

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 5421-17

COMMISSIONER OF THE
DEPARTMENT OF WORKPLACE STANDARDS
KENTUCKY LABOR CABINET

COMPLAINANT

v.

SOUTHERN PIPELINE
CONSTRUCTION CO.

RESPONDENT

Hon. John R. Rogers, Frankfort, Attorney for the Complainant. Hon. Robert V. Waterman and Lester I. Adams, Jr., Louisville, Attorneys for the Respondent.

DECISION AND ORDER
OF THIS REVIEW
COMMISSION

This case comes before the Review Commission from the Commissioner of the Department of Workplace Standards, Kentucky Labor Cabinet's ("Commissioner's"), timely petition for discretionary review of our hearing officer's recommended order dismissing all three items of a citation issued to Southern Pipeline Construction Company ("Southern Pipeline"). We granted review and asked for briefs. *See* 803 KAR 50:010, Section 48. For the reasons discussed herein, we affirm our hearing officer's dismissal of Items 1 and 3 of the Citation and reverse our hearing officer's dismissal of Item 2 and reassess the proposed penalty of \$4,200 for that item.

Standard of Review

KRS §336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky Occupational Safety and Health Act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the Department of Workplace Standards of the Labor Cabinet issues citations. KRS §338.141 (1). If the cited employer notifies the Commissioner of its intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission (“Review Commission”) “shall afford an opportunity for a hearing.” KRS §338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to “hear and rule on appeals from citations.” KRS §338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer’s recommended order may file a petition for discretionary review with the Review Commission; the Review Commission may grant the petition, deny the petition or elect to call the case for review on its own motion. 803 KAR 50:010, Section 47 (3). When the Review Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Brennan v. O.S.H.R.C.*, 487 F.2d 438, 441 (8th Circ. 1973), the Eighth Circuit said when the commission hears a case it does so “de novo.” *See also Accu-Namics, Inc. v O.S.H.R.C.*, 515 F.2d 828, 834 (5th Circ. 1975) (“the Commission is the fact-finder, and the judge is an arm of the Commission....¹”).

As stated by our Supreme Court in *Sec’y of Labor v. Boston Gear, Inc.*, 25 S.W.3d 130, 133 (Ky. 2000), “The review commission is the ultimate decision-maker

¹ See federal commission rule 92(a), 29 CFR §2200.

in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer”. “The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another.” *Terminix International, Inc. v Secretary of Labor*, 92 S.W.3d 743, 750 (Ky. Ct. App. 2002).

Facts and Summary of Proceedings

Southern Pipeline specializes in construction and excavation and is located in Louisville, Kentucky. On February 14, 2017, Southern Pipeline started its work to connect a new plastic gas line between two existing underground steel gas lines in Louisville, Kentucky near Lovers Lane and Billtown Road.² Southern Pipeline unearthed two sections of gas line, one near Lovers Lane and one near Billtown Road, creating two excavations.³ The parties refer to these excavations as the Lovers Lane and Billtown Road excavations given their proximity to those roadways. Southern Pipeline also dug a trench to lay a plastic pipe connecting the gas lines.⁴ The connection of the plastic pipe to the existing steel gas lines was made using a device called a Mueller, a transition piece made of steel on one end and plastic on the other, and a couple of other steel fittings.⁵ This project required workers to enter into in the excavations to perform steel welding and other tasks.⁶ The work took several days to perform and was nearing completion on February 16, 2017, when Seth Bendorf, a

² See Recommended Order (“RO”), Findings of Fact 16 & 17. A citation to a Finding in the RO implies that we found that the Finding is supported by substantial evidence and adopt it as our own.

³ See *id.*

⁴ See *id.*, Finding of Fact 16.

⁵ See *id.*, Findings of Fact 28, 29, Footnotes, 27 – 30.

⁶ See *id.*

compliance officer with the Labor Cabinet's Department of Workplace Standards, inspected the worksite.⁷

Upon his arrival, Mr. Bendorf walked over to the Lovers Lane excavation and observed a laborer, James Herrington, in the Lovers Lane excavation sitting on top of the steel gas line with his feet dangling above the lower level of the excavation.⁸ The excavation was less than five feet deep and was partially benched creating two levels in the excavation.⁹ Mr. Herrington entered the excavation by stepping down to the bench and then sat down on the bench so that he could scoot his rear onto the gas pipe.¹⁰ Mr. Herrington was clearing dirt from the Mueller so that an air hose could be attached and used to pressure test the new line after it was connected to both Muellers.¹¹ A ladder was not present in the excavation.¹² Southern Pipeline employees had not performed work in the Lovers Lane excavation on the day of the inspection necessitating entry to the bottom of the excavation.¹³

The lower level of the Lovers Lane excavation had standing water covering almost the entire surface of it.¹⁴ Mr. Bendorf did not measure the depth of the water.¹⁵ The foreman for Southern Pipeline, Larry Dowell, estimated the water to

⁷ See *id.*, Finding of Fact 17.

⁸ See *id.*, Finding of Fact 52; Hearing Transcript ("Transcript"), Day 1, p. 141 – 142; 148- 149.

⁹ See Transcript Day 1, p. 43; Hearing Exhibits ("HE") 5, 15, 16 (Lovers Lane); and HE18, pp. 0013 – 0022, 0024. All of these hearing exhibits are pictures Mr. Bendorf took of the Lovers Lane excavation during his inspection.

¹⁰ See Transcript, Day 1, p. 148 - 49.

¹¹ See RO, Findings of Fact 51 – 54.

¹² See RO Finding of Fact 54. Some of Mr. Bendorf's pictures show a ladder being present in the excavation. That ladder was put there after Mr. Bendorf arrived.

¹³ See RO Finding of Facts 50 & 54.

¹⁴ See RO, Finding of Fact 93.

¹⁵ See Transcript, Day 1, p. 124.

be 2- 3 inches deep based on pictures shown to him at the hearing.¹⁶ Water was not seeping through the walls of excavation during the inspection and the water level remained constant.¹⁷

The conditions in the Lovers Lane excavation on the day of the inspection were different when a welder entered the lower level days before. On February 14th and 15th, a contract welder named Jimmy Draper performed welding at the bottom of the excavation to install the Mueller and to make a connection to the plastic pipe via other fittings.¹⁸ Water had not yet accumulated when the welder performed his work in the excavation.¹⁹ Mr. Dowell, the foreman on site, testified that no water was present in the excavations when the welder entered the excavation.²⁰ The credibility of Mr. Dowell's testimony was bolstered by the nature of the welder's work in the excavation. The welder was required to lay on his back at the bottom level of the excavation to perform some of the welding, something he would not do if water was present there.²¹ Mr. Bendorf could not refute this testimony because he did not see the excavation when this work occurred. After the connection was made, Mr. Dowell

¹⁶ See *id.*, Day 2, p. 97.

¹⁷ See *id.*, Day 1, p. 31; Day 2, p. 97 – 99.

¹⁸ Mr. Draper started welding a Mueller to the existing gas line in the excavation on February 14th, which carried over to the next day. See Transcript, Day 2, p. 61 – 62. He welded outside of the excavation on February 15th to connect an angled steel fitting to the steel side of a transition piece, and to connect a short straight fitting called a “pup” to the other side of the angled steel fitting. See *id.*, p. 63 – 69. A Southern Pipeline employee, Mr. Higgs, fusion welded the plastic piping to the plastic part of the transition piece outside of the excavation. See *id.*, p. 65. Once this work was performed outside the excavation, Mr. Draper entered again to connect the pup to the Mueller thereby completing the connection of the plastic pipe to the existing gas line. See *id.*, p. 69.

¹⁹ See RO, Finding of Fact, 98.

²⁰ See Transcript Day 2, p. 59, 126- 27.

²¹ See Transcript, Day 2, p. 28. Mr. Dowell and a laborer who performed some of the plastic pipe fusion welding, Mr. Higgs, testified that welders are very particular about their work conditions and would predictably refuse to lie in water to weld. See Transcript, Day 2, p. 59 (Dowell); Transcript, Day 1, p. 188- 89 (Higgs).

backfilled about thirty feet of trench leading into/out of the Lovers Lane excavation covering the part of the plastic pipe near the connection.²² The soil placed where the trench led out of the excavation rested at an angle of repose just as it was when Mr. Bendorf arrived the day after.²³

No one was working in the Billtown Road excavation when Mr. Bendorf arrived. Earlier that day around 11:00 am, Mr. Draper entered the excavation to weld an angled fitting to a “pup” already attached to the Mueller.²⁴ After this welding was complete, Southern Pipeline employees exposed water and phone lines using shovels, after which Mr. Dowell used an excavator to complete the trench into/out of the excavation.²⁵ Southern Pipeline employees then laid a tracer wire along the trench, under the utility lines, and up to an apparatus that would be used to purge the gas line later.²⁶ Mr. Herrington entered into the bottom of the excavation using a ladder to retrieve a spool of this tracer wire during this process.²⁷

Southern Pipeline had also partially benched this excavation creating two levels.²⁸ There was a small puddle of water in the lower level of the excavation near

²² See RO, Findings of Fact 42, 47, Footnote 43, 45.

²³ See RO, Finding of Fact 135; HE 5, 15, 16 (Lovers Lane); Exhibit 18, pp. 0013 – 0020, 0022, 0024.

²⁴ See Transcript Day 2, p. 80 – 82; HE 25 & 26. The angled steel fitting was already welded to the transition piece by the time it was brought into the excavation to weld to the pup. *See id.* Mr. Draper had also entered and laid down underneath the existing gas line to weld the Mueller and pup thereto on February 14th. See Transcript Day 1, p. 171, 178; Day 2, p. 56- 58.

²⁵ See RO Finding of Fact 34, Footnotes 33 – 35; Transcript Day 1, p. 140, 155 – 156, 180-81; Day 2, p. 15, 84 – 87.

²⁶ See Transcript Day 1, p. 152 - 55; HE 12 (depicting the tracer line).

²⁷ See Transcript Day 1, p. 154.

²⁸ Mr. Bendorf took several pictures of this excavation. See HE 6, 10, 11, 12, 16 (Billtown Road); Exhibit 18, pp. 005 – 009, 0026 – 0033, 0035 – 0042

the Mueller.²⁹ Mr. Bendorf measured the Billtown Road excavation depth at six (6) feet near the Mueller and five (5) feet four (4) inches near the water line.³⁰ He took those measurements using a surveyor's rod and tape measure. He also used a board he found on site when measuring the depth near the water line in the Billtown Road excavation. The board was laid on the ground and part of it was extended over the excavation to create a reference point for the surface level.³¹

The Commissioner cited Southern Pipeline for three serious violations based on the conditions existing and worked performed on February 16, 2017. Item 1 of the Citation states that Southern Pipeline employees were working in excavations in which there was water "accumulating" without adequate protections in violation of 29 CFR §1926.651(h)(1). Item 2 provides that Southern Pipeline violated 29 CFR §1926.652(a)(1) because employees were working in both excavations having been classified as Class C soil without adequate cave-in protection. Additionally, Item 2 specifies that water was accumulating at the Lovers Lane excavation. Item 3 alleges a violation of 29 CFR §1926.1051(a) requiring a ladder or stairway for personnel points of access where there is a break in elevation of 19 inches or more. The penalties for these alleged violations total \$10,650.

²⁹ See HE 6, a picture that depicts the subject puddle. Mr. Bendorf did not determine the depth or area of this puddle. Mr. Dowell estimated it to be about one (1) inch deep. See Day 2, p. 96 (estimate by Mr. Dowell).

³⁰ Mr. Bendorf sketched both excavations and recorded his measurements on his drawings. When he returned to his office, he transcribed his measurements onto his photographs. See HE 16; see also, HE 10 & 11 depicting a surveyor's rod placed in the Billtown Road excavation near the Mueller and the waterline.

³¹ See Exhibit 18, p. 0040.

Southern Pipeline contested all three items of the Citation and a hearing on this matter was conducted in March of 2018. In his recommended order issued on November 30, 2018, our hearing officer dismissed all items of the Citation. The Commissioner filed a petition for discretionary review.

General Requirements to Sustain each Item of the Citation

The Commissioner must prove four elements for us to sustain each of the three subject standard-based violations:

- (1) the applicability of the standard;
- (2) the employer's noncompliance with the terms of the standard;
- (3) employee access to the violative condition; and
- (4) the employer's actual or constructive knowledge of the violation.

Bowlin Group, LLC v. Secretary of Labor, 437 S.W.3d 738, 744 (Ky. Ct. App. 2014) (quoting *David Gaines Roofing, LLC v. KOSHRC*, 344 S.W.3d 145, 148 (Ky. Ct. App. 2011)). Southern Pipeline does not dispute the knowledge element of any of the alleged violations. The applicability of the excavation related standards is also not in issue. Southern Pipeline, however, disputes whether the Commissioner proved noncompliance with the terms of those standards and whether there was sufficient employee access to the alleged violative conditions. It also denied that 29 CFR §1926.1051(a) applied to the excavations. Even if the regulation did apply to the work site, it contended that it had complied with the regulation's terms.

Item 1: Alleged Violation of 29 CFR §1926.651(h)(1)

This Item of the Citation alleges that Southern Pipeline's employees worked in the Billtown Road and Lovers Lane excavations on February 16th in violation of 29 CFR §1926.651(h)(1), which provides:

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.

29 CFR §1926.651(h)(1). The standard does not define accumulated water or provide a depth of water at which the regulation is triggered. The parties, however, agree that the water present in the excavations constituted accumulated water as that term is used in the standard. The water level was steady and not "accumulating" as alleged in the Citation.

In dispute is whether Southern Pipeline failed to comply with the terms of the standard when it did not remove the water or take other precautions to address the alleged hazards resulting therefrom. Southern Pipeline argues that the Commissioner must prove that there was an actual hazard posed by the water accumulation to sustain the violation. It believes that Mr. Bendorf's testimony that water can, as a general matter, increase the risk of cave-in, drowning or electrocution is not enough to meet this burden. The Commissioner, on the other hand, claims that a hazard posed by the accumulated water is presumed no matter the amount and without considering the particular circumstances of the case. He claims that the

failure of Southern Pipeline to do anything to address the water and the presumed hazards therefrom was a violation.

Our hearing officer held that a hazard is presumed when any amount of accumulated water is present in an excavation, but that the employer may rebut that presumption with evidence. Using the evidentiary rule he created, the hearing officer found that Southern Pipeline rebutted the presumption of a hazard. Southern Pipeline's geotechnical engineering expert, Peggy Duffy, testified that the volume of water in each excavation did not weaken the walls and make cave-in more likely. Moreover, employees had not used electrical equipment in the excavations subjecting them to a risk of electrocution. Last, the water had not accumulated in the bottom of the excavations until after the welder had been there welding the Mueller. The employees therefore did not have access to whatever risk of drowning was posed by the shallow water. The Commissioner offered no evidence of an actual hazard to employees to counter this evidence.

The hearing officer did not cite to any authority directly supporting this evidentiary presumption rule. Instead, he noted the general rule that the Commissioner does not have to prove the existence of an actual hazard when it shows that the conditions proscribed in the standard exist or that the employer does not employ the prescribed precautions or work methods stated in the regulation. *See* RO, Conclusion of Law, No. 25 (citing to *Labor v. Morel Const. Co.*, 359 S.W.3d 438, 453 (Ky. App. 2011); *Modern Drop Forge Co. v. Sec'y of Labor*, 683 F.2d 1105, 1114 (7th Circ. 1982)). When the proscribed conditions exist at a worksite or the employer does

not follow the explicit safeguards stated in the regulation, the hazard is presumed under the general rule. The hearing officer departs from the general rule, however, in formulating a rebuttable presumption. Under the general rule discussed in *Morel Constr. Co.* and *Modern Drop Force Co.*, an employer cannot defeat a citation by proving that a hazard presumed by the standard does not actually exist at the subject worksite.

We believe that this standard is unique and does not neatly fall within the category of standards for which a hazard is presumed. The water accumulation standard by its own terms does not prohibit work in an excavation with accumulated water. Nor does it mandate certain actions or requirements if water has accumulated. The standard allows work in excavations with accumulated water when adequate precautions are taken to address the hazards posed by that water. The regulation provides some suggestions for precautionary measures, but gives the employer leeway to determine and employ the necessary precautions to address the particular hazard posed by the accumulated water. Moreover, whether precautions are adequate will necessarily involve an analysis of what actual hazards are posed by the water under the particular circumstances.

As always, the Review Commission looks to the federal law when interpreting a regulation. Our hearing officer, however, seemed to depart from federal law, perhaps because he felt constrained by the Kentucky Court of Appeals holding in *Morel Construction*. The federal law we reviewed holds that the United States Department of Labor is required to prove that the water poses an actual hazard. If

it does, it must then prove why the employer's precautions to address that hazard were inadequate.

The Federal Register notifying the public of an amendment to this regulation in 1989 reveals that OSHA acknowledges that accumulated water in an excavation does not always pose a hazard. The amendment softened strict language in an older version of this regulation:

The existing requirement in §1926.651(p) states: "Water shall not be allowed to accumulate in an excavation." Taken literally, accumulated water in any amount, in any part of an excavation, violates the existing standard. However, OSHA does not intend this to be the case . . .

OSHA proposes to revise the existing requirement to recognize that not all water accumulated in excavation poses a hazard. In addition, it is OSHA's opinion that it is not always necessary to remove all water from an excavation in which employees are expected to work.

29 CFR Part 1926, Subpart P, 54 Fed. Reg. 45,894 (Oct. 31, 1989). The hearing officer's and Commissioner's position that a hazard is presumed for any amount of water seems in direct conflict with OSHA's recognition that not all water poses a hazard.

Southern Pipeline cites to a federal ALJ decision in its brief to the Review Commission, *Sec. Labor v. J.B. Coxwell Contr., Inc.*, 22 O.S.H. Cas. (BNA) 1101, 2007 WL 3084575 (O.S.H.R.C.A.L.J. June 29, 2007), to argue that the Commissioner must prove that accumulated water poses a hazard to sustain a violation of 29 CFR §1926.651(h)(1). In that case, the employer deployed a dewatering system, but there was still accumulated water present in the excavation when the compliance officer inspected the site. The ALJ dismissed an alleged violation because the "[s]ecretary failed to show that [the employer's] de-watering systems were not adequate or that

there was a hazard to employees posed by the water accumulation in this case.” *Id.* at * 6.

The Commissioner argues that *J.B. Coxwell Construction* should be distinguished from this case because the employer in *J.B. Coxwell Construction* pumped out some water and was taking steps to prevent further accumulation. We believe that the difference between that case and this one is immaterial. There was still some residual water after the employer in *J.B. Coxwell Construction* took steps to prevent water accumulation. The ALJ noted that the compliance officer thought that the remaining water was a “no violation” accumulation. The ALJ also implied that the United States Department of Labor failed to show a hazard to employees posed by any water accumulation, arguably even before some of the water was pumped out of the excavation. Regardless, the ALJ found that the Department of Labor had the evidentiary burden to prove that accumulated water posed a hazard and could not simply rely on a presumption.

In a similar vein, the Eighth Circuit Court of Appeals held that a federal review commission decision affirming a violation of this regulation was deficient because it did not contain a factual finding detailing what hazards the accumulated water posed and why the employer’s precautions were inadequate to address them. *See Dakota Underground Inc. v. Sec. of Labor*, 200 F.3d 564, 566 (8th Circ. 2000). Applying this rule, the United States Department of Labor must provide evidence that the accumulated water was hazardous under the particular circumstance of the case rather than relying on a general evidentiary presumption. *See Secretary of Labor v.*

DT Construction Co., 19 O.S.H. Cas. (BNA) 1305, 2000 O.S.H.D. (CCH) 32229, 2000 WL 1664948, at * 14 (O.S.H.R.C.A.L.J. Oct. 19, 2000) (holding that testimony stating that a trench wall that fell was “wet and cracked” and that there was knee deep mud in the bottom of the trench was sufficient to meet the requirements of *Dakota Underground, Inc.*).

Another federal ALJ held that the United States Department of Labor must show that the accumulated water poses a hazard in the case of *Secretary v. Straight Ahead Constr., Inc.*, 24 O.S.H. Cas. (BNA) 1332 (O.S.H.R.C.A.L.J. June 11, 2012) 2013 O.S.H.D. (CCH) P 33249, 2012 WL 3059588, at *5. “The Secretary cannot establish a violation of §1926.651 (h)(1) by proving water was merely present in the excavation; she must prove the accumulated water posed a hazard to employees.” *Id.* In that case, testimony providing that water can generally affect the stability of excavations was not enough to sustain the violation, especially when the compliance officer neglected to measure the depth of the water. *See id.*

The federal review commission adopted the reasoning of *Straight Ahead Construction* when dismissing a violation of this standard in the case of *Secretary v. Redline Pipeline, LLC*, 24 O.S.H. Cas. (BNA) 1590 (O.S.H.R.C.), 2013 O.S.H.D (CCH) P 33297, 2012 WL 7062519 (Dec. 26, 2012). Citing to *Straight Ahead Construction*, the federal review commission held that the Secretary failed to show “how two gallons of water” in puddles at the bottom of an excavation created a risk of cave-in. *See id.* at * 6. Like this case, the compliance officer only testified that the water could

“potentially weaken the base of the wall, and make cave-in more likely.” *See id.* That general statement was insufficient to carry the Secretary’s evidentiary burden.

We find these federal decisions persuasive and believe that our hearing officer erred in interpreting the regulation in the manner that he did. While the *Morel Constr. Co.* is binding precedent on the Review Commission as a general matter, it is properly distinguished for this regulation. The Commissioner must always carry the burden of proof when showing that the employer failed to comply with the terms of a standard. *See Bowlin Group, LLC*, 437 S.W.3d. at 744. The terms of this particular standard require that an employer take adequate precautions to address hazards posed by accumulated or accumulating water. The terms of the standard necessarily require the Commissioner to identify and prove a specific hazard resulting from the water and, if he does make that showing, prove why the employer inadequately addressed that hazard. The Commissioner cannot rely on a presumption of a hazard and then cite the employer for failing to take actions to address a hazard “posed by the water accumulation” that does not actually exist.

We therefore hold that the Commissioner must prove that accumulating or accumulated water in an excavation poses an actual hazard to establish that the terms of this regulation have been violated. The Commissioner should offer proof relating to the amount, source and rate of water accumulation as it relates to cave-in hazard and/or should enter facts into the record supporting employee exposure to a reasonable probability of electrocution or drowning. If the Commissioner proves that

a hazard exists, it must then prove why the employer's precautions, if any, were inadequate to address it.

Applying this rule, we shall affirm the hearing officer's dismissal of this violation. Mr. Bendorf testified that water can generally present a risk of cave-in, electrocution and drowning. The Commissioner acknowledges that it failed to offer evidence that these general hazards existed at this worksite. It argues that it had no obligation to do so. The Commissioner's failure to carry its burden of proof showing an actual hazard posed by the accumulated water is sufficient reason to dismiss the violation.

We nonetheless find, just as our hearing officer did, that the accumulated water in each excavation did not pose an actual cave-in hazard.³² This finding is supported by substantial evidence. Mr. Dowell, who has significant excavation experience, evaluated the water present in the excavation at the time and determined that it did not pose a hazard.³³ Southern Pipeline's expert, Ms. Duffy, also offered reliable expert opinion testimony providing that the small amount of water in each excavation did not increase the risk of cave-in.³⁴ Ms. Duffy has significant experience with excavation work in the geological area encompassed by the site.³⁵ She testified that the water was not from an artesian source and was not percolating through the excavation walls causing them to saturate and weaken.³⁶ She stated that the water

³² RO, Findings of Fact 76 – 77, 109.

³³ See Transcript Day 2, p. 37 – 39, 99.

³⁴ See Transcript Day 1, p. 208-10.

³⁵ See Transcript Day 1, p. 195 - 96.

³⁶ See Transcript Day 1, p. 208 -12. Mr. Dowell agreed with her assessment. See Transcript Day 2, p. 97 – 99.

had been trapped behind rocks in the soil and was released when the excavation was excavated and thereafter settled in the bottom of the excavation.³⁷ She also stated that it could take weeks for the water contained in the excavation to penetrate through the relatively impermeable soil in that area, and, even if it did penetrate, it was highly unlikely for such a small amount of water to cause collapse of the excavation walls.³⁸

We also adopt our hearing officer's findings that no employee was exposed to drowning or electrocution hazards.³⁹ There was no evidence that Southern Pipeline used electrical equipment in the excavation such that a risk of electrocution was present during the work. As we have already found, employees did not enter in the lower part of the Lovers Lane excavation when it contained water such that exposure to drowning was possible. The small shallow puddle in the Billtown Road excavation did not even pose a realistic risk of drowning. Even if it did, the puddle did not exist when the welder had to lay down to weld the Mueller on February 14th, and the welder and others who performed work on the day of the inspection were not in a vulnerable position such that it was possible to inhale the water in the puddle.⁴⁰

Item 2: Alleged Violation of 29 CFR §1926.652(a)(1)

29 CFR §1926.652(a)(1) provides:

(a) Protection of employees in excavations. (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective

³⁷ See Transcript Day 1, p. 212. Mr. Dowell again agreed with Ms. Duffy's assessment. See Transcript Day 2, p. 98.

³⁸ See Transcript Day 1, p. 208 – 210.

³⁹ See RO Findings of Fact, 61, 63, 80, 83, 88, 97, 98, 106, 107.

⁴⁰ See RO Findings of Fact, 83. Mr. Herrington's testimony also supports that the work performed in the excavation would not have put the workers in a position where drowning was a possibility. See Transcript Day 1, p. 141, 151 – 58.

system designed in accordance with paragraph (b) or (c) of this section except when:

- (i) Excavations are made entirely in stable rock; or
- (ii) Excavations are less than 5 feet (1.52 m) in depth and examination on the ground by a competent person provides no indication of potential cave-in.

Adequate protection from cave-ins involves either benching or sloping of the walls of an excavation or shoring the walls with a protective shielding system.

A. Soil Classification

The Commissioner contends that our hearing officer erred in finding that the soil in the excavations was either Class A or B because Mr. Dowell told Mr. Bendorf that the soil was class C on the day of the inspection. The classification of soil determines what type of protective systems are allowed and the overall stability of the excavation walls. Class A soil is most cohesive and stable and Class C the least stable.

The competent person and foreman on site, Mr. Dowell, tested the soil every day the excavations were open and classified it as Class B and A.⁴¹ He acknowledged telling Mr. Bendorf that the soil was class C because he was thinking that Mr. Bendorf would claim that the soil covered with water or the excavated soil that had been near the utilities could be considered Class C.⁴² Mr. Dowell also believed that Mr. Bendorf “had an agenda” and would disagree with whatever he said.⁴³ Ms. Duffy, who had experience with hundreds of excavations in the same area as this work site,

⁴¹ See Transcript Day 2, p. 43 - 46. Class A soil is more cohesive and has higher compressive strength than class B soil. No previously disturbed soil can be considered Class A regardless of its properties. See Appendix A to 1926 Subpart P.

⁴² See Transcript Day 2, p. 47- 50.

⁴³ See id.

also testified that Class C would have been unusual in this area and most soil was either Class A or B.⁴⁴ Mr. Bendorf on the other hand did not classify the soil in the excavation while on site and instead relied on what Mr. Dowell told him.⁴⁵ After taking into consideration the testimony before him, the hearing officer found that the soil was Class B, or Class A in some locations.

The hearing officer weighed Mr. Dowell's inconsistent statement to Mr. Bendorf against the other evidence relevant to soil classification. The hearing officer could examine Mr. Dowell's demeanor, mannerisms and the forcefulness of his testimony at the hearing to judge his credibility. The Review Commission is simply not in a position to do that by only reviewing a written transcript. We shall therefore adopt our hearing officer's findings that the soil in the excavations was at the very least Class B soil.⁴⁶

B. Lovers Lane Excavation

The Lovers Lane excavation was less than five (5) feet deep. The Commissioner nonetheless took the position that the accumulated water made cave-in likely making a protective system required. The hearing officer disagreed in light of Ms. Duffy's testimony that the small amount of water did not affect the stability of the excavation walls. We agree with our hearing officer's findings that the conditions of the Lovers Lane excavation do not support a violation of this standard.⁴⁷

⁴⁴ See Transcript Day 1, p. 202, 205.

⁴⁵ Mr. Bendorf tested some of the soil that had been removed from the excavation and found it to have compressive strength sufficient to be Class A, assuming it was not previously disturbed. *See* Day 1, p. 101-102.

⁴⁶ See RO Findings of Fact 73, Day 2, 127 – 129.

⁴⁷ More specifically, we agree and adopt the RO's Findings of Fact 76, 77 and 109.

C. Billtown Road Excavation

The Commissioner offered evidence proving that the Billtown Road excavation did not comply with the terms of this standard. Mr. Bendorf testified that this excavation was six (6) feet deep near the Mueller and approximately five (5) feet four (4) inches deep near a water line. Moreover, the excavation did not have adequate cave-in protection in accordance with Appendix B of the regulation. Even giving Southern Pipeline the benefit of the doubt about the soil being Class B, the excavation needed to be benched or sloped at a 1 to 1 ratio. *See* Appendix B, Subpart P of Part 1926. In this case, the depth from the bench to the bottom of the excavation in one area was 4 feet. The bench needed to be 4 feet wide to be compliant in that area yet it was not 4 feet wide in all parts of the excavation.⁴⁸

At the hearing, Mr. Dowell⁴⁹ offered his opinions as to why several pictures entered as exhibits in this case proved that Mr. Bendorf's measurements were inaccurate. For the most part, he contended that the surveyor rod in the pictures was not perfectly vertical and Mr. Bendorf used a warped board to help take a measurement near the water utility line.

Based on the testimony of Mr. Dowell, our hearing officer dismissed the violation on the grounds that all of Mr. Bendorf's depth measurements were too unreliable to sustain a violation⁵⁰. After reviewing the record, we hold that this

⁴⁸ *See* Exhibit 16 (Billtown Road); Transcript Day 1, pp. 66 – 67, 70 - 71 (testimony of Mr. Bendorf).

⁴⁹ Ms. Duffy also testified about the potential inaccuracy of Mr. Bendorf's measurements, but she was not witness to those measurements.

⁵⁰ *See* RO, Findings of Fact, 111, 124, 125

finding was not supported by substantial evidence with respect to the six (6) foot measurement that Mr. Bendorf took near the Mueller. We find that this area of the excavation was at least five (5) feet deep, which is sufficient to prove a violation of the standard's terms.

Mr. Bendorf has measured hundreds of excavations during his career and testified under oath that he kept the surveyor rod vertical when noting the excavation depth.⁵¹ Although some of the pictures indicate that the surveyor's rod was leaning, Mr. Bendorf stated that he could not hold the rod and take pictures of the measuring rod at the same time.⁵² According to him, the pictures' purpose was to show that he had used a surveyor's rod to take his measurements and not to depict the measurements he had recorded.⁵³

Mr. Dowell also admitted at the hearing that the excavation may have been greater than five (5) feet near the Mueller. He could not offer evidence of the excavation depth refuting Mr. Bendorf's measurements.⁵⁴ In fact, Mr. Dowell helped Mr. Bendorf measure the Billtown Road excavation from the bottom to the bench and yet did not testify about how this measurement was taken or what the measurement was.⁵⁵ Instead, Mr. Dowell only later criticized the pictures Mr. Bendorf took depicting the surveyor rod in the excavation at that location.⁵⁶

⁵¹ See Transcript Day 1, p. 15 – 16, 46 , 56 - 58

⁵² See Transcript Day 1, p. 56 – 58.

⁵³ See *id.*

⁵⁴ See Transcript Day 2. 189 – 90.

⁵⁵ See Transcript Day 2, p. 100.

⁵⁶ See Transcript Day 2, p. 105 - 106 (discussing Exhibit 18, p. 0038, 0039).

Mr. Dowell, as the competent person, had a duty to measure the excavation to ensure compliance with this regulation. Although Mr. Dowell may have felt that Mr. Bendorf's measurements were in error, he did not object to those measurements at the time that they were taken and instead waited to offer criticism of those measurements at the hearing. An ALJ in a federal case, *Secretary of Labor v. Masterson Constr. Co.*, 19 O.S.H. Cas. (BNA) 1791 (O.S.H.C.A.L.J. Nov. 29, 2001), 2001 O.S.H.D. (CCH) P 32493, 2001 WL 1530148, found that a superintendent's hearing testimony critical of a compliance officer's measurement was undermined by his failure to offer contrary measurements to the compliance officer at the time of the inspection. We agree with the principle in that case and apply it here. Therefore, Mr. Dowell's criticisms of the Mr. Bendorf's pictures at the hearing carry little, if any, weight.

We also observe that much of Mr. Dowell's criticism of the pictures of the excavations, even if we consider them, are immaterial to whether the Commissioner proved a violation based on the depth of the excavation near the Mueller. Significant portions of Mr. Dowell's hearing testimony relate to pictures taken of the Lovers Lane excavation, the depth of which is not even in issue because it was measured at less than five feet. Other criticisms focused on the part of the Billtown Road excavation near the water utility, which was measured at five (5) feet four (4) inches deep. This criticism included the allegation that Mr. Bendorf used a warped board to assist in taking this measurement. Even if the measurement in that area may be in question,

a violation is supported because the excavation near the Mueller in the Billtown Road excavation was at least five (5) feet deep.

A picture of the surveyor rod placed at the bottom of the excavation near the Mueller was entered into evidence and indicates that the top of the bench is level with the four (4) foot mark on the surveyor rod.⁵⁷ This picture is consistent with the four (4) foot measurement that Mr. Bendorf recorded and used to determine the total depth of six (6) feet in that location.⁵⁸ Therefore, the picture of the surveyor rod may reflect his actual measurement of the depth in that location. Mr. Bendorf measured the distance from the bench to the surface at two (2) feet, which Mr. Dowell did not challenge as incorrect during the hearing.⁵⁹ Thus, we shall at least consider the picture of the surveyor's rod in determining whether total measured depth from the surface to the bottom was at least five (5) feet.

Mr. Dowell pointed out that another picture of the back of the surveyor rod near the same location appears to show the rod leaning against the excavation wall.⁶⁰ The record does not establish whether the rod was in the same location and had the same orientation as it did when depicted in another picture showing the front of the rod. Assuming that it did, the actual distance from the bottom of the excavation to the bench may have been less than what is indicated on the surveyor rod. We find, however, that whatever error caused by the lean depicted would not amount to more than one foot such that the total excavation depth was actually less than five (5) feet.

⁵⁷ See HE 18, p. 39.

⁵⁸ See HE 16.

⁵⁹ See id.

⁶⁰ See HE 18, p. 38.

Using geometry,⁶¹ we estimate that the rod would have to be leaning to such a degree that the bottom of the rod would have to be approximately 2.65 feet away from the excavation wall. The picture of the back of the rod does not indicate that much of a lean. We also find it unlikely that Mr. Bendorf would have skewed the measurement to that degree even if he did not hold the measuring rod perfectly plumb.

Based on the foregoing, we find that the Commissioner proved that the conditions of the Billtown Road excavation violated the terms of the standard. The depth of the excavation near the Mueller was at least five (5) feet and Southern Pipeline did not employ a protective system such as benching, sloping or shoring that met the requirements of the standard.

Southern Pipeline also disputes whether its employees had access to the violative condition. Much of the dispute centers on the issue of whether Southern Pipeline's employees accessed the portion of the Billtown Road excavation near the water line when it was at full depth, which Mr. Bendorf measured at 5 feet 4 inches. Our hearing officer did not base his dismissal on a finding related to employee access, but nonetheless found that "the only worker who worked inside either excavation was

⁶¹ To arrive at an actual total depth of less than five feet, the distance between the top of the bench and bottom of the excavation would have to be less than 3 feet instead of the 4 feet indicated on the surveyor rod that Southern Pipeline maintains was leaning. The leaning surveyor rod extending from the bottom of the excavation to the benched area can be modeled as a hypotenuse of a right triangle, which is four feet long according to the pictures. The actual depth is represented by a plumb line extending from the bottom of the excavation to the benched area, which can be modeled as another side of a right triangle. The last side of this imaginary triangle is represented by the line between the bottom of the surveyor rod and the bottom of wall. The Pythagorean Theorem provides that the area of a square whose side is the hypotenuse is equal to the sum of the areas of the squares of the other two sides ($a^2 + b^2 = c^2$). Using this theorem, the bottom of the rod would have to be over 2.65 feet away from the wall for the actual depth to be only 3 feet and the surveyor rod to indicate a depth of 4 feet.

the welder.”⁶² The Commissioner also complains that the hearing officer erred in certain findings related to employee access to the Billtown Road excavation. For the sake of clarity, we explicitly find that the Commissioner proved the employee access element.

Whether Southern Pipeline employees entered the excavation near the water line when it was at full depth is not dispositive of the employee access issue. The First Circuit Court of Appeals held that the employer violated this regulation even though an employee only stepped on a pipe in a trench that was less than five (5) feet from the surface and never traveled to the very bottom that was greater than five (5) feet from the surface. *See Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 109 (1997). In so holding, the court relied on the federal review commission’s reasoning in, *Ford Dev. Corp.*, 15 O.S.H. Cas. (BNA) 2003, 2011 (1992), and stated, “[t]he safety standard is implicated by the depth to a particular trench, without regard to an individual worker’s precise position in it.” We agree with the First Circuit and hold that any entry, regardless of the employee’s precise position in the excavation is sufficient to prove employee access.

The record establishes that Southern Pipeline employees entered into the Billtown Road excavation when it was greater than five feet deep near the Mueller. Employees told Mr. Bendorf that they cleared dirt from underneath the waterline and placed a tracer wire there. Mr. Bendorf also observed footprints and trash in the excavation indicating that employees had been in the excavation prior to his arrival.

⁶² See RO Finding of Fact 133.

Other record evidence supports Mr. Bendorf's testimony concerning his basis for concluding that Southern Pipeline's employees had been in the excavation. Mr. Dowell testified that the workers merely located and dug around the utilities after which he used an excavator to dig underneath them. It is not clear from the testimony where the employees stood while doing this work. Mr. Dowell testified that the excavation may have extended up to the phone line before the utilities were cleared and that the wall in this area was benched like the other walls indicated in the photos entered as exhibits herein.⁶³ A reasonable inference from this testimony is that employees may have stood on the benched area to clear the utilities for the excavator operator. Regardless, Mr. Herrington admitted that he accessed the benched area to run a tracer wire and then used a ladder to climb down into the lower level of the excavation to retrieve a spool of tracer wire and tie the wire to the gas line after Mr. Dowell excavated underneath the utilities.⁶⁴

It is also clear from the record that Southern Pipeline's contract welder, Mr. Draper, entered into the excavation on the day of the inspection to weld an angled fitting to a pup that had already been attached to the Mueller.⁶⁵ The excavation was at least five feet deep near the Mueller when Mr. Draper entered the excavation.⁶⁶ Mr. Dowell further stated that he supervised this person and it is undisputed that Southern Pipeline created the non-compliant excavation.⁶⁷

⁶³ See Transcript Day 2, p. 131- 34.

⁶⁴ See Transcript Day 1, p. 152 - 54.

⁶⁵ See Transcript Day 2, p. 80 – 82; HE 25 & 26.

⁶⁶ See Transcript Day1, p. 190- 92; Transcript Day 2, p. 95 - 96.

⁶⁷ See Transcript, Day 2, p. 136

Mr. Draper's entry establishes the employee access element under the multiple employer work doctrine. Under that doctrine, "an employer who controls or creates a worksite hazard may be liable under the Occupational Safety and Health Act even if the employees threatened by the hazard are solely employees of another employer." *Dep. of Labor v. Hayes Drilling, Inc.*, 354 S.W.3d 131, 138 (Ky. Ct. App. 2011) (quoting *Universal Const. Co. v. OSHRC*, 182 F.3d 726, 728 (10th Circ. 1999)). An employer who controls a work area and is responsible for its maintenance can be liable for an OSHA violation when a "hazard has been committed" and that area was accessible to its own employees or "those of other employers engaged in a common undertaking." *Id.* at 138 — 39. These elements are met here as Mr. Dowell supervised Mr. Draper in the common undertaking of the subject gas line project.

We reverse our hearing officer's dismissal of Item 2 of the Citation. The evidence supports that workers entered the Billtown Road excavation site when it was greater than five feet in depth with non-compliant protective systems, which is a serious violation of 29 CFR §1926.652(a)(1).

Item 3: Alleged Violation of 29 CFR §1926.1051(a)

This regulation provides: "A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided." The Citation claims that on February 16, 2017 two (2) or more employees had been working in the Billtown Road and Lovers Lane excavations without a ladder or safe means of access and egress. The Citation alleges that there were vertical walls between four (4) feet and five (5) feet four (4) inches tall in the Billtown Road

excavation and between three (3) feet and three (3) feet eight (8) inches in the Lovers Lane excavation. These distances correspond to Mr. Bendorf's measurements of the walls surrounding the very bottom of the excavations as opposed to the distances he measured from the surface level to the benches in those excavations.⁶⁸

Bendorf only witnessed one person, Mr. Herrington, in the Lovers Lane excavation without a ladder. He also testified that the employees he interviewed said that they had worked in the Billtown Road excavation without a ladder and that there was no ladder present at that excavation when he arrived.

As preliminary matter, Southern Pipeline maintains that this regulation did not apply to the excavations here because there was not a "personnel point of access." Citing to an OSHA interpretation letter, the employer states that this standard should only apply at locations where employees are going to be moving on a regular basis, not every possible breach in elevation 19 inches or more. In this case, the employer states that there was no regular point of access for the excavations.

The Review Commission has applied this regulation to excavations in the past. *See Qualified Paving*, KOSHRC No. 4217-05, 4225-05 (Feb. 5, 2008). Moreover, the definition section of the subpart in which this regulation is found defines "lower level" as those areas where a person can fall from a ladder, including excavations. *See* 29 CFR §1926.1050(b). Without opining on what constitutes a regular personnel point of access for the subject excavation, we simply find that this regulation applies to the excavations as a general matter and shall affirm our hearing officer's dismissal based

⁶⁸ See Exhibit 16 (Billtown Road)

on a finding that the Commissioner failed to prove Southern Pipeline was non-compliant with its terms.

A. Billtown Road Excavation

The Commissioner failed to offer sufficient evidence to prove a violation based on the activities conducted in this excavation. The Citation alleges that workers entered the Billtown Road excavation without a ladder on the day of the inspection. Although there may have been some entries into this excavation by Southern Pipeline's employees and the welder, we do not believe that the Commissioner carried his burden of proof to show that these personnel violated the standard.

As discussed above, substantial evidence supported a finding that employees worked on the benched area of the excavation to clear the utilities for further excavation and to place a tracer line on the day of the inspection. The Commissioner, however, failed to offer evidence concerning these activities sufficient to support a violation of the subject standard. It is not even clear from the record what the conditions of the excavation were when the utilities were cleared. Even after the utilities were cleared, Mr. Bendorf's pictures reflect that some of the areas around the bench did not have vertical walls and may have constituted an embankment or ramp under the standard. Mr. Bendorf also did not measure every area around the bench to show that there was a break in elevation of greater than 19 inches in every location.

The Citation does not appear to base the violation on the workers traveling down to the bench anyway. The breaks in elevation mentioned in the Citation

correspond to deepest parts of the excavation near the Mueller and the water utility. The four (4) foot measurement was from the bench to the bottom of the excavation near the Mueller.⁶⁹ The five (5) foot four (4) inch measurement is the depth Mr. Bendorf measured near the water line.⁷⁰ Southern Pipeline's employees followed company policy to use a ladder to access excavations unless there was a ramp or embankment present. Consistent with this policy, Mr. Herrington used a ladder when entering the lower level of this excavation near the water line to retrieve a spool of tracer wire. Mr. Bendorf never saw anyone in this excavation because work had concluded in that excavation for the day and he could not refute the testimony offered by Southern Pipeline in its defense.

The record does not support a violation based on workers entering the bottom of the excavation without a ladder. There is also insufficient evidence to conclude that any entries onto the benched area in the excavation required a ladder. The Commissioner therefore failed to prove a violation based on the work activities in this excavation.

B. Lovers Lane Excavation

The Commissioner claims that a violation was occurring when Mr. Bendorf arrived on site. When he arrived, Mr. Herrington was in the Lovers Lane excavation sitting on top of the gas pipe. He did not travel to the bottom of the excavation. If he had, the break in elevation between the bench and bottom of the excavation was about

⁶⁹ See Exhibit 16 (Billtown Road).

⁷⁰ See id.

3 to 3 feet 8 inches, the same break of elevation alleged in the Citation. There was no ladder in the excavation when Mr. Bendorf arrived.

The trench leading to the Lovers Lane excavation had been partially backfilled prior to Mr. Bendorf's arrival on site. The pictures entered as exhibit and testimony reflect that the backfill had created a ramp (dirt sloped at an angle of repose) leading down to the bench and into the bottom of the excavation. Prior to backfilling, workers would have used a ladder to enter the bottom of the excavation per company policy.⁷¹

Mr. Herrington stepped onto a bench in the excavation, sat down on the bench and then scooted his rear onto the pipe. He did not go to the lower level of the excavation or traverse the break in elevation alleged in the Citation. Pictures show that there was a gradual embankment of soil leading onto the bench. Mr. Bendorf's own measurements also show that the distance from the surface to one area of the bench did not constitute a break of 19 inches sufficient to trigger the regulation.⁷² We find that Mr. Herrington did not traverse a break in elevation of more than 19 inches when stepping onto the bench to perform his work in the Lovers Lane excavation. Accordingly, the Commissioner also failed to prove a violation of this standard with respect to this excavation.

⁷¹ See RO Finding of Fact 134.

⁷² See Exhibit 16 (Lovers Lane, distance measured at 14").

Order

For the reasons discussed above, we hereby order as follows:

1. Affirm, albeit on slightly different grounds, the hearing officer's dismissal of the alleged violation of 29 CFR §1926.651 (h)(1) as set forth in Item 1 of the Citation;
2. Reverse our hearing officer's dismissal of Item 2 of the Citation and assess the proposed penalty of \$4200 for Southern Pipeline's serious violation of 29 CFR §1926.652(a)(1); and
3. Affirm the hearing officer's dismissal of the alleged violation of 29 CFR §1926.1051(a), as set forth in Item 3 of the Citation.

Respondents shall pay the penalty stated herein within thirty (30) days of entry of this Order. Payments shall be made payable to the Kentucky State Treasurer and mailed to the Workplace Standards Legal Division, 657 Chamberlin Avenue, Frankfort, Kentucky, 40601.

It is so ordered.

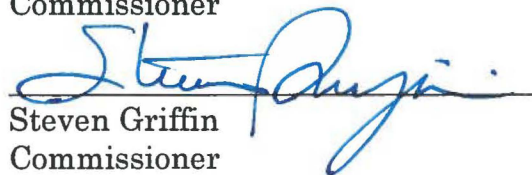
August 13th, 2019.



Brian Richmond
Chair



DeBorah J. McCormack
Commissioner



Steven Griffin
Commissioner

Certificate of Service

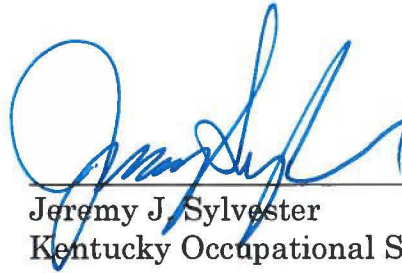
I certify that a copy of the foregoing order and decision has been served this
13th day of August, 2019, on the following as indicated:

Messenger Mail:

John Rogers, Esq.
Kentucky Labor Cabinet
Workplace Standards Legal Division
657 Chamberlin Avenue
Frankfort, Kentucky 40601

US Mail postage pre-paid:

Robert V. Waterman
Lester I. Adams, Jr.
Seiller Waterman, LLC
462 S. Fourth Street, Suite 2200
Louisville, Kentucky 40202



Jeremy J. Sylvester
Kentucky Occupational Safety and
Health Review Commission
4 Millcreek Park
Frankfort, Kentucky 40601
(502) 573-6892
Executive Director