearing, Mr. Walko acknowledged that usually there is one person directing the work on a job but then refused to identify such a person on this job site. (Tr. 3088.) Having a person directing the work would be consistent with the requirements of the R.F. Warder collective bargaining agreement which

requires jobs with more than three people to have an appointed foreman. (MOSH Ex. 53 at p. 26.) Mr. Hren visited the site only briefly on the morning of the accident which reflected minimal site supervision from the designated general foreman. Moreover, it strains credulity to believe that R.F. Warder was performing excavation work of the magnitude involved at the Clifton Park Pool and not a single on site employee was vested either formally or informally with supervisory responsibility. While the ALJ found that R.F. Warder had not expressly delegated supervisory authority to either Mr. Walko or Mr. Owens, the facts make it clear that Mr. Owens and Mr. Walko were in charge of the method and the manner of how the work was performed. As counsel for MOSH pointed out, R.F. Warder seeks to have it both ways. On the one hand, they suggest they are a simple "Mom and Pop" mechanical contracting company who can satisfy a training requirement by posting a picture on the refrigerator yet, on the other hand, they seek to avoid responsibility by suggesting that there were so many jobs going on that only a small portion of Mr. Hren's work time is in the field actually checking to make sure the employees are working safely. (Tr. 2635-36.)

The ALJ dismissed Mr. Walko's and Mr. Owen's statements that they were foremen during their June 13th interviews at the union hall on the grounds that they may have felt the need to identify someone as supervisor. The Commissioner finds that the ALJ erred in not considering these statements. The question posed to Mr. Walko was clear: who was the foreman on the job? Mr. Walko responded "he was going to say that he and Pat was." (MOSH Ex. 19 at p. 3.) In other portions of the same interview, Mr. Walko responded that he was "not sure" if he did not know the answer to a question. (*Id.* at 4-7.) If Mr. Walko was not certain who the foreman on the job was, his other answers indicate that he could have said he did not know. As to Mr.

Owens, when he was asked who was running the job, he replied "it was between him and Kenny, there was no set person." (MOSH Ex. 21.) It is reasonable to conclude that Mr. Owen perceived that he shared that responsibility with Mr. Walko, not that he doubted that he had the responsibility. The Commissioner finds that Mr. Walko and Mr. Owen were supervisors within the meaning of the occupational safety and health law and their knowledge of the violative conditions at the jobsite can be imputed to R.F. Warder.

In addition to actual knowledge, constructive knowledge can be established where the employer with the exercise of reasonable diligence "could have known of the presence of the violative condition." *Revoli Constr. Co.*, 19 O.S.H. (BNA) 1682, 1684 (2001). Determining whether an employer was reasonably diligent involves an examination of several factors including adequate work rules and training programs to ensure safety; adequate supervision of employees; inspection of the work area to anticipate hazards to which the employees may be exposed; and taking measures to prevent the occurrence of violations. *N & N Contractors, Inc.*, 18 O.S.H. (BNA) 2121, 2123, *aff'd* 255 F.3rd 122 (4th Cir. 2001).

On review, R.F. Warder asserts the ALJ erred in concluding that management had constructive knowledge of the violative conditions. MOSH argues that it has satisfied its burden of proof and the ALJ properly found that with the exercise of reasonable diligence, R.F. Warder should have known of the hazardous conditions. (ALJ Decision at 53-54.) The Commissioner agrees and finds that in addition to actual knowledge, R.F. Warder had constructive knowledge of the violative conditions.

R.F. Warder provided its employees with virtually no training or work rules on excavation safety. Messrs. Hren, Walko, Owens and Vaughan had not received any specific

excavation training from the Employer. (FF 10, 19, 20, & 30.) Mr. Hren, the individual with the title of general foreman, acknowledged during the hearing that he was not familiar with the requirements of the excavation standard, Subpart P and had no excavation training. (Tr. 2642-43; FF 10.) The general OSHA 10 training that some of the employees participated in only briefly covered the topic of excavation safety. One of the employees estimated that excavation safety was covered for just 30 minutes. (Tr. 3542.) There was nothing in the R.F. Warder Safety and Health program regarding excavation safety despite the fact it was a part of the company's work. (Tr. 3670.) Moreover, R.F. Warder had no disciplinary program to enforce safety rules. (MOSH Ex. 34.) Mr. Owens testified that he was not aware of a single instance of R.F. Warder stopping work for safety reasons.(Tr. 3408.) Mr. Walko testified that he had never taken a safety concern to Mr. Hren. (Tr. 3127.) To compound this, R.F. Warder's jobs did not regularly involve excavations of the magnitude of the Clifton Park job which reflects inexperience in understanding the hazards of an excavation of this size. The lack of management's training in excavation safety resulted in a lack of awareness of the hazards that an excavation at the depth of 15 feet posed.

Reasonable diligence requires an employer to "inspect the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations." *N & N Contractors, Inc.* 18 O.S.H. (BNA) at 2123. Here, Mr. Hren, who was the designated general foreman of the job, spent minimal time at a jobsite that involved dangerous excavation work and was well outside the scope of the company's normal operations. Mr. Hren did not conduct an inspection of the work site. (FF 99.) While he was in communication with Mr. Walko, Mr. Hren did not caution Mr. Walko or any of the other employees of the possible hazards to

which the employees were exposed by an excavation of this size. When Mr. Hren did have a conversation with employees at the job site, he noted that he thought the east wall needed to be sloped but left it completely up to Mr. Owens to address the issue. After he left the job site of a rapidly growing excavation, there was no follow-up by Mr. Hren to check on the sloping of the east wall. (Tr. 2577.) Mr. Hren also ignored Mr. Habitch's admonition that he needed a trench box.

The Commissioner affirms the ALJ's conclusion that with reasonable diligence, R.F. Warder should have known of the hazardous conditions at the Clifton Park Pool job.

Other Arguments

At the Review Hearing, counsel for R.F. Warder stated that the Employer incorporates by reference any arguments made in its post hearing brief or closing argument. (R.H. p. 110).[7] In addition to its arguments related to each citation, R.F. Warder raised other arguments including: (1) that there was spoliation of evidence; (2) that MOSH failed to advise the R.F. Warder employees that they had a right to have union representation during the June 5, 2018 interview with MOSH; and (3) that MOSH safety compliance officers allegedly fabricated information during the investigation. The Commissioner finds that none of these arguments has merit and, with the exception noted below, adopts the ALJ's findings and conclusions set forth in pages 32

[7] "R.H." refers to the transcript of the June 18, 2020 Review Hearing.

through 45 of the ALJ's proposed decision.[8] Additionally, on review R.F. Warder argues that the ALJ erred in upholding the award of egregious penalties for Citation 2, Items 1 and 4. The Employer argues that under MOSH procedures, egregious penalties may only be assessed with the input of the assistant commissioner/authorized representative of MOSH. The record reflects that the Assistant Commissioner for MOSH, William Dallas, reviewed the citations and characterized them as egregious. (Tr. 1074-78.) The Commissioner finds that the record supports MOSH's finding that the alleged violations indicate a blatant disregard for worker safety and the additional penalty factor was reviewed by Assistant Commissioner Dallas consistent with the MOSH Field Operations Manual.

THE CITATIONS

Citation 1, Item 1 - 29 C.F.R. §1926.100(a)

Citation 1, Item 1 was for a serious violation of 29 C.F.R. §1926.100(a) which provides that an employee "working in areas where there is possible danger of head injury from impact, or from falling of flying objects or from electrical shock and burns, shall be protected on protective helmets." R.F. Warder did not specifically address this citation in its brief to the Commissioner. However, in its closing brief to the ALJ, the Employer argued that the citation should be

[8] On page 43 of her decision, the ALJ finds that MOSH violated the "rights" of Mr. Vaughan, Mr. Walko and Mr. Owens by not advising them that they had the right to have a union representative present during the June 5, 2018 interviews. She concludes, however, that it was not done in bad faith and that the Employer was not prejudiced in any way. The ALJ's conclusion that certain rights were violated appears to be based on the testimony of Mr. Allan relative to the Field Operations Manual ("FOM") (Tr. 1176-77.) The Commissioner disagrees with this finding. The FOM is intended to be a guidance document for MOSH inspectors. The purpose of this FOM section is to allow a collective bargaining representative to participate in the inspection process. The FOM does not confer on each employee an individual right to have a union representative present during an interview nor does it impose upon a MOSH inspector an obligation to advise employees of such a right.

dismissed on two grounds. First, the Employer argues that MOSH failed to meet its burden of establishing that Mr. Hancock was required to wear a hard hat for protection when working in the excavation, and second that MOSH should have cited a more specific standard under the excavations standards of Subpart P. MOSH asserts that it satisfied its burden of proof.

Section 100(a) is clear that it applies when there is a "possible danger" of head injury. Case law has established this standard applies to an employee who has access to a hazard and that actual exposure is not necessary. *See Donovan v. Adams Steel Erection,* 766 F.2d 804 (3d Cir. 1984) (access not exposure to danger is proper test). The courts applying this standard have examined whether an employee was in the "zone of danger." *Id.*

Here, R.F. Warder employee Mr. Hancock was working 15 feet below ground in and about the bottom of an excavation without head protection while other employees were working with tools above him including an excavator which was moving soil adjacent to the excavation. (Tr. 802 & 1396.) These circumstances created the danger of head injury from falling loose soil, rock or tools. (MOSH Ex. 42.) Several R.F. Warder employees acknowledged that they violated the standard when they told MOSH Compliance Officer Allan that they were issued protective helmets, but none of them, including Kyle Hancock, wore the helmets while working in the excavation. (Tr. 804; 3428; FF 136.) In working in the excavation with no head protection, Mr. Hancock was exposed to the hazard of a head injury. As found by the ALJ, R.F. Warder should have had a supervisory employee trained in excavation safety at the job site to advise Mr. Hancock of the head protection requirements for working in an excavation.

Finally, the Commissioner rejects the Employer's argument that a more specific standard in Subpart P, 29 C.F.R. §1926.651(j) applies rather than the cited standard. Section 651(j)

addresses structural options to secure an excavation including scaling and the installation of barriers. Subpart P does not address the wholly separate issue of personal protective equipment for employees exposed to the danger of falling soil, rock or tools into an excavation. The Commissioner affirms the ALJ's conclusion, including penalty calculations, that MOSH met its burden of proving a violation of 29 C.F.R. §1926.100(a).

Citation 1, Item 2--29 C.F.R. §1926.651(c)(2)

Citation 1, Item 2 was for a serious violation of 29 C.F.R. §1926.651(c)(2) which requires a safe means of egress from trench excavations in excess of certain depths. The ALJ found that the preponderance of the evidence established that there was a safe means of egress. At the Review Hearing, MOSH advised that based on the evidence adduced at the hearing, it was not pursuing this citation further. Accordingly, the Commissioner vacates this citation.

Citation 2, Item 1 - 29 C.F.R. §1926.21(b)(2)

Citation 2, Item 1 was for a willful serious violation of 29 C.F.R. §1926.21(b)(2) which requires an employer to "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." The standard is a general training standard found in the construction standards. MOSH argues that whatever training the employees received regarding the avoidance of unsafe conditions and the applicable regulations governing excavations was inadequate and resulted in a failure to plan for safety. MOSH characterized any attempts by the Employer to educate its employees about safety as "infrequent and passive." (MOSH Closing Argument p. 22.) On review, the Employer asserts that the ALJ failed to give

proper weight to the OSHA 10 training, R.F. Warder's on the job training, and other evidence of training introduced by R.F. Warder.

An employer's obligation to train under the cited standard is dependent upon the specific conditions at a jobsite. As noted by the Commission, "[e]mployees must be given instructions on 'how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions.'" *Capform, Inc.*, 19 O.S.H. (BNA) 1374, 1376 (1998) (quoting *Superior Custom Cabinet Co.*, 18 O.S.H. (BNA) 1019, 1020 (1997). Caselaw has established that this standard looks at whether the cited employer failed to provide the instructions that "a reasonably prudent employer would have given in the same circumstances." *Superior Custom Cabinet Co.*, 18 O.S.H. at 1014.

Shortly after the fatal accident, MOSH's investigators tried to determine whether the employees at the Clifton Park Pool site had been trained in excavation safety. When MOSH investigators spoke with the three surviving employees, the only one to provide an answer was Mr. Owens who responded "videos, OSHA 10 and on the job training." (MOSH Ex. 21.) When the company president Mr. Warder was interviewed, he could not recall any training in excavations. (MOSH Ex. 36; Tr. 878.) R.F. Warder did not have any written policy or written instructions regarding excavations. While the Employer placed brochures and "line cards" in the employee's mailboxes, the employees were unable to identify the topics covered. Moreover, there was no follow-up by the Employer to determine if the employees' even read or understood the materials. There was nothing in R.F. Warder's health and safety manual addressing this type of excavation operation. (MOSH Ex. 34; Tr. 2727 & 3670.) During the hearing, Mr. Warder stated that he posted a photograph of a shoring system for an excavation on the door of the office

refrigerator as evidence of training. (Tr. 3645.) Yet, there was no explanation along with the photograph or follow-up with the employees. Both Mr. Warder and Mr. Hren acknowledged that they had never reviewed the regulations on excavations under Subpart P. (Tr. 2642-43 & 3697.) There were no oral instructions by Mr. Hren identifying the hazards or ways to avoid those hazards. *See GEM Industrial Inc.*, 17 O.S.H. (BNA) 1861, 1863 n.5 (1996) *aff'd*, 149 F.3d 1183 (6th Cir. 1998) (unwritten safety rules need to be clearly and effectively communicated to employees). In fact, there was no plan for safety at this job site. This was confirmed by Mr. Walko when he noted that there was "[n]ot really a plan. Started digging first." (MOSH Ex. 19 at p. 4.)

The Employer argues that the ALJ erred in not providing sufficient weight to the OSHA 10 training that some of the employees had participated in or the training provided by the union. The standard requires training of the specific hazards of the job site. The MOSH Compliance Officer noted that there was no way the OSHA 10 training course could cover all of the specific hazards related to excavation due to the general nature of the training. (Tr. 952.) Additionally, there is nothing to indicate that the union training was specific to the hazards of the Clifton Park job. *See Springfield Steel Erectors, Inc.* 6 O.S.H. (BNA) 1313, 1315 (1978) (Union training does not substitute employer's obligation to determine the specific hazards of the worksite for the job being performed and responsibility to give specific instructions on how to avoid the hazards). As far as on the job training is concerned, the Employer repeats its argument that the ALJ failed to give this sufficient weight. As noted by the ALJ, the standard places the duty on the current employer to ensure that its employees are provided specific instructions on hazards of a worksite that may be avoided. The ALJ found that Mr. Owens had some on the job training but had not

received any training on soil classification. As to Mr. Hancock and Mr. Hren, the ALJ concluded that they received no training at all in excavation safety. While Mr. Hancock's duties may have been more limited, this does not absolve R. F. Warder from ensuring Mr. Hancock received instruction in the recognition and avoidance of unsafe conditions in an excavation. As found by the ALJ, Mr. Hancock had not received any excavation safety or soil classification training. (FF 43.) There is no evidence that Mr. Walko's and Mr. Vaughan's on the job training addressed the hazards posed by the Clifton Park pool jobsite.

On review, R.F. Warder argues that because Mr. Owens pulled up information on his smartphone about benching and sloping and showed it to Mr. Hren, it was reasonable for Mr. Hren to infer that Mr. Owens knew proper sloping and "knew how to find excavation safety information." (R.F. Warder Post Hearing Brief p.5). The vast majority of the general public has a smartphone and access to the Internet. Using R.F. Warder's logic, a general practitioner could be deemed to be "trained" in neurosurgery because the general practitioner had access to a smart phone and videos about neurosurgery. Moreover, Mr. Owens did not implement the proper sloping for the east wall despite what he found on the Internet. The idea that R.F. Warder is relieved of its obligation to provide excavation safety training because Mr. Owens used his smartphone to look up information about benching and sloping is without merit.

R.F. Warder also argues on review that it is plain error that MOSH did not give credit for abatement for the company's change in policy on the scope of excavation work it would perform. To correct the violation for abatement purposes, MOSH sought proof of excavation training through copies of programs, training certifications and receipts. (MOSH Ex. 45.) The Employer produced none. (Tr. at 1962-63.) Instead, the Employer later proffered that it was no longer

performing excavation work below 5 feet. (Tr. 3633.) This prospective change in the scope of work performed by the Employer does not amount to an abatement of the Employer's obligation to provide proof of employee training in the specific hazards of excavation work. The Employer's argument is without merit.

The Commissioner affirms the ALJ's findings as to Citation 2, Item 1, the classification as willful serious, the penalty assessment, and the designation as egregious.

Citation 2, Item 2 - 29 C.F.R. §1926.651(h)(1)

Citation 2, Item 2 was for a willful serious violation of 29 C.F.R. §1926.651(h)(1) which provides as follows:

> Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

On review, the Employer incorporates its argument before the ALJ that it adequately addressed any accumulating water by controlling it and that MOSH failed to prove that a hazard existed. MOSH responds that there was a thirty minute period in which there was a continuous source of water accumulating in the excavation in violation of the cited standard. The ALJ found that the cited standard did not apply because there was insufficient evidence to find that the employees worked in the excavation while water was accumulating. The Commissioner disagrees.

The standard prohibits employees from working in excavations where there is accumulated water or where water is accumulating unless adequate precautions have been taken. The ALJ found that there was still water flowing through the sanitary sewer line from another

source even after the Clifton Park Pool source had been eliminated. (FF 68.) During the process of digging to locate the pipe, Mr. Owens hit the top of the terracotta pipe with the excavator and broke the pipe. This resulted in more water flowing into the hole from the broken pipe. (FF 105.) Mr. Owens tried to control the flow of water from the pipe with a channel but when he was unable to effectively do so with the excavator, he decided that it would be better to dig a channel by hand to allow for the flowing water to go from one end of the pipe to the other. Water was accumulating during this time period.

At approximately 1:15 p.m., Mr. Hancock, Mr. Owens, and Mr. Walko entered the excavation and dug until they were able to expose both ends of the pipe. (Tr. 2970.) They completed the channel at approximately 1:45 p.m. (Tr. 2977.) During this time, there was no channel to control the flow of the water. As Mr. Walko described, the channel "stopped it [the water] from puddling up inside of our hole." (Tr. 2975.) This evidence reflects that the water was accumulating in the excavation during this period of time. This is further confirmed by the fact that once the water was diverted into the channel, there was about one-half to two inches of water "constantly flowing through the channel." (Tr. 3001.) With no channel, the water had to be accumulating in the excavation. After the channel was created, Mr. Hancock and then Mr. Sutton continued to work in the excavation. (Tr. 2076, 2097, 2103, 2117.) During this period of time, Mr. Sutton testified that the ground shifted so they had to continue to dig around the trench so they could get the water heading back over to the drain. (Tr. 2116.) Looking at all of the evidence, the Commissioner finds that a preponderance of the evidence supports the conclusion that there was accumulating water in the excavated area and that the cited standard applies.

Turning to whether R.F. Warder violated the cited standard, Messrs. Hancock, Owens and Walko were digging by hand in the excavation while the water was freely flowing from the broken pipe. The standard requires that an employer take "adequate precautions" to protect its employees from the hazards posed by the water accumulation. While the standard acknowledges that the necessary precautions vary with the facts of each situation, special supports or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline are suggested options. In this case, R.F. Warder did not utilize any listed options or an option of its own while the pipe was broken and before the channel was completed. (Tr. 1004-05.) In fact, R.F. Warder did not take any precautions to address the accumulating water while three employees were working in the 15 foot deep excavation hand digging the channel. The Employer argues that controlling the flow of water with the channel to allow the accumulating water to flow from the west end of the sewer line to the east end was an adequate precaution. The shortcoming of this position is that while it may have addressed the water once the channel was complete and during the time the channel was effective in controlling the flow of the water, there was no precaution in place while the employees were creating the channel or maintaining the channel by digging to divert the water back into the channel.

As to exposure, MOSH has established that Messrs. Owens, Hancock, Walko and Sutton worked in the excavation when there was accumulated water without the requisite adequate safety precautions. The employees dug by hand to create the channel while the water was flowing freely into the excavation. Later, Mr. Sutton and Mr. Hancock continued to dig to maintain the channel so the accumulating water was flowing into the channel. As noted by

MOSH Compliance Inspector Allan, the presence of water in the excavation led to the potential weakening of the unprotected sides of the excavation which could lead to the hazards of a cave-in as well as inhibiting an employee's ability to exit the excavation. (Tr. 984.)[9]

With regard to knowledge, Mr. Owen was operating the excavator when it hit the top of the pipe with the bucket and broke the pipe. Mr. Owens and Mr. Walko came up with the plan to dig by hand around the pipe to divert the water. They had knowledge that water was accumulating in the excavation. As the employees controlling the method and manner of the jobsite, they knew that adequate precautions had not been put in place prior to their entering the excavation to dig. Moreover, in addition to actual knowledge, the Employer should have known with the exercise of reasonable diligence that there was water accumulating in the excavation and that no adequate precautions had been taken to address this hazard. Mr. Hren knew that there had been accumulated water in the excavation on the day before the accident. (Tr. 2531-32.) While accumulated water had been pumped out before his arrival to the job site on the day of the accident, Mr. Hren was aware that the broken sewer pipe had not been located so that water had to be continuing to flow into the excavation. Given that the pipe had not been located, Mr. Hren knew that there would be more digging and it was reasonable to assume more water. Mr. Hren also knew that employees would have to perform work in the excavation to repair the pipe. Mr.

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[9] The facts support the conclusion that the area around the pipe where the employees were working was saturated from the flowing water. While the soil in the excavation was dry after being pumped out on the morning of the accident, the area around the channel was wet after Mr. Owen's broke the pipe allowing the water to flow. (Tr. 3004; 3075.) This is further reflected by the fact that Mr. Hancock was standing on a safety cone so he would not have to stand in the muddy area near the east end. (FF 118.) At one point when Mr. Hancock stepped off the traffic cone, his boot came off when he tried to lift his foot out of the mud. (FF 126.) Mr. Sutton was on the pipe with one foot over the other while he was digging around the pipe. (FF 125.) It is reasonable to conclude that these employees would not go to these lengths unless water had accumulated at some point to saturate the ground.

Hren did not take any measures nor did he give any direction to the employees at the worksite on how to address the hazards associated with accumulated water. With the exercise of reasonable diligence, an employer would conclude that water could accumulate in the excavation and adequate precautions needed to be taken. The Commissioner finds that R.F. Warder should have known of the violative conditions.

Citation 2, Item 2 is properly classified as willful-serious. R.F. Warder permitted its employees to work in an excavation with accumulating water and failed to take adequate precautions. The failure to take adequate precautions as required by the standard created a substantial probability that death or serious physical harm could result. The employees were exposed to possible injuries that included broken bones, suffocation, and/or death as a result of a cave-in from water accumulating in the excavation. The Commissioner finds that the violation was serious in nature. As to the willful component of the classification, as noted earlier in this decision, a violation is willful where an act is done "voluntarily with either an intentional disregard of, or a plain indifference to" the requirements of the occupational safety and health act. *Dayton Tire*, 671 F.3d at 1256. Even if an employer had a good faith belief that an area was safe, a violation is willful where the employer knowingly fails to comply with occupational safety and health requirements. *See Intercounty Construction Co.,* 522 F.2d at 780. R.F. Warder allowed its employees to work in a 15 foot deep excavation with a vertical wall, with accumulating water and with no precautions. The Employer's failure to have adequate precautions in place compounded by a lack of any training on the associated hazards constitutes plain indifference.

MOSH assessed a penalty of $30,500 for this citation. MOSH Compliance Officer Allan testified in detail how he calculated the recommended penalty in the violation worksheet. (Tr. 1007-10; *See also* MOSH Ex. 47.) Mr. Allan applied the same formula in this citation that was used in the calculation of penalties for the other violations. (Tr. 1006.) Mr. Allan made the following assessments: a severity assessment of ten as the employees were working in an environment where water was accumulating without adequate precautions; a frequency exposure of one for the day of the accident, June 5, 2018; a working condition value of seven because there was wet soil in the excavation and water coming from the pipe; there were three exposed employees (Messrs. Walko, Hancock, and Owens); employee proximity value of ten because the employees were working directly in the excavation. In addition, Mr. Allan applied the penalty adjustment factor for the Employer of 70% which was based upon the Employer's size and minimal history of OSHA violations.[10] Due to the fact that there was actual harm, MOSH properly assessed an additional $2,000 and a multiplier of 10 as a result of the willful factor. COMAR .09.12.20.12J(4). Taking into consideration Mr. Hancock's death, the Commissioner finds MOSH's assessment reasonable with regard to Citation 2, Item 2 and affirms MOSH's penalty calculation as set forth in MOSH Exhibit 47.

Citation 2, Item 3 - 29 C.F.R. §1926.651(k)(1)

Citation 2, Item 3 was for a willful serious violation of 29 C.F.R. §1926.651(k)(1) which provides that:

> 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 a competent person prior to the start of

[10] The same penalty adjustment factor was applied for all the citations. *See* ALJ Decision at 66, footnote 31.

> 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.

A "competent person" is defined as someone "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 action to eliminate them." 29 C.F.R. §1926.650(b). MOSH argues that R.F. Warder did not have a competent person conducting daily inspections of the excavation. R.F. Warder contends that Mr. Owens and Mr. Walko did examine and evaluate the excavation as it progressed and that Mr. Owens was a competent person "even if just barely so." (R.F. Warder Post Hearing Brief p. 23.) The Employer argues that there is one "technical aspect of the overall standard" that Mr. Owens did not meet which is that he did not know how to conduct soil classifications. *Id.*

Mr. Owens was interviewed twice by MOSH. At the first interview on June 5, 2018, Mr. Owens told MOSH investigators that he was the competent person on the jobsite and that he had not classified the soil at the start of the project. (MOSH Ex. 21, p. 1.) At the second interview on June 13, 2018, when asked if anyone on the jobsite was a competent person, Mr. Owens responded that "he did not think so." (MOSH Ex. 21, p. 2.) When asked at the hearing why he changed his opinion on whether he was a competent person, Mr. Owens testified "I looked up to see what a competent person was and I didn't think I was qualified at that point." (Tr. 3399.) He testified that when he was initially asked about it, he did not understand what a competent person was within the meaning of the standard.

It is undisputed that four employees of R.F. Warder were working in and around the excavation. Therefore, the cited standard applies. R.F. Warder violated the standard because it

failed to have a competent person conduct daily inspections of the excavation. R.F. Warder's assertion that Mr. Owens was a competent person is unpersuasive. Mr. Owens himself did not even think he met the definition of a competent person. While the standard does not enumerate all of the skills that a competent person must have, the ability to classify soil is a fundamental one. The four R.F. Warder employees who worked in and around the excavation were exposed to the hazardous condition. R.F. Warder knew or should have known with reasonable diligence that Mr. Owens was not a competent person and that no competent person was present to conduct inspections at the jobsite.

R.F. Warder's failure to have a competent person on site to conduct daily inspections of the excavation was properly classified as willful-serious. Major excavation work is one of the most dangerous types of construction work. A trained competent person would have immediately recognized the cave-in hazard presented by the unprotected east side of the excavation. R.F. Warder's suggestion that it had a "good faith" belief that Mr. Owens was a competent person is belied by the evidence in the record. R.F. Warder made no attempt to either understand or fulfill its obligation to make sure its employees had a safe working environment and the result was the tragic death of Mr. Hancock. The idea that R.F. Warder didn't know or understand its obligation is somehow a good faith defense to a willful serious citation is without merit.

The Commissioner affirms the ALJ's findings as to Citation 2, Item 3, the classification as willful serious, and the penalty assessment.

Citation 2, Item 4 - 29 C.F.R. §1926.652(a)(1)

Citation 2, Item 4 was for a willful-serious violation of 29 C.F.R. §1926.652(a)(1) which provides that:

> (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.

MOSH argues that three of R.F. Warder's employees were not protected from the hazards of cave-ins while working within a trench excavation that exceeded five feet in depth. The Employer contends that the ALJ erred in finding that it was plainly indifferent to the requirements of the standard because it had a good faith belief that Mr. Owens could create a safe excavation.

It is undisputed that the excavation was not in stable rock and was over five feet deep, accordingly, the standard applies. The evidence established and the ALJ concluded that the east wall was nearly vertical. As Mr. Sutton stated, the east wall was "vertical, straight up and down." (MOSH Ex. 22, p. 3.) The Employer violated the standard because the east wall was nearly vertical and not protected from cave-ins. It is also uncontested that Messrs. Hancock, Walko and Vaughan worked in the excavation when the east wall was not properly sloped. Mr. Hancock died as a result of the failure to properly slope the east wall which resulted in a cave-in that buried him. With reasonable diligence, the Employer should have known of the hazardous condition. In fact, the employer disregarded a cautionary comment from Baltimore City employee John Habicht who expressed his hope that R.F. Warder was using a trench box. As Mr.

Habicht testified, when Mr. Hren told him how deep the excavation would be, Mr. Habicht responded "holy crap Joe. I hope you got a freaking trench box in there." (Tr. 365-66.)

The citation was properly classified as willful-serious. The standard allows for several types of protective systems including sloping and benching. Mr. Owens elected a combination of sloping the east and west walls and sloping and benching the north and south walls. This option requires that soil and rock deposits be classified in accordance with Appendix A to Subpart P of Part 1926. No one at the job site, including Mr. Owens, knew how to classify soil and, consequently, sloping was not done properly to protect the excavation from cave-in. The Commissioner agrees with MOSH that R.F. Warder's approach to the excavation at the Clifton Park Pool was at worst reckless and at best neglectful. R.F. Warder's contract with Baltimore City required that it comply with all OSH and MOSH regulations yet neither Mr. Hren nor Mr. Warder bothered to familiarize themselves with these requirements.

The Commissioner affirms the ALJ's findings as to Citation 2, Item 4, the classification as willful serious, the penalty assessment, and the designation as egregious.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on this 16th day of October, 2020, hereby ORDERS:

Citation 1, Item 1 for a serious violation of 29 C.F.R. §1926.100(a) with a penalty of $900.00 is AFFIRMED;

Citation 1, Item 2 for a serious violation of 29 C.F.R. §1926.651(c)(2) with a proposed penalty of $1,050.00 is VACATED;

Citation 2, Item 1 for a willful serious violation of 29 C.F.R. §1926.21(b)(2) with a penalty of 122,000.00 is AFFIRMED;

Citation 2, Item 2 for a willful serious violation of 29 C.F.R. §1926.651(h)(1) with a penalty of $30,500.00 is AFFIRMED;

Citation 2, Item 3 for a willful serious violation of 29 C.F.R. §1926.651(k)(1) with a penalty of $30,500.00 is AFFIRMED;

Citation 2, Item 4 for a willful-serious violation of 29 C.F.R. §1926.652(a)(1) with a penalty of $91,500.00 is AFFIRMED;

Citation 3, Item 1 for an other than serious violation of Md. Code Ann. Lab & Empl. § 5-503(a) with a proposed penalty of $300.00 is AFFIRMED;

Citation 3, Item 2, for an other than serious violation of Md. Code Ann. Lab & Empl. § 5-503(c)(1)(i) with a penalty of $300.00 is AFFIRMED.

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, 5-215, Annotated Code of Maryland, and the Maryland Rules, Title 7, Chapter 200.

Matthew Helminiak
Commissioner of Labor and Industry