United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR
Complainant,
v.

KIRILA CONTRACTORS, INC.
Respondent.

OSHRC DOCKET
NO. 95-1393

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 17, 1996. The decision of the Judge will become a final order of the Commission on August 16, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 6, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: July 17, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-1393

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

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v.

KIRILA CONTRACTORS, INC.,

Respondent.

OSHRC DOCKET NO. 95-1393

Appearances:

Theresa C. Timlin, Esq.
U.S. Department of Labor
Office of Solicitor, Region III
Philadelphia, Pa.
For Complainant

Ronald James Rice, Esq.
Donald Duda, Esq.
48 West Liberty Avenue
Hubbard, Ohio 44425
for Respondent

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to section 10(c) of the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, Kirila Contractors, Inc. ("Kirila"), at all times relevant to this action maintained a worksite at Route 832, Erie, Pa., where it was engaged in running pipe underneath the highway via an open excavation. Kirila admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On July 20, 1995, Compliance Safety and Health Officer ("CO") Beverly Braughler of the Occupational Safety and Health Administration, Erie Office, conducted an inspection of the aforementioned worksite. As a result of this inspection, Kirila was issued a willful citation alleging a violation of 29 C.F.R. §1926.652(a)(1). The total proposed penalty was $16,500.00. By timely notice of contest Kirila brought this proceeding before the Occupational Safety and

Health Review Commission ("Commission"). On March 25, 1996, this Court granted the Secretary's Motion to Permit Amendment of the Citation and Complaint. The amended citation and complaint allege, in the alternative, a repeat violation of 29 C.F.R. §1926.652(a)(1).

On April 2, 1996, a hearing was held in Pittsburgh, Pennsylvania, on the contested issues. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violation of 29 C.F.R. §1926.652(a)(1)

Willful/Repeat (in the alternative) Citation 1, Item 1 alleges:

29 C.F.R. §1926.652(a)(1): Each employee in an excavation was not protected from caveins [sic] by an adequate protective system designed in accordance with 29 C.F.R. §1926.652(c). The employer had not complied with the provisions of 29 C.F.R. §1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper that [sic] one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

> (a) Rt. 832, Erie, Pa; employee shoveling loose dirt from around a pipe-pusher which was pushing 18 inch metal pipe underneath Rt. 832 for the gas company. The employee was not protected from soil movement in an excavation that was approximately 6 feet deep, 10 feet wide and 30 feet deep.

Facts

On July 20, 1995, as part of a contract, Kirila was engaged in pushing a gas line underneath the highway at Route 832 for National Fuel Gas Supply Corporation. In order to perform this work an excavation was created by Kirila adjacent to the highway at the subject worksite. Kirila placed a pipe pushing machine in the excavated area in order to perform this task. As the result of a referral that morning, CO Braughler was assigned to inspect the excavation. She arrived at the worksite, which was adjacent to a two-lane highway, at approximately 9:00 a.m. Upon her arrival she photographed two employees in the unshored excavated area (Exh. C-1; Tr. 18-19). She learned that one of the employees was the owner and person in charge, Mr. Ron Kirila (Tr. 18). She observed the employees using the pipe pushing machine. She also observed other equipment at the worksite, i.e., a crane, a truck with welding equipment, and a backhoe. She noted that the south side of the excavation had vertical walls (Tr. 18). She testified that she observed "[v]ery little sloping, if any, sloping in the north end", and "none at the south end" (Tr. 64-64). Furthermore, the sloping she observed was not in compliance with the regulations for Type A or B soil (Tr. 64).

CO Braughler observed what she believed was undermining of the excavation wall where the dirt had fallen in on one side of the excavation. She testified that the wall of the excavation showed that material had fallen out from underneath (Tr. 65-66; Exh. C-1). This observation led her to believe that the conditions were unstable (Tr. 22). She performed a thumb penetration test with dirt which she retrieved from one of the spoil piles just outside the excavation in order to determine the cohesiveness of the soil (Tr. 50; 63-64). She determined that the soil type was Type B, which is cohesionless. However, because the roadway was so close, the crane was just outside the excavation, and the backhoe was on the south side, she classified the soil as Type C. She believed a surface encumbrance just outside the excavation, i.e., a crane, would create

pressure on the ground causing a hazard to the employees in the excavation (Tr. 22). CO Braughler testified that she saw evidence of fissures where the material at the bottom of the excavation had fallen (Tr. 24). Furthermore, she testified that one of the employees in the trench told the other employee that, "some of the excavation had fallen in, [and] that he was going to go ahead and dig it out."(Tr. 25; Exh. C-2).

CO Braughler, accompanied by Mr. Kirila, measured the depth of the excavation with a measuring stick. She took her measurements in the area where an employee was observed working (Tr. 63). She measured two areas in the south area, one on each side of the backhoe, which measured approximately six feet in depth (Tr. 25-26; Exh C-3 and C-4). Mr. Kirila informed her that the excavation was approximately 10 feet wide and 30 feet long.

CO Braughler issued the subject citation based upon her observation that the employer had employees in a trench[1] greater than five feet and the trench was not in stable rock (Tr. 28). There was no type of slope present at the south end of this excavation, where an employee was observed working, and very little, if any, at the north end (Tr. 64-65). Prior to leaving the worksite that day, Mr. Kirila had his backhoe operator slope back the trench, which was in compliance with the regulations (Tr. 27; Exh. C-5 and C-6). CO Braughler testified that it took approximately 20 to 30 minutes for the backhoe operator to abate the condition (Tr. 70).

Kirila maintains that the cited area was a separate hole dug in the corner of the excavation for the purpose of collecting ground water which may have accumulated. This hole was less than one foot in diameter where a small sump pump was placed to draw off any accumulated water. The Respondent maintains that the Secretary's measurements were taken in the sump hole, and thus, are an inaccurate representation of the actual depth of the excavation. (Tr. 105; Respondent's Post Trial Brief at pp. 2-3). Respondent concedes that the maximum depth of the excavation was around five feet deep. More specifically, Ron Kirila, President and CEO, testified that the front of the pit was "a little over than five feet, but the back of the pit was not that deep." (Tr. 96). He testified that the condition of the soil was a mixture of clay and rock with the last two feet being rock. He believed that there was no danger of a cave-in (Tr. 99). On cross examination, he admitted that the area in which CO Braughler photographed the laborer, Doug Fausnaught, was six feet in depth. He testified that Mr. Fausnaught was not standing on a pipe but "standing in the low part", which was more than five feet in depth (Tr. 119; Exh. C-2).

Doug Fausnaught, the laborer, testified that the condition of the soil was clay - rock on the bottom part with a "little bit of top soil on the top" (Tr. 142). He admitted that he was the employee shoveling the excavated area (Exh C-1 and C-2). He testified that he was cleaning out a sump hole, which had been created because ground water was coming into the area (Tr. 143). On cross-examination he agreed that the area depicted in Exh. C-2 was more than five feet in

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[1] The record reflects that the terms "*trench*" and "*excavation*" are used interchangeably throughout these proceedings. Subpart P defines excavations to include trenches. *Excavations* means any man -made cut, cavity, trench or depression in an earth surface, formed by earth removal. *Trench (Trench excavation)* means a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is grater than the width, but the width is not greater than 15 feet. 29 C.F.R.§1926.650 (b).

depth (Tr. 145). He further testified on redirect examination that the pump hole was deeper than the rest of the excavated area, and that if he had not been standing in the pump hole his head would have been at five feet (Tr. 146).

Discussion

> The Secretary has the burden of proving his case by a preponderance of the evidence. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

The aforementioned testimony presented by both parties, as well as Exh. C-1 and C-4, unequivocally establish that Respondent's employees were working in an excavated area. Respondent excavated this area in order to push a gas line under Route 832. The characterization of this area as an open pit, excavation or trench does not negate the fact that this was a "man-made cut, cavity, trench, or depression in an earth surface formed by earth removal" 29 C.F.R. 1926.650(b). The aforementioned testimony also establishes that this excavated area was at least five feet in depth. CO Braughler's photographs of a Kirila employee working in an excavated area, depicts an area which measured six feet in depth. (Exh. C-3 and C-4); and Ron Kirila agreed that this area was six feet in depth (Tr. 105; 118). The standard requires that employees in such areas, with certain exceptions, be provided with protective systems.

Additionally, respondent contends that the Secretary's six foot measurement was representative of only one portion of the excavated area. This argument lacks merit for two reasons: (1) the respondent's witnesses acknowledged that the excavation was at least five feet in other locations, and (2) the standard does not make exceptions for certain portions of a trench. Mr. Kirila testified that the front of the pit was a little more than five feet (Tr. 96). When describing Exh. R-10, he stated that the measurement from the bottom of the pit to the top of the hole was five feet (Tr. 109-110). He also agreed that the area where CO Braughler measured Mr. Fausnaught working was six feet (Tr. 118). Mr. Fausnaught acknowledged that if he had not been standing in the pump hole when CO Braughler photographed him, his head would have been at or a little over the five-foot mark (Tr. 145-146). The undersigned finds that the standard is applicable at five feet, and the evidence established the cited area was not less than five feet. Thus, the standard is clearly applicable.

The record reveals that the area cited had not been sloped in any manner nor was a support system installed. CO Braughler performed a thumb penetration test - an approved manual test - from the soil pile which she observed just outside of the excavation.[2] *See* 29 C.F.R.

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[2] Respondent disputes whether or not this soil sample was actually representative of the excavated soil. It is respondent's position that this soil had been exposed to the elements or may have come from the bore cuttings. (See Respondent's Post Hearing Brief at p. 2, and Reply Brief at p. 4). The undersigned finds that a preponderance of the evidence indicates that this soil

Part 1926, Subpart P, App. A(d)(2)(iii). The record reveals that the pile had been created that day. CO Braughler determined that the soil was cohesionless, i.e., Type B. This classification was modified to Type C in light of the vehicular traffic on the roadway immediately adjacent to the excavation, and the presence of the crane and backhoe at the south end of the excavation (Tr. 24).

The Respondent assert, that the Secretary did not prove that the excavation in question "was not sloped at the proper ratio for the soil composition of the excavation". (Respondent's Reply Brief at p.6). The undersigned finds that the record reveals that the cited portion of the excavation had not been sloped in any manner. The record reveals that the south side of the excavation had vertical walls which had not been laid back into any type of slope (Tr. 18, 22; Exh. C-1). Ron Kirila testified that the sides had been sloped down, however, the front bank had not been sloped, because of the presence of gas lines on the roadside (Tr. 97). The undersigned notes that the record is void of any evidence that it was infeasible to shore the cited area, and furthermore, Mr. Kirila directed his backhoe operator to slope back the cited area in order to achieve abatement - a task completed in 20-30 minutes (Tr. 27, 70).

Section 1926.652 was promulgated to ensure that employees working in excavations/trenches are protected from cave-ins by an adequate system, such as "sloping" or "benching". An exception for this protection, applies only if the excavation is made "entirely of stable rock" [29 C.F.R.§1926.652(a)(1)(I)], or is "less than five feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in"[29 C.F.R.§1926.652(a)(1)(ii)]. The Commission has held that the party claiming the benefit of an exception bears the burden of proving that its case falls within that exception. *Ford Development Corp.*, 15 BNA OSHA 2003, 2010 (No. 90-1505, 1992)[citing *Dover Elevator Co.*, 15 BNA OSHA 1378, 1381 (No. 88-2642, 1991)].

The undersigned finds that Respondent presented no evidence that this excavation was made entirely of stable rock. Doug Fausnaught, the laborer observed in the excavation, testified that the area contained a mixture of clay and rock - rock on the bottom part up and a little bit of top soil on the top (Tr. 142). Ron Kirila characterized the last two feet or the bottom of the excavation as rock with the area above being a mixture of clay and rock (Tr. 98, 11). The undersigned finds that this testimony falls short of establishing that the area was made "entirely of stable rock". Similiarly in *Ford Development Corp.*, the employer argued that the subject standard did not apply because the trench material was hard clay and rock, the Review Commission found that "clay is soil and soil is not stable rock".[3] *supra*, at 2011

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sample, which did not fall within the exceptions of the cited standard, was representative of what was observed within the trench. *See also Woolston Construction Co.*, 15 BNA OSHA 1114, 1117 (No 88-1877, 1991).

[3] Similarly, in the matter of *Suburban Pipeline Co., Inc.*, 16 BNA OSHA 1132, 1136 (No. 91-1380, 1993), *aff'd* 16 BNA OSHA 1585 (2d. Cir. 1994), Administrative Law Judge Paul L. Brady found the word "entirely" unambiguous, and held that "a layer of soil over rock establishes that the cited trench was not dug entirely in solid rock".

Furthermore the undersigned finds the record is void of any evidence that a "competent person"[4] had made an examination of the ground in order to determine that there was no indication of a potential cave-in. The record contains no evidence that Mr. Kirila, in his position as the "competent person" on the site on the day of the inspection, performed any such examination. He testified that Mr. Fausnaught performed a "visual hand" examination (Tr. 98). He also testified that this same individual performed a "thumb test" of the area (Tr. 111).[5] However, the record does not indicate that Mr. Fausnaught was a "competent person". And other than the assertion that he had performed such a task, the record is void of any explanation as to the results of his examination in terms of soil classification.

In light of the above discussion, the undersigned finds that by failing to install an adequate protective system to protect the observed employees in the excavation, the respondent violated the cited regulation. Mr. Kirila, who was one of the two persons observed in the cited area, was exposed to this hazard as well. The undersigned also finds that Mr. Kirila, in his acknowledged position as the "competent person" on the site, was fully aware that the subject excavation lacked an adequate protective system. He testified that he had done thousands of these borings in the past and personally supervised different types of excavation work (Tr. 95). Furthermore, he acknowledged that he was aware of his obligation to comply with the OSHA standards, and that OSHA had standards which covered excavations (Tr. 103). His presence on the worksite and his knowledge of the OSHA standards are indicative of his actual knowledge of the cited condition.

The undersigned finds that the record reveals that the hazard to which respondent's employees were exposed was serious. The cited standard articulates that an employer must employ an adequate protective system to protect employees from the hazard of a cave-in. It is well settled that when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *See Clifford B. Hannay & Sons, Inc.*, 6 BNA OSHA 1335 (No. 15983, 1978). In order to prove a serious violation the Secretary must show that there is a substantial probability that death or serious physical harm could result from the condition in question. 29 U.S.C.§ 666(k). The Secretary need not prove that an accident is probable. *Flintco Inc.*, 16 BNA OSHA 1404, 1405 (No 92-1396, 1993).

CO Braughler testified that a person exposed to a cave-in may suffer from injuries which can range from broken bones and lacerations to death (Tr. 29). The legislative history of the excavation standards clearly sets forth the serious nature of the physical harm expected from cave-ins. The Preamble to the standard sets forth that,

> [s]tudies show that excavation work is one of the most hazardous

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[4] "*Competent person*" means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them. 29 C.F.R. §1926.650(b).

[5]The undersigned also notes that a review of Mr. Fausnaught's testimony reveals no mention of his performance of any examination of the soil.

> types of work done in the construction industry . . . The primary type of accident of concern in excavation-related work is a cave-in. all of construction . . . those that do occur tend to be of a very serious nature. Cave-in accidents are much more likely to be fatal to the employees involved than other construction-related accidents.

Rules and Regulations, Department of Labor, Occupational Safety and Health Administration, 29 C.F.R. Part 1926, [Docket No. S-204] RIN 1218-AA36, Occupational Safety and Health Standards - - Excavations, 54 FR 45894, 45897 (Tuesday, October 31, 1989).

Classification of violation

The Secretary alleges that Kirila's violation of §1926.652(a)(1) was willful, or in the alternative, repeated. It is the Secretary's position that respondent had been made aware of the requirements of the trenching standards and the hazards associated with noncompliance on four prior occasions, and yet, management made a decision not to comply with those standards and subject its employees to a hazardous condition.

> The Review Commission has described a willful violation as one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety . . . A willful violation is differentiated from a non willful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety . . . A willful charge is not justified if an employer made a good faith effort to comply with a standard even though the employer's efforts are not entirely effective or complete.

Valdak Corp., 17 BNA OSHA 1135, 1136 (No. 93-0239, 1995).[6] "The test of good faith for these purposes is an objective one - whether the employer's belief concerning a factual matter or concerning the interpretation of a rule was reasonable under the circumstances." *Williams Enterp., Inc.*, 13 BNA OSHA 1249, 1259 (No. 85-355, 1987)(citation omitted).

The undersigned finds that the record establishes that respondent had actual knowledge of the requirements of the cited standard, and had intentionally, knowingly and voluntarily chose to disregard the requirements of the cited standard. Accordingly, a willful violation can be found. The record reveals that Kirila's history of previous violations included four prior violations of §1926.652(a)(1) - February 14, 1992; April 16, 1992; October 25, 1993; and June 9, 1994. Each of these previous violations involved respondent's employees' exposure to cave-ins because an

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[6] In *Babcock & Wilcox Co. V. OSHRC*, 622 F.2d 1160, 1167 [8 BNA OSHA 1317, 1322] (3d Cir. 1980) the Third Circuit discussed the "willfulness" test announced in *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200 [2 BNA OSHA 1283] (3d Cir. 1974), *aff'd on other grounds sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 97 S. Ct. 1261 (1977)(willfulness equivalent to a knowing, conscious, and deliberate flaunting of the Act, it involves an element of obstinate refusal to comply). The Third Circuit observed that in determining whether a violation was willful the same results will likely be achieved regardless of the standard used, *e.g.*, "intentional disregard", "obstinate refusal to comply", "defiance", or "plain indifference". "Flaunting the act" or "flouting it" carries the same meaning.

adequate protective system had not been installed in excavations which were greater than five feet in depth. CO Braughler was the investigating compliance officer with respect to the latter three citations. She testified that with respect to each of her previous contacts, she spoke with management about the requirements of the trenching standards (Tr. 42-42). Erie Area Director, John Stranahan testified that he too had spoken with a member of Kirila management on three previous occasions where excavation violations were at issue and discussed the trenching standards -April 1992, October 1993, and June 1994 (Tr. 77-78). Additionally, respondent visited the Erie OSHA Office in May 1992 to meet with Safety Supervisor Tony Rizzo for training (Tr.76). Mr. Rizzo again met with respondent in October 1993, at which time he answered technical questions regarding the excavation standards (Tr. 77) Such contacts certainly provided Kirila with a heightened awareness of the requirements of the excavation violations.[7] The record also discloses that at Respondent's annual company safety meeting in March 1995, the OSHA excavation standards and the five-foot rule were discussed (Tr. 104-105, Joint Exh. 1). Mr. Kirila also acknowledged that he was obligated to comply with OSHA regulations pursuant to his contract with National Fuel (Tr. 103). In spite of the aforementioned, on July 20, 1995, Mr. Kirila, along with another employee, was observed violating the cited excavation standard.

Mr. Kirila testified that based upon his training and experience (30 years), he believed that the excavation was safe (Tr. 98). The undersigned finds that Mr. Kirila's statement that he believed the excavation presented no danger of a cave-in, falls short of a good faith effort to comply with the standard. This statement is especially unreasonable in light of his familiarity with the excavation standards, his knowledge of previous violations, and the recent annual training his company had completed. His admission that the excavation at some portion was five feet in depth even more evidence of the unreasonableness of his belief (Tr. 96 & 111). Furthermore, the fact that Mr. Kirila entered the cited excavation area does negate the willful nature of this violation. The Review Commission has held that the fact that a foreman entered an excavation himself, "while perhaps demonstrat[ed] confidence in his own professional assessments of potentially dangerous situations," did not change the willfulness of a violation *Conie Construction Inc.*, 16 BNA OSHA 1870, 1872 (No. 92-0264, 1994).

Penalty

> The Commission is the final arbiter of penalties in all contested cases. Section 17(j) of the Act, 29 U.S.C.§666(j), requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business; gravity of the violation; good faith; and prior history of violations. *J.A. Jones Construction Co.,* 15 BNA OSHA 2201, 2213-14 (No. 87-2059, 1993)(citation omitted) These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.,Inc.,*15 BNA OSHA 1481, 1483 (No. 88-

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[7] Respondent argues that the aforementioned history involved prior (now deceased) management of Respondent and thus, Ron Kirila should not be held accountable. Respondent's Reply Brief at p.2. The undersigned finds that the record reveals that Mr. Kirila's testimony establishes a thirty year history with prior Kirila management, and that he was in fact aware of the previous citations (Tr. 106).

2691, 1992)(citation omitted). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones*, at 2214 (citation omitted).

Hern Iron Works, Inc., 16 BNA OSHA 1619, 1624 (No. 88-1962, 1994).

The Secretary assessed the probability and severity of the violation as medium lesser, which resulted in a gravity-based penalty of $55, 000.00. The penalty was adjusted only for size in light of the willful classification. However, because the Area Office was involved in an incentive program for employers, the penalty was cut in half because the condition was abated while OSHA was still on the site. After considering the above factors and the gravity of the violation, a penalty of $16,500.00 is deemed appropriate.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Citation 1, Item 1, alleging a willful violation of §1926.652(a)(1), is AFFIRMED with a penalty of $16,500.00.

Covette Rooney
Judge, OSHRC

Dated: JUL 16 1996
Washington., D.C.