UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. K.M. DAVIS CONTRACTING CO., INC., Respondent.	OSHRC Docket No. **20-1437**

DECISION AND ORDER

Attorneys and Law firms

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JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

A work crew of Respondent K.M. Davis Contracting Co., Inc. (Davis) was connecting a water main for the Cobb County Water System on June 12, 2020, on Ernest Barrett Parkway in Marietta, Georgia (worksite) when Compliance Safety and Health Officer Charles Johnson[1] with the Occupational Safety and Health Administration (OSHA) drove past the worksite and noticed a hydraulic excavator next to a trench off to the side of the road. Pursuant to OSHA's excavation emphasis program, Johnson stopped and met with the three men working at the site and learned they were employees of Davis and had excavated an area next to the road to connect the water meter. Johnson conducted an inspection of the worksite and the Complainant Secretary of Labor (Secretary)[2] subsequently issued Davis a three-item citation and notification of penalty (citation) with proposed penalties totaling $20,241.00.

[1] "Compliance Safety and Health Officer" means "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d).

[2] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 1–2012, *Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health*, 77 Fed. Reg. 3912

Davis timely contested the citation pursuant to section 10(a) of the Act, bringing the matter before the Commission (court) under section 10(c) of the Act. The Secretary subsequently filed a formal complaint[3] with the court seeking an order affirming the citation. Based upon the record, the court concludes it has jurisdiction over the parties and subject matter in this case. (*See* Compl.¶¶ II, II; Answer ¶¶ II, II; *see also* Pretrial Order, Attach. C, p. 11). The court subsequently held a bench trial in Atlanta, Georgia, and the parties filed post-trial briefs. Davis's primary argument is that the Secretary failed to establish employer knowledge of the alleged violations. For the reasons indicated *infra*, the court concludes the Secretary failed to establish employer knowledge of the alleged violations, and therefore, the citation must be vacated.

II. STIPULATED FACTS[4]

Davis was installing a water mount on June 12, 2020, on an existing pipe at the worksite. The trench at the worksite was dug in Type C soil and the dimensions of the trench were greater than 5 feet in depth and 7 feet wide at the bottom by 15 feet, 8 inches in width [at the top] and 20 feet long. The trench was sloped at an angle steeper than one and one-half horizontal to one vertical. A Davis employee was working in a trench box measuring approximately 5 feet in height/depth by 7 feet in width. Davis had a second trench box of the same dimensions that was not being utilized prior to OSHA's arrival at the worksite. The walls surrounding the trench box were approximately 3 feet higher than the top of the trench box.

Based upon the working conditions at the worksite, an employee inside the trench should have been wearing a hard hat at all times. Gustavo Ortiz was Davis's foreman at the worksite and had the primary responsibility for ensuring that the trench was excavated in compliance with all applicable statutes. Alvin King was Davis's superintendent over the worksite and supervised the plans for the configuration of the worksite, including the trench. King went to the jobsite on June 12, 2020, prior to any excavation beginning, but was not present at any time while the trench was being dug.

(Jan. 25, 2012). The terms "Secretary" and "OSHA" are used interchangeably herein. For simplicity, the court also refers to actions taken by the Assistant Secretary and the Area Directors as actions taken by the Secretary.

[3] Attached to the complaint and also adopted by reference was the citation, which was "a part thereof for all purposes." *See* 29 C.F.R §2200.30(d).

[4] *See* Pretrial Order, Attach. C, pp. 11-12.

III. ADDITIONAL FACTS

Around midday when Johnson drove past the worksite, he observed a hydraulic excavator at the side of the road at the worksite and a man "standing on a sidewalk looking down into a hole." (Tr. 23). Johnson could not see into the hole but since OSHA has a trenching and excavation emphasis program, he turned his vehicle around, parked at the worksite, and got out (Tr. 23). Johnson met with Foreman Ortiz and was told the other two employees on the worksite worked for Davis: Excavator Operator Luis Perez and Laborer Jerland Stephens. Johnson held an opening conference with Ortiz, who stated he was a competent person[5] (Tr. 25, 66).

Johnson testified Ortiz told him that he and his crew had excavated the trench that morning to install a meter on a water main located next to the road but "they couldn't actually put the width correctly because the road was right there. It was about 6 and a half feet off the highway." (Tr. 27). Johnson observed Stephens in the trench inside a trench box and noticed Stephens was not wearing a protective helmet.[6] Johnson noted there was no ladder in the trench. Instead, "a rough stairway" was cut in the soil at one end of the trench. Johnson believed the trench was dug in Type C soil, for which it was not properly sloped. Johnson took photographs and measurements of it (Tr. 24-26, 36).

Johnson held a second opening conference with management personnel, including King, at Davis's office (Tr. 43). King informed Johnson he had dropped two trench boxes at the worksite early on June 12, 2020. However, King was not present when the Davis crew excavated the trench (Tr. 44-45). Upon completion of his inspection, Johnson recommended the Secretary cite Davis for the three alleged violations at issue in this proceeding. The Secretary did so on September 26, 2020.

IV. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive

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[5] A "competent person" is "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 §1926.32(f).

[6] Johnson photographed Stephens in the trench. In Exhibits C-1, C-2, C-5, C-6, C-7, and C-8, Stephens can be seen wearing a bandana on his head but not a protective helmet. In Exhibits C-7 and C-8, his protective helmet can be seen lying in the dirt to his left.

regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety and Health Review Comm'n (CF&I Steel Corp.),* 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)). "The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards." *Id*. To achieve this purpose, the Act imposes two duties on an employer, a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1), and a specific duty to "comply with occupational safety and health standards promulgated under this Act." Id. § 654(a)(2). Thus, each employee must "comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct." Id. § 654(b).

Pursuant to that authority, the standards at issue in this case were promulgated. *See* 29 U.S.C. § 665. Meanwhile, the Commission is assigned to carry out adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I Steel Corp*., 499 U.S. at 151.

Under the law of the Eleventh Circuit where this case arose,[7] "the Secretary will make out a *prima facie* case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) (quoting *ComTran Grp., Inc. v.*

[7] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. See 29 U.S.C. §§ 660(a) and (b). The Commission has held that "[w]here it is highly probable" that a case "would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case — even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2068 (No. 96-1719, 2000). The Eleventh Circuit has jurisdiction over both the site of the alleged violations and Davis's business office, both of which were located in Marietta, Georgia. (*See* Compl.¶¶ III, IV; Answer .¶¶ III, IV). The court applies its precedent here.

U.S. Dep't of Labor, 722 F.3d 1304, 1307 (11th Cir. 2013)). "If the Secretary establishes a *prima facie* case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Id.* (citing *id.* at 1308).

Alleged Violations

Item 1

Section 1926.100(a) mandates that employees "working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets." 29 C.F.R §1926.100(a). The Secretary alleges in Item 1 Davis violated that section when its employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns. (Compl. Ex. A at 1.) More specifically, the Secretary asserts an employee was exposed to struck-by and engulfment hazards while working in a 9 foot deep trench with overhead hazards such as an unsupported nearly vertical wall with a concrete sidewalk towering 3 1/2 foot over the employee's trench box and an excavator bucket over the employee. *Id.* The Secretary also asserts the onsite foreman/supervisor allowed the employee to continue. working without head protection after the employee's hat had fallen off. *Id.*

Item 2

Section 1926.65l(c)(2) mandates that a "stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees." 29 C.F.R §1926.65l(c)(2). The Secretary alleges in Item 2 Davis violated that section when a "stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees[.]" (Compl. Ex. A at 2.) More specifically, the Secretary asserts "the compliance officer observed an employee installing a sleave on a 12 in. watermain for a wet tap. The employee was in a 5 ft. by 7 ft. UltraSHORB trench box in a 9 ft. deep by 15 ft. 8 in. wide and 20 ft. long trench without a ladder or other safe means of ingress or egress." *Id.*

Item 3

Section 1926.652(b)(1)(i) mandates that excavations "shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal),

unless the employer uses one of the other options listed [in (b)(2)-(b)(4)]." 29 C.F.R §1926.652(b)(1)(i). The Secretary alleges in Item 3 Davis violated that section when it "allowed an employee to be exposed to cave-in/engulfment hazards while working in a trench that was 9 ft. deep, 7 ft. wide at the bottom, 15 ft. 8 in. wide at the top and 20 ft. long." (Compl. Ex. A at 2.) More specifically, the Secretary asserts Davis "allowed an employee to be exposed to cave-in/engulfment hazards while working in a trench that was 9 ft. deep, 7 ft. wide at the bottom, 15 ft. 8 in. wide at the top and 20 ft. long." *Id.*

(1) Whether Cited Standards Applied

Davis stipulated that it performs construction services and admits that OSHA's construction standards, 29 C.F.R. § 1926, *et seq.*, apply to its operations at the worksite. (*See* Pretrial Order, Attach. C.)

A. Item 1

Section 1926.100(a), cited in Item 1, is found in Subpart E (Personal Protective and Life Saving Equipment) of the construction standards. It requires the use of head protection for employees working in "areas where there is a possible danger of head injury from impact, or from falling or flying objects." Here, Stephens was working in a 9-foot deep trench directly below the bucket of the hydraulic excavator (Ex. C-8; Tr. 35). And Davis concedes section 1926.100(a) is applicable here (Resp't's Br., p. 6). Therefore, the court concludes the Secretary has establish section 1926.100(a) applies to the cited activity.

B. Item 2 and Item 3

Sections 1926.651(c)(2) and 652(b)(1)(i) are found in Subpart P (Excavations) of the construction standards, which "applies to all open excavations made in the earth's surface. Excavations are defined to include trenches." 29 C.F.R §1926.650(a). The standard defines "excavation" as "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." 29 C.F.R §1926.650(b). Davis concedes the cited excavation standards apply. (*See* Resp't's Br at 8) ("Other than the applicability of a standard … the Secretary cannot prove any of the elements of the burden of proof with respect to the alleged violation of the cited ladder standard."). Therefore, the court concludes the Secretary has established the standards cited in Items 2 and 3 apply to the cited activity.

(2) Whether Cited Standards Were Violated

A. Item 1

It is undisputed that Stephens was not wearing a protective helmet while working in a 9-foot deep trench directly underneath the bucket of a hydraulic excavator (*See* Ex. C-1 through Ex. C-9; Tr. 24, 99, 143). Therefore, the court concludes Stephens was working in an area where there was the danger of head injury from impact or from falling or flying objects. Thus, the court concludes the Secretary has established the cited standard in Item 1 was violated.

B. Item 2

Although the parties stipulated the trench at the worksite was greater than 5 feet in depth, Johnson actually measured it and found it to be "about 9 feet deep." (Tr. 25.) As indicated *supra*, §1926.65l(c)(2) mandates that a "stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees." 29 C.F.R §1926.65l(c)(2). It is undisputed Davis did not have a ladder in the trench as a means of egress on June 12, 2020.

The parties stipulated the trench was dug in Type C soil. Because this was Class C soil, Johnson determined the stairway dug was inadequate, and a ladder directly into an adequate trench box[8] was required to provide a safe and viable means of egress. (*Id.* at 7) (*citing* Tr. 26:5-11, 56:13-57:6).[9] Thus, Secretary contends that because Davis was using a trench box as protection against a cave-in, "the only safe means of egress would be a ladder directly into the box, allowing the worker to enter and exit without exposure to the cave-in hazards." (Compl't's Br. at 17). Davis counters that it was in full compliance with the cited standard because the "dirt ramp provided the employee in the trench with one of the safe and adequate means of egress specifically described

[8] The excavations standards refer to "trench boxes" as "shields." A "shield" or "shield system" means "a structure that is able to withstand the forces imposed on it by a cave-in and thereby protect employees within the structure. . . . Shields used in trenches are usually referred to as 'trench boxes' or 'trench shields.' 29 C.F.R. § 1926.650(b).

[9] Johnson testified that, as a means of egress from the trench, Davis's crew "had actually cut [a] . . . stairway[ ] down into it. It was a rough stairway" that was cut "down to about 4 feet off the bottom." (Tr. 26.) He also testified that "in order to access the trench box you had to be outside the trench box when you got to the bottom. . . . you can't come outside the trench box even to enter it. You needed a ladder, which should have been put inside the trench box so he could enter the trench box." (*Id.*)

in the standard, and the ease by which the employee exited proved the ramp's adequacy." (Resp't's Br. at 6.)

However, rather than a ramp, Johnson described it as a rough stairway that began "about 4 feet off the bottom" of the trench (Tr. 26). His description is supported by the Secretary's photographic exhibits. Ortiz also considered the sloped opening to be a stairway. "Pretty much Georgia is Type C [soil] but . . . this particular job the dirt . . . was so hard to dig. . . . And the reason we [did the] steps [was] because the dirt is so hard mixing with . . . small rocks." (Tr. 101.) Thus, the court concludes the sloped section of the trench wall that Stephens used to exit the trench was a stairway, not a ramp. The court concludes Davis's means of egress did not provide a safe means of egress.[10]

Davis tacitly acknowledges steps cut into Type C Soil do not comply with the cited standard by transmuting in its argument the "steps" into a "ramp." However, a stairway and a ramp are not interchangeable terms—they are listed as separate means of egress in section 1926.651(c)(2). Statutory construction requires each word to be accorded its separate denotation. *See Savage Servs. Corp. v. United States,* 25 F.4th 925, 935 (11th Cir. 2022) (the surplusage canon cautions courts to "avoid a reading that renders some words altogether redundant."); *see also In Re Shek*, 947 F.3d 770, 777 (11th Cir. 2020) ("This surplusage canon obliges us, whenever possible, to disfavor an interpretation when that interpretation would render a clause, sentence, or word superfluous, void, or insignificant."

Although the cited standard specifies a stairway as an acceptable means of egress from an excavation, slopes (or steps) specified in section 1926.652(b)(1)(i) "shall be excavated to form configurations that are in accordance with the slopes shown for Type C soil in appendix B to this subpart." 29 C.F.R §1926.652(b)(1)(ii). Thus, although Type A Soil and Type B Soil can use single bench (single step) or multiple bench (multiple steps) form configurations for excavations, excavations made in Type C Soil do not include those options, but rather, only provide for a simple slope or a vertical sided lower portion form configuration option. *See* Appendix B, to Subpart P,

[10] Sloping the wall of an excavation in a terraced manner is called "benching" or a "benching system," which is "a method of protecting employees from cave-ins by excavating the sides of an excavation to form one or a series of horizontal levels or *steps*, usually with vertical or near-vertical surfaces between levels." 29 C.F.R. § 1926.650(b) (emphasis added).

Figures B–1.1, B-1.2, and B-1.3. Therefore, the court concludes cutting steps into Type C Soil did not create a safe means of egress.

Exhibit C-1 is a photograph of Stephens bending over in the trench box at the bottom of the trench. The bucket of the hydraulic excavator is above him. In the foreground (in the center of the bottom half of the photograph) is an opening cut into the side of the trench (the claws of the excavator bucket are facing the opening). Looking at the right side of the opening, the separate "steps" of the slope can be seen cut into the soil. The surface is not ramped; it is tiered. Exhibit C-3 affords a slightly broader perspective from the same angle. The separate steps of the slope are clearly visible. Exhibit C-6 shows a different angle of the slope, taken after the ladder was placed in the trench. The sloped section is above the ladder in the photograph. Visible in the photograph is the 4-foot high area at the bottom of the trench wall with the stairway starting above it, as described by Johnson. As indicated *supra*, excavations made in Type C Soil do not include a bench (steps or stairway) option. Therefore, the court concludes the Secretary has established Davis failed to comply with the terms of the cited standard in Item 2.

C. Item 3

Davis admitted the trench at the worksite was dug in Type C soil and that the trench was sloped at an angle steeper than one and one-half horizontal to one vertical. (Pretrial Order Attach. C.) Excavations are required to be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed in (b)(2)-(b)(4). Davis does not assert it relied on one of the alternative options listed in (b)(2)-(b)(4). Therefore, the court concludes the Secretary has established Davis failed to comply with the terms of the cited standard in Item 3.

(3) Whether Employees were Exposed to Hazard

A. Item 1

Davis admits that "[b]ased upon the working conditions at the site on June 12, 2020, an employee inside the trench should have been wearing a hard hat at all times." (Pretrial Order Attach. C.) Stephens had access to head injury hazards presented by the 9-foot trench wall and the bucket of the hydraulic excavator. Therefore, the court concludes the Secretary has satisfied the third element as it relates to Item 1.

B. Item 2

Stephens was working in a trench deeper than 4 feet. The only means of egress provided for him was a stairway cut into the Type C soil of the trench. In the event of an emergency, the unstable soil could potentially hinder or prevent his exit from the trench. The Secretary has established Stephens had access to an unsafe means of egress from the trench. Not to be dissuaded, Davis argues, "the ease by which the employee exited proved the ramp's [sic] adequacy." (Resp't's Br. at 6.) The court finds no merit in Davis's position. The Secretary "need not prove that a given employee was actually endangered by the unsafe condition, but only that it was reasonably certain that some employee was or would be exposed to that danger." *Min. Indus. & Heavy Const. Grp. v. Occupational Safety & Health Rev. Comm'n*, 639 F.2d 1289, 1294 (5th Cir. 1981).[11] "The goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors." (*Id.*) Therefore, the court concludes the Secretary has satisfied the third element as it relates to Item 2.

C. Item 3

Stephens was working in the noncompliant trench. He was exposed to the hazards presented by a cave-in, including engulfment and asphyxiation (Tr. 35-36). Therefore, the court concludes the Secretary has satisfied the third element as it relates to Item 3.

(4) Whether Davis "Knowingly Disregarded" the Act's Requirements

"The Secretary may prove that an employer had knowledge of a violation in one of two ways—(1) by imputing the actual or constructive knowledge of a supervisor or (2) by demonstrating constructive knowledge based on the employer's failure to implement an adequate safety program." *Samsson Constr., Incorp. v. Sec'y, U.S. Dep't of Lab.*, 723 F. App'x 695, 697 (11th Cir. 2018) (*citing Comtran*, 722 F.3d at 1311).

A. Item 1

Johnson testified Ortiz was standing at the edge of the trench looking down as he drove past the worksite. (Tr. 29.) The Secretary asserts that when Johnson "drove past the worksite, he observed an individual . . . inside a trench he believed was approximately eight feet deep." (Compl't's Br. at 3) (*citing* Tr. 23:12-24:3, 24:22-24). However, the cited portion of the transcript

[11] *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*) (adopting as binding precedent all published cases of the former Fifth Circuit decided prior to the close of business on September 30, 1981).

actually shows the opposite. Johnson admitted that when he drove by the worksite he "couldn't see into the hole but seeing how we had a trenching and excavation emphasis program, I turned around and came back." (Tr. 23:19-21.) Further, the record does not reflect how long it took Johnson to find a place to turn around on Barrett Parkway and drive back to the worksite. But it was only after Johnson "pulled up" that he "saw an individual inside the trench." (Tr. 23-24.)

When Johnson pulled up and got out of his vehicle, Ortiz approached and identified himself as the foreman and Johnson held an opening conference with Ortiz to explain who he was and what he was doing at the worksite. (Tr. 24; Tr. 71.) They then walked to the trench where they both observed Stephens working without a protective helmet. Exhibit C-1 is a photograph Johnson took when he first walked up to the trench. Stephens can be seen bent over inside the trench box, wearing a bandana on his head but not a protective helmet. On the sidewalk at the right edge of the trench is a white circle with a dot inside it. Johnson testified the white marking was the location Ortiz was standing when Johnson first drove by and that's also "where he was when I pulled up there." (Tr. 71-72).

However, Ortiz testified he was at his truck when Johnson drove up (Tr. 96-97). Davis's counsel questioned him regarding this time period.

> Q. [Do] you recall you went to the truck?
> A: I don't recall exactly why I went. I [had] been there, I don't know five, six, eight minutes, I don't know. But I don't recall why I went to my truck; I don't recall why.
> Q. Okay. And before you walked away from the trench to go to your truck, who if anybody was in the trench?
> A: No [one].
> . . .
> Q. Now, where were you standing or working when you first noticed Mr. Johnson?
> A: I was in my truck like I say when I see the car coming in the driveway. I just turn[ed] around to the car and I start walking . . . to him[.]
> Q. Now, where was your truck relative to the trench?
> A: Approximately maybe 40/50 feet away from the trench.
> . . .
> Q. Now, when did you first notice that anyone was in the trench?
> A: When I -- well, when I see [Johnson] coming, I start walking. And he start[ed] putting his vest and badge and everything and he told me he was OSHA. When I turn[ed] around I see [Stephens] inside the box.

(Tr. 106-08)

The Secretary's counsel attempted to impeach Ortiz's testimony. In his deposition, Ortiz testified he was at his truck when Johnson arrived onsite and got out of his vehicle. As Ortiz approached Johnson, Ortiz saw Stephens in the trench wearing his protective helmet:

> [L]ike I say I was on my truck and I watch as that guy start taking pictures. But his hardhat I know was on the other side. He had a hardhat there. It may have fall off when he -- in the front or the side, I don't know. But I mean, I can't start screaming, hey, put a hardhat on right now before he see you whatever. I know he has a hardhat in there. But I can't see in the picture.

(Tr. 113) (*quoting* from Ortiz Dep identified as pp. 80-81.). Ortiz then testified, "when I left over there when I went to the truck he had a hard hat on." (Tr. 115) (*quoting* from *id.*).

The Secretary argues these statements prove Ortiz knew before he went to his truck that Stephens was not wearing his protective helmet when he entered the trench, indicating Ortiz had seen Stephens in the trench prior to Johnson's arrival, in contradiction to his trial testimony. (Compl't's Br. at 20.) There is, however, another equally plausible explanation for Ortiz's deposition testimony. Ortiz testified that he, Stephens, and Perez had all been wearing protective helmets and safety vests since the morning of the inspection (Tr. 105). If Ortiz had seen Stephens wearing his protective helmet in the hours prior to Johnson's arrival, it was reasonable for him to assume Stephens was wearing it when he entered the trench.

Stephens corroborated Ortiz's testimony regarding his location at his truck when Stephens entered the trench. Stephens testified it was his decision to enter the trench that day after he and Perez decided to go ahead and place the trench boxes in the trench (Tr. 146-47). Stephens was asked why he was not wearing his protective helmet when Johnson arrived, and he responded, "I was -- we had lowered a piece of equipment, material, in the trench box. I was down there taking the chain off, and my hat come off. It was hot. I didn't put my hat right on after I took the chain off the piece of equipment." (Tr. 143.)

The court credits Johnson's testimony that he observed a man, later identified as Ortiz, looking down in the direction of the trench as Johnson drove by the worksite on June 12, 2020. It is unknown, however, whether anyone was in the trench at that time. Johnson testified he could not see into the trench from his vehicle as he drove by. He gave no estimate of how long it took him to find a place to turn around and drive back to the worksite. Ortiz and Stephens both maintain Ortiz was at his truck, 40 to 50 feet from the trench. When asked where Ortiz was when he pulled up, Johnson stated he was standing at the place indicated by the white marking in Exhibit C-1,

directly above the trench (Tr. 71-72). Ortiz is not, however, visible in the photograph. When asked where Ortiz was when the photograph was taken, Johnson replied, "When I took the picture, he was coming over to me." (Tr. 30.) Ortiz does not appear in any of the photographic exhibits adduced by the Secretary, and if Johnson recorded Ortiz's location at the time of his arrival in his case file notes, the Secretary did not elicit that information at trial.

Based on the record, the Secretary has not established by a preponderance of evidence that Ortiz was standing by the trench when Johnson arrived. Ortiz and Stephens both testified Ortiz was at his truck, but Stephens did not know Ortiz's location once he was in the 9-foot deep trench and focused on removing the chain from the piece of equipment. The conflicting testimony between Johnson and that of Ortiz and Stephens weighs more preponderantly on Davis's side.

The problem for the Secretary is the timing of the violative conduct. There is no reliable evidence for how long Stephens was in the trench before Johnson arrived or how long he had been in the trench without wearing his helmet. Stephens admitted that when his helmet fell off, "It was hot. I didn't put my hat right on after I took the chain off the piece of equipment." (Tr. 143.) This statement provides no information on the duration of the violation. Was it seconds, a minute, several minutes? Even if Ortiz had been standing where Johnson said he was when he arrived, Johnson testified Ortiz was walking towards him (presumably with his back to the trench) as Johnson took the first photograph (Exhibit C-1) showing Stephens in the trench without his helmet on. Ortiz testified that as soon as he saw Johnson's "car coming in the driveway, I just turn[ed] around to the car and started walking . . . to him." (Tr. 108.) Johnson stated he first realized Stephens was in the trench without his helmet "when I pulled up." (Tr. 28.) It is possible Stephens's helmet came off between the moment Ortiz turned (whether away from the trench or away from his truck) towards Johnson's vehicle as he pulled up and the moment Johnson noticed Stephens in the trench.[12] Therefore, the court concludes the Secretary has failed to establish Ortiz had actual knowledge that Stephens was not wearing his helmet while in the trench.

[12] When asked how long he was in the trench, Stephens replied, "Not long. Seconds." (Tr. 142.) Stephens's estimate is clearly incorrect. Johnson testified, "Stephens was in there probably about four to five minutes when I first got there and he came out of the trench when I asked him if he could come out of the trench." (Tr. 29.) Ortiz, who assisted Johnson with taking measurements of the trench, corroborated Johnson's timeline, responding "Yes" to the question, "And the whole time that OSHA Officer Johnson was there taking pictures and making measurements and asking you to put the . . . ladder into the trench, Mr. Stephens is still in the excavation without his hardhat, right?" (Tr. 101.) The record does not indicate whether Stephens put his helmet back on during

For the reasons indicated *infra*, the court concludes the Secretary also failed to establish Ortiz had constructive knowledge since the Secretary has failed to show that with the exercise of reasonable diligence, Ortiz could have known of the violative conduct. As the Commission has noted, "[a]bsent evidence showing how long the violative condition existed, we are unable to evaluate whether a reasonably diligent inspection by the foreman … would have informed [the company] of the deceased employee's failure to tie off." *Thomas Indus. Coatings, Inc.,* 23 BNA OSHC 2082, 2086 (No. 06-1542, 2012). The Commission has also held reasonable diligence does not require employers to detect every instance of violative conduct on its worksite.

> The thrust of the Secretary's argument seems to be that the very fact the violations occurred proves Stahl's supervision was inadequate. However, an "employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard." *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30653, p. 42,527 (No. 91-3467, 1995) (emphasis in original).

Stahl Roofing, Inc., 19 BNA OSHC 2179, 2182 (Nos. 00-1268 & 00-1637, 2003).

For the reasons indicated *infra*, the court also concludes the Secretary failed to establish Ortiz had constructive knowledge "based upon the employer's failure to implement an adequate safety program . . . with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable" by "a showing of lax safety standards[.]"*ComTran Grp.*, 722 F.3d at 1308, 1304.

The Commission has held the factors to be considered for evaluating the adequacy of a safety program under constructive knowledge are the same as for evaluating the affirmative defense of unpreventable employee misconduct. *See Burford's Trees, Inc.*, 22 BNA OSHC 1948, 1952 (No. 07-1899, 2010). In the Eleventh Circuit, to establish this defense, an employer must "prove that it had (1) established work rules designed to prevent the violations; (2) adequately communicated those rules to its employees; (3) taken steps to discover violations; and (4) where it had discovered violations, had effectively enforced the rules." *Crowther Roofing & Sheet Metal*

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this time. However, the court does not weigh Ortiz's failure to immediately instruct Stephens to don his helmet as a factor in determining whether he had actual knowledge of the violative conduct. Ortiz was the sole supervisor onsite when Johnson arrived. He was in the presence of a safety professional. It is not surprising Ortiz took his cues from Johnson. The fact Johnson waited approximately five minutes, after taking photographs and measurements, before instructing Stephens to exit the trench reflects more poorly on Johnson than on Ortiz.

of Fla. v. Occupational Safety & Health Rev. Comm'n, 454 F. App'x 774, 776 (11th Cir. 2011). Therefore, if the Secretary relies on an alleged lax safety program to establish constructive knowledge, the Secretary must prove at least one of those factors was missing from Davis's safety program.

At the time of the inspection, Davis had a written Safety and Health Manual with rules designed to prevent the violative conduct and conditions cited in this case (Ex. C-11, pp. 26, 28, 42, 57). Davis adequately communicated these rules to its employees by initial orientation upon hiring, refresher courses, and weekly toolbox talks (Ex. C-14; Tr. 84-85). Davis took reasonable steps to discover safety infractions. Superintendent King inspected worksites two to three times a week (Tr. 80). Safety manager Norton also conducted worksite inspections and completed inspection forms (Ex. R-29; Tr. 81, 176-80). Johnson conceded Davis's safety program met the first three elements of the adequacy test but found it lacking in effective enforcement.

> The actual written program looked good to me; the enforcement didn't. . . . [Davis] had everything on the written program telling them what to do. . . . The enforcement was inadequate.

(Tr. 73-74). "To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred." *Gem Indus., Inc.,* 17 BNA OSHC 1861, 1864 (No. 93-1122, 1996).

> The conventional way to prove the enforcement element is for the employer to introduce evidence of a disciplinary program by which the company reasonably expects to influence the behavior of employees. For instance, an employer may provide evidence of a progressive disciplinary plan consisting of increasingly harsh measures taken against employees who violate the work rule. . . . To prove that its disciplinary system is more than a "paper program," an employer must present evidence of having actually administered the discipline outlined in its policy and procedures.

Precast Servs., Inc., 17 BNA OSHC 1454 (No. 93-2971, 1995). Here, at the time of the inspection, Davis had a disciplinary program:

> **Enforcement - Progressive Discipline Procedures**
>
> Project Managers, Superintendents, or any employee found violating any of the safety and health policies outlined in the Safety and Health Manual, or participating in any other hazardous activity on the job site or while performing activities for the company, will be subject to the following progressive discipline procedures.
>
> **First Violation**: A written warning, followed by an explanation and/or training.

Second Violation: A written warning, management review of written warning; followed by one of the following actions:
- Suspension, without pay
- Subject to termination

Third Violation: Subject to termination

(Ex. C-11, p. 11).

Davis produced evidence that it administered the disciplinary program when its employees violated its safety rules. Davis empowers foremen and superintendents with the authority to discipline and fire employees whom they discover engaging in violative conduct (Tr. 78, 80-81). On May 7, 2019, Davis safety manager Troy Norton issued a written warning to Ortiz for violations of the excavation standards (Ex. C-13; Tr. 81). Davis adduced evidence of other written warnings given to its employees prior to the June 12 inspection (Ex. R-32 through Ex. R-34). Therefore, the Secretary has also failed to establish Davis had constructive knowledge by showing it had a lax safety program. Accordingly, Item 1 of the Citation must be vacated.

B. Item 2 and Item 3

For the same reasons discussed *supra* related to actual knowledge of the protective helmet violation in Item 1, the court also concludes the Secretary failed to establish Ortiz, and therefore Davis, had actual knowledge of the violative conditions of the trench cited in Items 2 and 3. For the same reasons discussed *supra*, the court also concludes the Secretary has failed to establish Davis had constructive knowledge by showing it had a lax safety program.

The issue then is whether the Secretary established Ortiz had constructive knowledge of the violative conditions. The court concludes the Secretary failed to establish Ortiz had constructive knowledge by showing that with the exercise of reasonable diligence, he could have known of the violative conduct cited in Items 2 and 3. Ortiz testified that in 2020, he and his crew generally performed excavation work to install pipes and water meters. Most of the excavations they dug were fewer than 4 feet deep (Tr. 76-77). The Davis crew was at the worksite the day before the OSHA inspection. They discovered the pipe they needed to access was approximately 8 feet. To compensate for the increased depth, they planned to stack two trench boxes in the trench for cave-in protection. Each trench box was approximately 5 feet high and 7 feet wide (Pretrial Order Attach. C, p. 12; Tr. 90-91).

Ortiz and his crew arrived at the worksite on Friday, June 12, 2020, between 7:30 and 8:00 a.m. Their assignment for the day was to excavate the trench and place trench boxes in it. Superintendent King stopped by that morning and dropped off the two trench boxes (Tr. 79, 92). He left before Ortiz's crew excavated the trench (Tr. 80). Ortiz instructed operator Perez in how to dig the trench, a task that took four to six hours to complete (Tr. 102). Ortiz testified his crew had planned to place the trench boxes in the trench "because it was Friday and [someone] said somebody can steal it and we better put it in there and then we can go home." (Tr. 96.) Ortiz testified his crew planned to stack the trench boxes in the trench, using tubing "pins" to connect the boxes and secure them. He stated his crew placed the pins in the top of the trench box (visible in Exhibit C-8 at the four corners of the trench box) before the trench box was placed in the trench (Tr. 109).

Both trench boxes were in the trench when Johnson arrived at the worksite (Ex. C-1, Tr. 146-47). Stephens testified that he and Perez decided to place the trench boxes in the trench without waiting for instruction from Ortiz (Tr. 147). Stephens stated he and Perez had lowered a piece of equipment they planned to install Monday into the trench. He entered the trench to remove the chain from the equipment and to place it in one of the trench boxes for safekeeping over the weekend (Tr. 150). Stephens was performing this task when Johnson took the photographs admitted into the record.[13]

Davis argues that the only assignment for Ortiz's crew that day was to excavate the trench and stack the trench boxes in it, in preparation for installing the water meter on Monday. There was no expectation an employee would enter the trench. The crew had dug out a stairway for ingress and egress, a violation when done in Type C soil, which shows an intent to use it to enter and exit the trench. But Stephens testified, without contradiction, that the crew had prepared the trench and left it open over the weekend so that on Monday they could install the water meter (Tr. 151). If employees used the dirt stairway Monday to enter and exit the trench, Ortiz could be

[13] There are gaps in the record pertaining to important facts. The process for placing the trench boxes in the trench is not described. Was it necessary for an employee to enter the trench to facilitate their placement? Shovels and other equipment are visible in the trench boxes in Exhibits C-1, C-3, and C-7. Did Stephens perform work in addition to removing the chain from the piece of equipment he stored in trench box? These lines of inquiry were not developed at trial. The court is left with an incomplete picture of what transpired at the worksite before Johnson arrived on June 12.

charged with knowledge of their conduct, because he knew that day's assignment required employees to enter the trench. However, Items 2 and 3 do not cite hypothetical future behavior. On June 12, 2020, Ortiz was unaware one of his crew would enter the excavation.

"Whether a condition is readily observable and how long it existed are relevant in determining whether the condition would have been discovered with the exercise of reasonable diligence." *MasTec N. Am., Inc.,* No. 15-1574, 2021 WL 2311875, at *4 (OSHRC Mar. 2, 2021). Ortiz stated he was at his truck, which was 40 to 50 feet from the trench. According to his testimony, he was at his truck for five to eight minutes at the time Stephens entered the trench (Tr. 106). In the example cited in *ComTran*, the Commission found constructive knowledge when a supervisor was 10 feet from the violative conduct. Here, however, the court concludes the length of time and distance was not such that Ortiz should have known with the exercise of reasonable diligence that Stephens had entered the trench. Thus, Items 2 and 3 of the citation must also be vacated. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Items 1, 2, and 3 of the citation are **VACATED** and no penalties are assessed.

SO ORDERED.

/S/
JOHN B. GATTO, Judge

Dated: February 14, 2023
Atlanta, GA