



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

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 10-2096

UNITED CONTRACTORS MIDWEST, INC.,
d/b/a R.A. CULLINAN & SON,

Respondent.

ON BRIEFS:

Stacy M. McGuire, Attorney; Heather Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Julie O'Keefe, Esq.; Armstrong Teasdale LLP, St. Louis, MO
For the Respondent

DECISION

Before: ATTWOOD, Chairman; and MACDOUGALL, Commissioner.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued United Contractors Midwest, Inc., a citation alleging a willful violation of 29 C.F.R. § 1926.652(a)(1) for failing to protect employees working in an excavation from cave-ins.¹ Administrative Law Judge Patrick B. Augustine affirmed the violation as willful and assessed a \$63,000 penalty. On review, we consider the two issues United raises with regard to this citation item—the company's unpreventable employee misconduct (UEM) defense and the willful characterization.²

¹ The cited provision states that "[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system" 29 C.F.R. § 1926.652(a)(1).

² United also sought review of the judge's affirmance of a serious violation of the OSH Act's general duty clause, 29 U.S.C. § 654(a)(1), for exposing employees to a struck-by hazard posed

United was replacing a section of road in East Peoria, Illinois, which involved relocating and installing sewers. An OSHA compliance officer visited the worksite and saw two United employees working in the north end of an approximately 70-foot-long excavation—where the excavation was between 13 and 17 feet wide and ranged in depth from 7 to 8 feet. The CO also observed two United supervisors—foreman/site supervisor Jim Davis and his supervisor, superintendent/project manager Ken Volk—standing at the excavation’s edge. The record shows that Davis tested the soil that day, classified it as Type A,³ and filled out an excavation entry permit required by United specifying that “benching” would be the method of cave-in protection. No benching was being used at the north end, however, and the parties agree that the soil was previously disturbed and, therefore, Type B. Additionally, the CO measured the slope of the excavation’s southeast wall at 72 degrees, the north wall at 40 degrees, and the southwest wall at between 80 and 87 degrees.

United’s risk department manager/corporate safety director Scott Ketcham and regional risk manager Kevin Wilkins had visited the worksite in the ten days prior to the OSHA inspection. During their visits, both reminded Davis of the excavation standard’s requirements. On the day of the inspection—prior to the CO’s arrival—United construction manager Earl Koch told Davis to make sure “if they [dug] deeper,” that the sides of the excavation were sloped. The day after the inspection, United fired Davis, who had worked for the company and its predecessor for more than twenty years (fourteen of them as a foreman), for failing to ensure that the excavation was properly sloped and/or benched. Volk, who had been a project manager for the company and its predecessor for twenty years, was reprimanded, and his bonus for that year was reduced.⁴

by an excavator. The Commission did not include this citation item in its briefing notice; so, we do not address it on review.

³ Soil type is relevant to whether a protective system is required. If the soil is found to require a protective system, its specific type is relevant to the amount of protection that will be required. *See* 29 C.F.R. § 1926.652(a) & app. B. When sloping and/or benching is used as a protective system, the soil type is a factor in determining the permissible configuration. *Id.*

⁴ Prior to 2001, both Davis and Volk worked for R.A. Cullinan & Son, which that year combined with two other companies to form United. United continued to do business as R.A. Cullinan, and the judge found “a clear nexus between the two entities, as well as substantial continuity” Neither party takes issue with this finding.

In affirming the § 1926.652(a)(1) violation, the judge rejected United’s UEM defense, finding that while the company showed that it had work rules in place, adequately monitored for compliance with those rules, and disciplined employees when violations were found, the company failed to communicate the rules to employees. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003) (“To establish [UEM], the employer must show that it: (1) has established work rules designed to prevent the violation; (2) has adequately communicated the rules to its employees; (3) has taken steps to discover violations of the rules; and (4) has effectively enforced the rules when violations were detected.”). On review, the Secretary agrees that United had established work rules designed to prevent the excavation violation. As for the defense’s second element, we find that the judge erred in concluding that United failed to adequately communicate these rules.

The judge found that United’s “failure [was] not adequately communicating *who* is responsible for ensuring the safety and health of the employees at the worksite,” basing this finding on testimony from Davis and Volk showing that “at each level of supervision the responsible person claimed to be relying on the person below him,” and on the fact that “both supervisory personnel . . . failed to address a clear violation of the excavation standard.” However, the judge’s focus on Volk’s and Davis’s conduct on the day of the OSHA inspection with regard to the second element of the UEM defense, and what he characterized as a “ ‘pass the buck’ mentality,” is misplaced. Inadequate communication is not established by proof of noncompliance with a standard—indeed, the very concept underlying the UEM defense is that employee “failure[s] . . . to comply with the applicable standards [have] occurred *despite* a vigorous program of safety education”⁵ *L.E. Myers Co.*, 16 BNA OSHC 1037, 1042 (No.

⁵ On review, the Secretary cites four cases as support for the judge’s finding that Davis’s and Volk’s failure to take excavation safety precautions establishes that United failed to effectively communicate its safety rules. One of these cases is a judge’s decision, which was not reviewed by the Commission, *Daisy Constr. Co.*, 23 BNA OSHC 2244 (No. 10-2248, 2012) (ALJ), and is therefore not binding precedent. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4049, 1976). Although the judge’s decision in *Daisy* was affirmed on appeal, the D.C. Circuit’s opinion was unpublished, and it did not explicitly address the UEM defense’s communication element. *Daisy Constr. Co. v. Sec’y of Labor*, 527 F. App’x 1 (D.C. Cir. 2013) (unpublished). The remaining three cases do not support the judge’s rationale. In *Paul Betty*, the Commission noted—in ruling that employees “w[ere] not adequately instructed”—that the supervisor “did not recognize the scaffold’s deficiencies until informed of them by the [OSHA] compliance officer,” but there the employer conceded that the supervisor “was ‘ignorant’ of the OSHA standards.”

90-945, 1993) (emphasis added). Rather, in assessing the adequacy of communication, the Commission considers evidence of whether and how work rules are conveyed. *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1823 (No. 78-5159, 1986); *see also Floyd S. Pike Elec. Contractor, Inc.*, 6 BNA OSHC 1675, 1678 (No. 3069, 1978) (finding adequate communication where the employer “issue[d] an employee manual to each of its employees,” the equipment had decals containing work instructions, and the foreman attended a safety meeting two weeks before the violations); *Interstate Brands Corp.*, 20 BNA OSHC 1102, 1104 (No. 00-1077, 2003) (finding adequate communication based on employee’s receipt of lockout/tagout training).

Here, the record establishes that United communicated its excavation work rules to its employees, including Davis and Volk. United conducted orientation for new employees, as well as onsite toolbox talks and annual training sessions that included instruction on excavation safety. The record also shows that both Davis and Volk attended the five annual supervisory training sessions preceding the OSHA inspection at issue here. Further, Ketcham and Wilkins had reminded Davis of the excavation standard’s requirements in the days prior to the inspection, and Koch told Davis on the day of the inspection to make sure to slope the sides if the excavation was dug deeper. In light of this record evidence, we conclude that the judge erred in finding that United failed to establish the second element of the UEM defense.

Nevertheless, for the reasons discussed in our separate opinions below, we are divided regarding the final two elements of the UEM defense. To resolve this impasse, we agree to vacate the direction for review, thereby allowing the judge’s decision to become the final appealable order of the Commission, with the precedential value of an unreviewed administrative law judge’s decision.⁶ *See, e.g., Texaco, Inc.*, 8 BNA OSHC 1758, 1760 (No. 77-3040, 1980)

9 BNA OSHC 1379, 1383 (No. 76-4271, 1981). In *National Realty & Construction Co. v. OSHRC*, the court stated that “the fact that a foreman would feel free to breach a company safety policy is strong evidence that *implementation* of the policy was lax,” not that communication of the rule, specifically, was lacking. 489 F.2d 1257, 1267 n.38 (D.C. Cir. 1973) (emphasis added). Finally, in *Brock v. L.E. Myers Co.*, the court stated that “negligent behavior by a supervisor . . . raises an inference of lax enforcement and/or communication of the employer’s safety policy,” but the court was not ruling specifically on the UEM defense’s communication element. 818 F.2d 1270, 1277 (6th Cir. 1987).

⁶ We note that in its brief on review, United requested a stay of enforcement “during the review of this case.” This request, however, does not comply with Commission Rule 40(a), which prohibits motions from being “included in another document, such as a brief . . .” 29 C.F.R.

(consolidated); *Rust Eng'g Co.*, 11 BNA OSHC 2203, 2205 (No. 79-2090, 1984); *Safeway, Inc.*, 20 BNA OSHC 1021, 1023 (No. 99-0316, 2003); *Timken Co.*, 20 BNA OSHC 1070, 1072 (No. 97-0970, 2003). *See also* 29 U.S.C. §§ 659(c), 660(a)-(b), 661(i). Accordingly, the direction for review is vacated. The separate opinions of the two Commission members follow.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

Dated: October 28, 2016

/s/
Heather L. MacDougall
Commissioner

§ 2200.40(a). In any event, under section 10(b) of the OSH Act, the employer is not required to abate while the case is pending before the Commission. *See* 29 U.S.C. § 659(b) (abatement “period shall not begin to run until the entry of a final order by the Commission in . . . any review proceedings . . . initiated by the employer in good faith . . .”). If United chooses to appeal the judge’s decision to a Circuit Court of Appeals, the company may request a stay from that court. *See* 29 U.S.C. § 660(a) (“Upon [the] filing [of a petition with the Court of Appeals], the court . . . shall have power to grant such temporary relief or restraining order as it deems just and proper . . .”). We therefore deny United’s request.

Separate Opinion of Chairman Attwood

ATTWOOD, Chairman.

I would reject United's UEM defense because the company has not demonstrated that the misconduct of five employees—one of whom was a twenty-plus-year veteran employee who had been a foreman for his last fourteen years and another a twenty-year veteran superintendent—was unpreventable. It is undisputed that United failed to properly slope the sides of an excavation in which two employees were working while United foreman/site supervisor Jim Davis and his immediate supervisor, superintendent/project manager Ken Volk, stood by and did nothing to protect the exposed employees in their charge from a cave-in hazard. The evidence shows that both men stood at the edge of the excavation watching the work. United defends the conduct of its supervisory personnel, effectively endorsing their reliance on a “pass the buck” mentality that left exposed employees to fend for their own safety. These supervisory failures preclude the company from establishing the final two UEM elements, which require adequate monitoring for compliance with the company's work rules and enforcement of those rules. Accordingly, I would affirm the § 1926.652(a)(1) violation. And based on the plain indifference to employee safety demonstrated by the United's supervisors' inaction, I would characterize this violation as willful.

“[T]he proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program.” *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987). An effective program requires “a diligent effort to discover and discourage violations of safety rules by employees.” *Paul Betty*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981). Here, the judge concluded, with little discussion, that United took steps to discover and discourage violations of its safety rules based on inspections by its risk management team and documentation of disciplinary actions introduced at the hearing. I disagree with the judge's analysis of the evidence. In my view, the record establishes that United failed to effectively implement its safety program, as exhibited by the dereliction of both Davis and Volk, who observed and ignored unsafe conditions on the day of the OSHA inspection. *See Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991) (“A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax,” because “it is the supervisor's duty to protect the safety of employees under his supervision.”), *aff'd*, 978 F.2d 744 (D.C. Cir. 1992) (unpublished).

That Davis and Volk stood together at the edge of an obviously noncompliant excavation while watching employees work inside it and did nothing to protect them reveals an utter breakdown in the company's supervision. This supervisory breakdown began with Davis's incorrect classification of the soil as Type A. It is elementary that the presence of utilities in an excavation indicates that the soil has been previously disturbed and, therefore, cannot be classified as Type A. Nonetheless, despite completing the company's own Excavation Entry Permit that plainly prohibits classifying previously disturbed soil as Type A, Davis did just that. *See* 29 C.F.R. Pt. 1926, subpt. P, app. A (no soil is Type A that has been previously disturbed). And even if Davis's evaluation of the soil had been correct, the sloping of two of the excavation's walls (72 and 80-to-87 degrees) was still between 19 and 34 degrees steeper than what the standard permits for Type A soil. *See* 29 C.F.R. Pt. 1926, subpt. P, app. B (maximum allowable slope for Type A soil is 53 degrees; for Type B soil is 45 degrees). Nevertheless, even in the face of two employees working at a depth of 7 to 8 feet and adjacent to nearly-vertical walls, Davis never measured any slope, instead "assum[ing] that [the excavation] was" compliant because his excavator operator "usually was good at" sloping.¹ As for Volk, he testified that he was watching the excavation but did not "pa[y] careful attention to the sloping," did not have the experience that would enable him to determine the proper slope, and did not know what type of cave-in protection was appropriate.² Rather than make any affirmative attempt to verify whether Davis had properly executed his competent person duties, Volk "trust[ed] [his] labor foremen to assure that [the excavation was] properly sloped or benched or whatever is required."

United's compliance efforts broke down at multiple levels. The excavator operator improperly sloped the sides of the excavation, and two laborers entered and worked in a visibly noncompliant excavation. Davis, as the foreman and competent person, made no effort to verify that the excavator operator had complied with the excavation standard or to remove the two employees from the noncompliant areas of the excavation. And Volk, as Davis's supervisor, stood by and watched the work in the excavation without evaluating Davis's supervision of his crew and ensuring that Davis was not shirking his competent-person responsibilities by ceding

¹ Nearly-vertical walls in excavations more than five feet deep without protective systems are permissible only in "stable rock." 29 C.F.R. Pt. 1926, subpt. P, app. B, tbl. B-1.

² It strains credulity that Volk did not even possess a rudimentary understanding of OSHA sloping requirements, especially when, by his own admission, 70 percent of his projects for United involved excavations.

responsibility to his subordinates. In these circumstances, United cannot claim that it has effectively implemented its safety program by discovering and discouraging rules violations. See *Archer-Western*, 15 BNA OSHC at 1017 (“When the alleged misconduct is that of a supervisory employee, the employer must . . . establish that it took all feasible steps to prevent the accident, including adequate . . . supervision of its [supervisory] employee.”); *Atl. & Gulf Stevedores, Inc.*, 3 BNA OSHC 1003, 1010-11 (No. 2818, 1975) (consolidated) (“[T]he Act places the final responsibility for compliance on the employer,” and so employers cannot “evade their responsibilities by shifting them onto their employees.”), *aff’d*, 534 F.2d 541 (3d Cir. 1976).

Furthermore, there is no merit to United’s contention that Volk’s role is irrelevant to its alleged UEM defense, or to my colleague’s assertion that ascribing any supervisory responsibility to Volk would create a new “absolute duty of guaranteeing compliance at all times” The company contends that its written excavation safety program places primary compliance responsibility on its foremen, and that OSHA’s excavation standard makes the “competent person” responsible for “[d]aily inspections of excavations,” which could result in “employees [being] removed from the hazardous area.” 29 C.F.R. § 1926.651(k)(1)-(2). According to United, because Davis was the foreman and competent person, it was his misconduct alone that led to the violation. But any claim that Volk lacked excavation safety responsibilities is belied by record evidence showing that, at United’s behest, he attended the five annual supervisory training sessions preceding the OSHA inspection at issue here, as well as a superintendent training session held six months before the inspection, and every one of those sessions included excavation safety instruction. In addition, 70 percent of Volk’s projects for United involved excavations. And my colleague’s assertion that a new duty would be imposed appears to overlook the critical fact that, although Volk was not required to be onsite at all times continually overseeing the work, on this occasion he was there, stood with Davis at the edge of the excavation at the time of the violation, and took no action. As Davis’s “*direct boss*,” it is simply not credible that United would train Volk on excavation safety, and yet deprive him of authority over the very supervisors the company charges with ensuring excavation safety compliance. Also, the company boasts that, as a direct result of his failure to comply with the company’s safety requirements here, it not only required Volk to appear before its board of directors to be orally reprimanded, it also reduced his annual bonus because, as United risk manager Scott Ketcham admitted, he was responsible for making sure Davis was doing his job

correctly.³ Because it is inconceivable that such disciplinary measures would be imposed absent a determination that Volk bore some responsibility to address the conditions he observed, the company must have concluded that he failed to take appropriate action.⁴ *Stark Excavating, Inc.*, 24 BNA OSHC 2218, 2221-22 (No. 09-0004, 2014) (consolidated) (rejecting UEM defense, finding non-compliance by supervisors/competent persons responsible for worksite condition is “strong evidence” of lax enforcement), *aff’d on other grounds*, 811 F.3d 922 (7th Cir. 2016); *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001), *aff’d per curiam*, 53 F. App’x 122 (D.C. Cir. 2002) (unpublished) (same); *Manganas Painting Co.*, 21 BNA OSHC 1964, 1998 (No. 94-0588, 2007) (rejecting UEM defense, finding lack of reasonable diligence to discover or enforce work rule violations when noncompliant condition is in plain view of foreman and company owner).

Moreover, assessing Volk’s supervision of Davis would not, as my colleague insists, “create a new obligation for all employers . . . to have the work of a competent person monitored by a *second* competent person.” In asserting what amounts to an unpreventable supervisory misconduct defense, the company is required to show “adequate . . . supervision of its supervisor.” *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982); *see also Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1321 (No. 86-351, 1991) (“[A] supervisor’s knowledge of the violations . . . is imputable to the employer . . . unless the employer establishes that it took all necessary precautions to prevent the violations, including adequate instruction and supervision of its supervisor.”). Accordingly, Volk’s conduct is relevant here because United itself claims that the violation was due to the misconduct of Davis—the competent person *and* Volk’s direct subordinate—*not* because Volk was required to be a “second competent person.”

United also contends that it limited supervisory authority over excavation safety matters exclusively to its risk managers.⁵ Had United’s program, in fact, operated this way, the company

³ United also notes that “[d]epending on the nature of the offense,” its disciplinary policy gives “substantial latitude to jump steps” in imposing discipline, which the company highlights as “what happened to Volk” here.

⁴ As my colleague notes, “United disciplined Davis and Volk for their failures on the day of the inspection.”

⁵ United’s written excavation safety program states that foremen/site supervisors such as Davis “report to the Regional Manager of their operating area,” who is then responsible for “insur[ing] that all aspects of the Excavation Safety Program are being followed” The record, however, shows only that each United Regional Manager was “in charge of the entire region,” and does

must show that occasional visits by its risk managers constituted adequate supervision of Davis. *See Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991) (employer must present “evidence to show that it took . . . measures to monitor adherence to safety rules by supervisory employees”). Contrary to my colleague’s contention, the company has not made this showing. United has five employees in its risk management department—risk managers Scott Ketcham and Kevin Wilkins, as well as a safety officer and two liability claims specialists—who visit the company’s various worksites and ensure compliance with work rules. Although the team does conduct unannounced worksite visits, the record shows that Ketcham’s only visit to the worksite at issue here was when “there wasn’t any trenching going on.” And while Wilkins stated that he visited “portion[s] of the [Route 8] jobsite” several times in the year prior to the events here,⁶ his two visits to this particular worksite occurred when this part of the project was in its “early stages;” when workers “were just removing pavement and starting to tie back into the existing storm sewer.” Thus, none of the risk managers’ three visits to this worksite involved an assessment of Davis’s compliance with United’s excavation safety rules.

This failure to adequately supervise Davis was apparently longstanding. Wilkins testified that he had, on prior occasions, visited excavation worksites at which Davis was the foreman, and “[n]ever ha[d] any problems with Mr. Davis’[s] work prior to [the day at issue here] with regard to compliance with OSHA requirements.” The record shows, however, that, despite Davis’s more than twenty years of experience with United and its predecessor, fourteen of those years as a foreman and at least ten of them as a competent person, he was apparently incapable of correctly classifying the soil in an excavation with utilities, misunderstood his excavation safety responsibilities in the company, and did not recognize that a nearly vertical wall was improperly sloped. Incredibly, even as late as the hearing in this case, more than two years after the OSHA inspection, Davis “still th[ought] [the excavation] was in compliance.” Moreover, the record is silent regarding whether any of these visits occurred when protective systems were

not indicate whether this geographic area of responsibility allowed for effective supervision of the foremen. In the absence of these facts, I would find that this arrangement was not sufficient to carry United’s burden of proof on the UEM issue.

⁶ The record indicates that the worksite at issue here was part of the larger “Route 8 Project,” other parts of which had begun almost a year earlier.

actually required in the excavations Davis oversaw.⁷ See *S.W. Bell Tel. Co.*, 19 BNA OSHC 1097, 1098-99 (No. 98-1748, 2000) (finding failure to monitor where “there [was] no evidence that [the employer] enforc[ed] the competent person’s obligation to perform trench inspections”), *aff’d*, 277 F.3d 1374 (5th Cir. 2001) (unpublished). And Wilkins’s ringing endorsement of Davis’s prior work stands in stark contrast to Davis’s immediate termination on the day after the OSHA inspection.⁸

My colleague makes a number of arguments concerning circularity of reasoning and the rudiments of the UEM defense. But none of these arguments address the basic fact of this case: a foreman and his direct supervisor did nothing as they stood by and watched—in *real time*—as two employees worked in a noncompliant excavation; they neither stopped the work nor removed the employees from danger. This is the antithesis of “*unpreventable*” misconduct. The absence of any effective monitoring for compliance with work rules or enforcement of those rules could not be more evident; nor could it be made more obvious than by United’s discipline of Davis and Volk for their failures that day. *E.g.*, *Daniel Constr.*, 10 BNA OSHC at 1552 (UEM defense more difficult to establish when supervisory employee is involved because “it is the supervisor’s duty to protect the safety of employees under his supervision”); *Archer-Western*, 15 BNA OSHC at 1017 (supervisory misconduct is strong evidence of lax safety program because supervisor is responsible for protection of employees). In these circumstances, I would reject United’s UEM defense and affirm the § 1926.652(a)(1) citation item.

⁷ The judge found that United also ensured compliance with work rules based on the company’s hiring of an independent safety auditor. The record shows, however, that this auditor was hired by United’s predecessor company in response to an OSHA citation issued four years prior to the one at issue here, and that the auditor was under contract for only six to eight months. Accordingly, this arrangement is irrelevant.

⁸ This makes one wonder—could Wilkins’s failure to find violations at Davis’s worksites be just that, a failure on the part of United’s risk management department to adequately supervise the company’s safety efforts? Frankly, it is difficult to see how United can have it both ways. Can a company have, as my colleague apparently believes, a stellar risk management program with a team competently and frequently conducting comprehensive safety inspections, and yet somehow keep on its payroll for more than twenty years (fourteen as a foreman in charge of safety) an employee unable to properly classify previously disturbed soil, who then commits a safety infraction (his first, apparently, given that the risk management program never found any problems with his work) so alarming to the company that it concludes immediate termination is warranted?

Moreover, I would affirm this violation as willful. “Willful violations are ‘characterized by an intentional or knowing disregard for the requirements of the Act or a “plain indifference” to employee safety, in which the employer manifests a “heightened awareness” that its conduct violates the Act or that the conditions at its workplace present a hazard.’ ” *Barbosa Grp., Inc.*, 21 BNA OSHC 1865, 1868 (No. 02-0865, 2007) (quoting *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1261 (No. 98-0701, 2003)), *aff’d*, 296 F. App’x 211 (2d Cir. 2008) (unpublished). A supervisory employee’s state of mind “may be imputed to the employer for purposes of finding that [a] violation was willful.” *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000). United claims that the evidence here suggests a simple lack of diligence on the part of Davis and Volk. I would disagree.

As noted, in the face of a nearly-vertical excavation wall, Davis and Volk—both of whom had a heightened awareness of the excavation requirements given their extensive training and Davis’s status as a competent person—did absolutely nothing to protect the workers inside the excavation, who at least could have been evacuated. Instead, they relied on their non-supervisory subordinates to handle compliance with company rules and OSHA requirements. In the face of this unmistakably violative condition, I would have no trouble agreeing with the Secretary that this inaction shows plain indifference to the safety of the employees in their charge. *See Stark Excavating, Inc. v. Perez*, 811 F.3d 922, 924 (7th Cir. 2016) (affirming willful characterization of § 1926.652(a)(1) violation in which foreman, “from a vantage point at the top edge of the hole, observed [an employee] working there for approximately 10 minutes,” but “took [no] action to slope the excavation so as to comply with the requirements of the Act”); *Lakeland Enters. of Rhineland, Inc. v. Chao*, 402 F.3d 739, 747-48 (7th Cir. 2005) (“[I]gnoring obvious violations of OSHA safety standards amounts to ‘plain indifference’ for purposes of a finding of willfulness.”) (citing *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 373 (7th Cir. 1997)). Accordingly, I would affirm a willful violation of § 1926.652(a)(1), and assess the undisputed \$63,000 penalty assessed by the judge. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (assessing proposed penalty where undisputed).

Dated: October 28, 2016

/s/ _____
Cynthia L. Attwood
Chairman

Separate Opinion of Commissioner MacDougall

MACDOUGALL, Commissioner:

After United Contractors Midwest petitioned for review of the judge's decision affirming a willful citation item and one serious citation item, the Commission asked for briefing on only the alleged willful violation of 29 C.F.R. § 1926.652(a)(1) and only with regard to two issues—whether United established its unpreventable employee misconduct (UEM) defense and, if not, whether the judge erred in characterizing the violation as willful. As noted in our joint opinion, under Commission precedent, an employer can defend against the Secretary's showing of a violation by asserting UEM, which requires the employer to prove that it has: (1) established work rules designed to prevent the violation; (2) adequately communicated those rules to its employees; (3) taken steps to discover violations; and (4) effectively enforced the rules when violations have been discovered. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080-81 (No. 99-0018, 2003). My colleague and I agree that United has established the first and second elements of the UEM defense.

For the reasons detailed below, I would also find that United has established the third and fourth elements of the UEM defense; therefore, I would vacate the citation alleging a willful violation of § 1926.652(a)(1). My colleague, on the other hand, would reject United's defense and would create a new obligation for all employers in complying with the cited excavation standard—to have the work of a competent person monitored by a *second* competent person—the responsibilities for which she would automatically designate to any higher-level supervisor on-site. Clearly, such an obligation is not contemplated by the cited standard.

BACKGROUND

The excavation at issue, which was part of United's 1.25-mile-long "Route 8 Project," was dug the day of the April 20, 2010, OSHA inspection for the purpose of installing a new sewer line and manhole. While the excavation was 65 to 70 feet long, two discrete parts are addressed by the § 1926.652(a)(1) citation item—southwest and southeast of the manhole that was being installed at the far north end of the excavation.

When OSHA's compliance officer first arrived on the worksite, United's foreman/site supervisor Jim Davis and superintendent/project manager Ken Volk were standing next to the excavation, with two employees inside it. Volk had arrived at the excavation ten to twenty minutes before OSHA's arrival and had last been at the site earlier in the day, before the area

around the manhole was excavated. Davis did not measure the slopes of the excavation walls on the day of the inspection, but he indicated the expected depth (more than five feet), took a soil sample, classified the soil type, and completed an excavation entry permit, signing it as the “competent person.”¹ Prior to OSHA’s arrival, Davis did not notice that portions of the excavation were noncompliant.² Davis, who had been a foreman for United for approximately fourteen years and a competent person for at least ten, was the worksite’s competent person on the day of the inspection.³ Davis’s work as the competent person was overseen by United’s risk management department, which included a risk manager/corporate safety director—Scott Ketcham—and four regional managers—in this region, Kevin Wilkins.

Part of United’s safety program included an 85-page excavation safety manual. The excavation safety manual lays out the duties of a competent person in the various aspects of excavation safety, and it requires the competent person to “conduct a pre-excavation planning meeting for trenches five feet or more in depth prior to beginning any excavation work,”

¹ As noted in the joint opinion, Davis classified the soil incorrectly as Type A. This fact is not in dispute. Even so, I would not find, as would my colleague, that this shows Davis was “incapable of correctly classifying the soil in an excavation.”

² Davis testified that he had worked with the excavator operator who dug the excavation that day repeatedly over the course of twenty years and the operator was adept at properly sloping excavation walls. However, Davis’s testimony indicates that he understood he was responsible for worksite compliance with United and OSHA excavation safety requirements. My colleague quotes Davis’s testimony objecting to his termination for the misconduct, as claiming he “still th[ought] [the excavation] was in compliance.” Given that United terminated Davis for his misconduct the day after the OSHA inspection, a decision with which he clearly disagrees, his response to being directly questioned about those unpleasant events is understandably a defensive one. Thus, I give more weight to Davis’s earlier testimony indicating that he understood the reason for his termination—he “didn’t catch what [he] should have” until the inspector’s arrival, and he made the mistake because he “didn’t measure [the excavation], and the dirt was so hard and we were shallow”

³ OSHA’s excavation standard sets forth the duties of an employer’s competent person:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a *competent person* for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the *competent person* prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

29 C.F.R. § 1926.651(k)(1) (emphasis added).

complete for “[a]ll trenches that are over five feet in depth . . . the appropriate pre-entry permit,” “classify the soil type;” and “immediately cease [all work and contact] the risk management department . . . if adequate cave-in protection cannot be provided.” Additionally, it makes the competent person responsible for “one [t]ool [b]ox talk per job per week to specifically address trench safety.” This manual also clearly laid out the responsibilities for ensuring the compliance of the company in excavation safety and gives the risk management department responsibility for, among other things, “[m]onitor[ing] the overall effectiveness of the program,” “[p]rovid[ing] training to affected employees and supervisors,” “[r]andomly and regularly inspect[ing] Trench Crew operations,” “[p]rovid[ing] technical assistance as needed,” and “[w]ork[ing] in coordination with the Regional Manager in administering the Disciplinary Program.”

Volk was United’s superintendent/project manager over the entire Route 8 Project, which included all crews and subcontractors, and another worksite approximately one-quarter mile from the one at issue here. Volk stated that his duties included determining the means of construction, equipment, and manpower to be used. My colleague correctly notes that 70 percent of the jobs on which Volk was project manager included some excavation work; however, at least half of those excavations were less than five feet deep (typically three to four feet) and did not require sloping. While Volk admitted that he did not pay careful attention to the sloping on the day of the inspection, he claimed it was because he did not know what type of cave-in protection the crew was going to use, and he had limited familiarity with the cited excavation standard.⁴ Volk specifically noted, though, that this responsibility was assigned to other individuals employed by United. In discussing Volk’s failure to identify the noncompliant trench, Ketcham explained that the foreman is the competent person responsible for compliance with United’s safety requirements, and that United does not hold a project manager or superintendent, such as Volk, to the same standard on excavation safety as it does the foreman, because the project manager has a number of other responsibilities on the project.

The day after the inspection, United terminated Davis’s employment for failing to ensure that the excavation was properly sloped and/or benched. Volk was not fired, but he was reprimanded and his bonus for that year was “substantially cut.”

⁴ Volk stated that he expected his foremen to assure that an excavation was properly sloped.

DISCUSSION

The Commission and the courts have recognized that “[t]o hold employers to the absolute duty of guaranteeing compliance at all times by its supervisory personnel would be to impose a duty which is not achievable, a result not intended by Congress.”⁵ *Floyd S. Pike Elec. Contractor, Inc.*, 6 BNA OSHC 1675, 1677 (No. 3069, 1978) (quoting *Ocean Elec. Corp.*, 3 BNA OSHC 1705, 1706-07 (No. 5811, 1975)). The Commission has noted that the defense “provides employers with an incentive to take affirmative steps in instructing and training its employees as to the proper methods of complying” with the requirements of the Act. *Id.* However, we have held, where a supervisor feels free to breach a company safety policy that is strong evidence that the implementation of the policy is lax. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1480 (No. 76-1538, 1979). Here, the record shows that United’s UEM defense is well supported; therefore, United should not be held liable for the isolated and unforeseen failure of its supervisor to ensure compliance with workplace safety rules.

I. United Made Diligent Efforts to Discover and Discourage Violations of Its Safety Rules

Although an employer is not required to provide constant surveillance, it is expected to take reasonable steps to monitor for unsafe conditions. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999); *see also Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) (employer’s duty is to take reasonably diligent measures to detect hazardous conditions through inspections of worksites; it is not obligated to detect or become aware of every instance of a hazard). “Establishing adequate procedures for monitoring employee conduct for compliance with applicable work rules is a critical part of any employer effort to eliminate hazards.” *Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). Further, effective program implementation requires “a diligent effort to discover and discourage

⁵ While the Commission and some Courts of Appeals treat unpreventable supervisory misconduct as an affirmative defense, several circuits have placed the burden of proving the foreseeability of such misconduct on the Secretary. *See, e.g., Capital Elec. Line Builders of Kan., Inc. v. Marshall*, 678 F.2d 128, 129-30 (10th Cir. 1982) (“[W]here the presence or absence of a violation essentially turns on alleged omissions by a supervisor, the burden of disproving unpreventable employee misconduct rests with the Secretary.”); *Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 357 (3d Cir. 1984) (Secretary bears the burden of proving that supervisor’s failure to comply with standard was foreseeable); *L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1241 (4th Cir. 1998) (“[T]he Commission’s burden-shifting in this case was error.”).

violations of safety rules by employees.” *Paul Betty*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981). I would agree with the judge that United had adequate procedures for monitoring employee compliance with its safety rules and made a diligent effort to detect violations.

Under § 1926.651(k), Davis, as the competent person, was required to inspect sloping and, as clearly laid out in United’s excavation safety program, the risk management department was responsible for discovering violations of safety rules. The judge concluded that United took steps to discover violations of its rules based on evidence that “its risk management team employed unannounced visits to worksite[s] to ensure compliance,” and, in response to a prior violation, the company “employed an independent auditor to ensure compliance with the work rules.”⁶

I would agree the record establishes that United’s safety personnel routinely inspected excavation worksites without providing advance notice to the work crews. Members of United’s risk management department spent roughly sixty percent of their time in the field. During inspections, they checked proper sloping and/or benching (along with compliance with other safety rules), and determined whether the foremen understood excavation requirements by observing them, talking to their crews, and asking questions to make sure they understood the requirements. In 2009, United risk manager Wilkins inspected the Route 8 Project between 35 and 40 times, each time unannounced. In April 2010, Wilkins twice inspected the Route 8 Project, unannounced.⁷ A week before the OSHA inspection, Wilkins, again unannounced, inspected the excavation and discussed the excavation program with Davis. Ketcham inspected the Route 8 Project, unannounced, approximately ten days prior to the OSHA inspection, at which time he discussed trenching requirements with Davis for twenty minutes.⁸ Thus, the

⁶ In 2001, R.A. Cullinan & Son combined with two other companies—Illinois Valley Paving Co. and Freesen, Inc.—to form United. After the merger, United continued to do business as R.A. Cullinan, which contracted with an independent auditor in 2006 for approximately six to eight months. However, the independent auditor was no longer performing services for United or its affiliates at the time of the OSHA inspection, and no further evidence was introduced as to why the services were discontinued. Therefore, unlike the judge, I would not rely upon the use of a safety auditor to find that United has established its UEM defense.

⁷ The construction season in this part of the country does not start each year until spring; so, when the OSHA inspection occurred, that year’s construction season had just gotten underway.

⁸ No trenching was being done at the Route 8 Project at the time of Ketcham’s inspection. Ketcham explained that it was the start of the construction season and when he inspected the Route 8 Project “there wasn’t any trenching going on,” but he knew that once it got underway,

Route 8 Project was subject to unannounced inspections by United’s risk management department three times in the fourteen working days prior to OSHA’s inspection. No safety issues were observed during any of the inspections of the Route 8 Project.

In addition, with regard to the oversight of Davis, testimony from both Wilkins and Ketcham indicates that he was considered safety-minded and there was no reason to believe he required special attention or monitoring. Wilkins stated that, prior to the date of the inspection and during the timeframe in which they both were employed by United, he had made unannounced visits at various excavation worksites, observing Davis between fifteen and twenty times and for between twenty-five minutes and three hours. Wilkins stated that he never observed unsafe behavior by Davis or conditions for which he was responsible. Regardless, after each inspection, the risk management team reminded Davis to comply with excavation safety requirements and to properly slope trenches. I would find that Davis’s positive work history gave United no notice that greater supervision was necessary.⁹

Further, unlike my colleague and the Secretary, I would not find that Volk’s failure to address the violative condition undermines United’s contention that it had adequate procedures for monitoring employee conduct for compliance with excavation safety rules. There is no dispute that United’s competent person on site was Davis, not Volk. United’s excavation safety manual and OSHA’s excavation standard makes the competent person, Davis, responsible for “daily inspections of excavations.” As already discussed, the record shows that United made diligent and sufficient efforts to discover work rule violations, including at the Route 8 Project.

“there was going to be some trenching . . . so [he took] the opportunity to meet with . . . Davis to discuss with him some of the specifics of that.” The Secretary and my colleague fault Ketcham for not returning to the site to observe excavation work and ensure compliance with excavation safety rules. On other occasions in the prior year, though, Wilkins returned to the worksite once excavation work had begun. An employer is not required to provide constant surveillance, *see Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999), and there is nothing in the record indicating that Ketcham should have known that a follow-up was necessary regarding the excavation on the day of the inspection.

⁹ My colleague appears to treat Davis’s misconduct as evidence that United’s prior oversight must have been inadequate—in other words, according to this logical fallacy, the very misconduct that caused United to assert the affirmative defense of UEM is the same evidence that she uses to reject the defense. Such circular reasoning not only mischaracterizes the nature of the affirmative defense, but it also ignores the record evidence that despite United’s frequent oversight of Davis, no unsafe behavior or conditions for which he was responsible were ever found.

There is no additional requirement, given the previous effectiveness of its program, that Volk also be given the responsibilities of a competent person in terms of ensuring compliance with excavation work rules. “Insisting that each employee be under continual supervisor surveillance is a patently unworkable burden on employers.” *Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2183 (No. 00-1268, 2003) (consolidated) (quoting *N. Y. State Elec. & Gas Corp. v. Sec’y of Labor*, 88 F.3d 98, 109 (2d Cir. 1996)); *cf. Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991) (employer must present “evidence to show that it took . . . measures to monitor adherence to safety rules by supervisory employees”).

While United made clear that safety is everyone’s job,¹⁰ and Volk, as superintendent/project manager, retained overall responsibility for the Route 8 Project, he was not part of the safety team responsible for oversight as outlined in United’s excavation safety manual.¹¹ As discussed above, while United’s excavation safety manual clearly delineates the responsibilities of the safety director, regional manager, and competent person, it does not mention the project manager or superintendent. The risk management department, not Volk, was given responsibility for “[m]onitor[ing] the overall effectiveness of the program” and “[r]andomly and regularly inspect[ing] Trench Crew operations,” which reflects a reasonable determination by United at that time to rely on individuals specialized in the field of employee safety for oversight. In addition, the cited standard and Commission precedent do not require that there be two competent persons on site—only that there be adequate procedures for monitoring the responsibilities of the competent person, which in the case of Davis had previously proven to be effective.¹² Nothing in the cited standard requires anyone other than the

¹⁰ In line with this view on the importance of safety, earlier on the day of the inspection, United’s construction manager, Earl Koch, visited the worksite to determine whether any manpower changes would be needed for the next day. At the time of Koch’s visit, the excavation was dug about half the distance to the new manhole, approximately 25 to 30 feet long with a shallow depth. Koch reminded Davis to make sure to properly bench/slope the excavation if it got deeper.

¹¹ The record shows that Volk did attend several United safety training sessions.

¹² The excavation standard is one of many OSHA standards requiring employers to have a designated, competent person responsible for making technical determinations in order to comply. Generally, a competent person is a single individual on-site who, by way of training and/or experience, is knowledgeable of the applicable standard, capable of identifying existing and predictable hazards in the surroundings or working conditions that are unsanitary, hazardous,

competent person to make the required technical determinations with respect to an excavation's soil classification, sloping angles, or benching ratios. To require an additional person to assess the excavation to the same level of detail as the competent person would be to rewrite the standard to contain additional requirements. Further, to conclude otherwise, when United had been given no previous reason to know that its oversight efforts were inadequate, would write new obligations into the standard without appropriate notice to the regulated community.

I would also note that the facts here are similar to those in *Floyd S. Pike*, in which the Commission found unpreventable misconduct of a foreman when he violated his employer's work rule on the use of lifting equipment in close proximity to energized power lines, resulting in his electrocution. In finding that UEM was established, the Commission relied on evidence showing that the foreman was considered a safety-minded person, and the employer's safety director had visited the foreman's crew in the past and had observed him working safely. 6 BNA OSHC at 1678. At no time prior to the foreman's electrocution had the employer heard of or observed his failure to comply with the work rule. *Id.* Similarly, here, prior to the violation on the day of the inspection, United's risk management team repeatedly stressed the excavation requirements to Davis. Davis was considered safety-minded, and his excavation work had been observed fifteen to twenty times for between twenty-five minutes and three hours each time by the risk management team with no safety violation observed.

The facts in this case are distinguishable from cases in which the Commission has rejected an employer's unpreventable supervisory misconduct based on its failure to discover violations of its work rules. For example, in *Propellex Corp.*, 18 BNA OSHC 1677 (No. 96-0265, 1999), the Commission held that the employer had not made a diligent effort to discover and discourage violations of safety rules where the production manager admitted that, while the company made unscheduled visits to ensure that the safety regulations were being adhered to, its efforts were inadequate to discover a violation which had been ongoing for a period of weeks. *Id.* at 1682. *See also S.W. Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000) (failure to monitor where there was no evidence that the employer enforced the competent person's obligation to perform trench inspection), *aff'd*, 277 F.3d 1374 (5th Cir. 2001) (unpublished). Here, in contrast, despite its consistent monitoring efforts, the violation existed

or dangerous to employees, and has authorization to take prompt corrective measures to eliminate them. *See, e.g.*, 29 C.F.R. § 1926.32(f).

for a number of hours, not weeks, on the day of inspection, and there is no admission that the efforts of the risk management team were inadequate.

While United's excavation safety program did not identify the hazard cited in this case, United was never on notice that greater oversight was necessary; as such, I would find that United took reasonable steps to discover violations of its safety rules. To find United responsible under these circumstances would be to hold employers to the absolute duty of guaranteeing compliance at all times by its supervisory personnel. As such, like the judge, I would find that United established the third element of the UEM defense.

II. United Effectively Enforced Its Rules When Violations Were Detected

Adequate enforcement is also a critical element of the misconduct defense, and I would agree with the judge that United effectively enforced violations it did discover. Davis was terminated the day after the OSHA inspection for failing to identify and remedy the sloping violation, and Volk was reprimanded. However, as the Commission observed in *Thomas Industrial Coatings, Inc.*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012), post-inspection discipline alone is not necessarily determinative of the adequacy of an employer's enforcement efforts. United, however, introduced into evidence its disciplinary policy, which the Secretary concedes called for progressive discipline for safety violations, along with documentation of such discipline. Also, as the Secretary concedes, United submitted copies of written warnings the company issued between 2005 and 2010, including those issued to fourteen different employees and two issued to company supervisors for "allowing employees to work in a trench that did not meet company or OSHA policies."¹³ Thus, the evidence shows that United's disciplinary system is more than a paper program and that the company actually administered the discipline outlined in its policy and procedures.¹⁴ See *Dover Elevator Co.*, 16 BNA OSHC 1281,

¹³ After a 2006 excavation violation, the foreman/competent person's employment was terminated, and another supervisor was issued a written warning and suspended for two weeks without pay.

¹⁴ My colleague faults the judge's decision for concluding "with little discussion" that United effectively enforced its work rules when violations were discovered, but her separate opinion contains just as little discussion of this UEM element. Moreover, her brief analysis of this issue again uses Davis's misconduct itself on the day of the inspection (including his incorrect classification of the soil type) to refute the affirmative defense. In other words, my colleague presupposes and would find that, because United terminated Davis for the misconduct, there must have been a lack of previous enforcement and a "longstanding" problem with Davis, despite *no record evidence* for finding such a problem (and despite the *unrefuted evidence* that

1287 (No. 91-862, 1993) (“In evaluating the adequacy of a safety program, the substance of the program is determinative rather than its formal aspects.”).

The Secretary contends that, this evidence notwithstanding, United failed to establish the final UEM element based on the post-inspection discipline of Davis and Volk. The Secretary asserts that there is no written record of the disciplinary actions taken against Volk and Davis as a result of the inspection day violation. In addition, the Secretary claims that Volk’s explanation that he was “reprimanded for not paying more attention” shows that the company’s disciplinary policy was ineffective and that Davis’s post-inspection termination is insufficient to show effective discipline.

The Secretary does not dispute that Davis was terminated for the incident. Moreover, with regard to Volk, the Commission has held that “a single instance of delayed discipline”—assuming Volk’s discipline was indeed delayed, given that the record is unclear on the timing of his reprimand and bonus reduction—with regard to the violation at issue is insufficient to establish ineffective enforcement of work rules where the employer’s disciplinary policy and record is otherwise sound. *Am. Eng’g & Dev. Corp.*, 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012). In *American Engineering*, as here, the employer: (1) had a progressive disciplinary program and a record of disciplining employees for violating work rules; (2) eventually (two months after the inspection) disciplined the employees involved in the violation at issue; and (3) was not shown to have foregone disciplining employees for prior, similar violations. *Id.* Thus, since “Commission precedent does not rule out consideration of *post*-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline,” *Precast Servs., Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) (emphasis in original), *aff’d*, 106 F.3d 401 (6th Cir. 1997), I would not find that the evidence of Davis’s and Volk’s post-inspection discipline negates or diminishes the specific evidence United has presented with regard to this UEM element.¹⁵

Davis’s excavation work had been subjected to many unannounced inspections by the risk management team with no safety violation observed). As my colleague recounts the merits of the citation, she again fails to acknowledge the nature of the UEM affirmative defense, which mitigates the legal consequences of the respondent’s otherwise unlawful conduct.

¹⁵ Again, my colleague employs circular reasoning as she “wonders” how there could have been effective enforcement when, despite this being Davis’s first rules violation, he was terminated the day after OSHA’s inspection. I wonder if it is wise to admonish United for imposing this discipline, which my colleague notes in her footnote 3 is permitted pursuant to United’s

I would find that the record shows that United disciplined Davis and Volk for their failures on the day of the inspection and it consistently enforced violations of its safety program when they were discovered. As such, I would find, like the judge, that United has proven the final element of the UEM defense and therefore, has established its defense. Accordingly, I would vacate the citation item alleging a willful violation of § 1926.652(a)(1).¹⁶

Dated: October 28, 2016

/s/

Heather L. MacDougall
Commissioner

disciplinary policy that gives it “substantial latitude to jump steps.” There is no record evidence, despite any speculation to the contrary, to contradict that United had an enforcement system that resulted in numerous written warnings (including two issued to supervisors) when violations were found. My colleague’s reasoning unfairly creates a catch-22 for employers—if an employer terminates a supervisor for his first act of misconduct, it is evidence that the employer must have missed earlier violations; if it does not terminate the supervisor for the misconduct, then the employer is not fully committed to safety in the workplace. I would not conclude that the contours of the UEM defense are intended to create such a dilemma for employers. Indeed, the UEM defense addresses another dilemma—despite an employer meeting its OSH Act responsibility to do everything reasonably possible to ensure that its personnel do not violate safety standards, an employee may nonetheless ignore firmly established safety measures. The UEM defense recognizes, in such cases, that it is simply unfair to hold the employer liable for that conduct. Under the circumstances here, it would be unfair to hold United liable for its employees’ misconduct.

¹⁶ Because my colleague and I are divided on the UEM defense and agree only to vacate the direction for review, should United choose to appeal the judge’s decision to an appropriate Circuit Court of Appeals, and if the court finds that the UEM defense has not been established, I note that I would concur with my colleague’s determination that any violation of the cited standard was willful, however, based solely on Davis’s conduct indicating plain indifference on the day in question.

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,
Complainant,

v.

UNITED CONTRACTORS MIDWEST, INC
d/b/a R.A. CULLINAN & SON,
Respondent.

OSHRC DOCKET NO. 10-2096

Appearances:

Ruben R Chapa, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Julie O'Keefe, Esq., Armstrong Teasdale LLP, St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a United Contractors Midwest, Inc. (“Respondent”) worksite in Washington, Illinois on April 20, 2010. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging three violations of the Act. Respondent timely contested the citation, and a trial was held on June 26–28, 2012, in Springfield, Illinois. Both parties have filed post-trial briefs.

II. Jurisdiction

The parties stipulated and the Court finds that the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). (Ex. J-1).

Further, the parties also stipulated that, at all times relevant to this matter, Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

III. Background³¹

Respondent was formed on June 5, 2001 when R.A. Cullinan & Son, Inc., Illinois Valley Paving Co., and Freesen Inc. combined to form United Contractors Midwest, Inc. (Ex. C-55). Respondent is a road contractor that specializes in asphalt paving, concrete paving, and bridge and overpass development. (Tr. 440–41). Respondent’s primary customers are the State of Illinois and the State of Missouri Departments of Transportation. (Tr. 441). On April 20, 2010, Complainant conducted an inspection of Respondent’s worksite, which was located at the intersection of Crestlawn Drive and Illinois Route 8 in Washington, Illinois.³² (Tr. 39, 45, Ex. R-55).

The site of the inspection was a new sewer line and manhole installation that was part of a larger road project known as the “Route 8 Project”. (Ex. R-55). The Route 8 Project began in the spring of 2009 and consisted of the removal and replacement of a one-and-a-quarter mile section of street and the relocation of a sewer. (Tr. 698). The entire project was overseen by Respondent’s Project Manager/Superintendent, Ken Volk. (Tr. 458). The portion of the project at issue in this case involved the installation of a new 24-inch sewer line, which ran from an existing manhole at the south end of the worksite to a new manhole, which was being installed at the north end of the worksite. (Tr. 45, 537–38, 711, 733). The length of the entire excavation was approximately 65–70 feet; however, by stipulation of the parties, the focus of the citations involved a circular excavation at the north end of the worksite. (Tr. 353–54, Ex. J-2).

³¹. The parties stipulated to a number of issues that are too numerous to reprint here. References to the parties’ stipulations are indicated by citation to Joint Exhibit Number 1, or Ex. J-1.

³². Route 8 is also known as Washington Street.

Respondent's foreman, Jim Davis, oversaw the work in the excavation. (Tr. 533).

When Compliance Safety and Health Officer ("CSHO") Jeff Strain arrived at the worksite, he observed Davis and Volk standing at the edge of the excavation. (Tr. 94, Ex. C-15). As he approached the excavation, CSHO Strain also observed two of Respondent's employees, Brad Vonderheide and Todd Leichtenberg, in the excavation working around a manhole at the north end of the excavation. (Tr. 196). Upon CSHO Strain's arrival, Vonderheide and Leichtenberg exited the excavation at the north end. (Tr. 123). Prior to beginning a full-scale inspection of the site, CSHO Strain contacted his Area Director, Tom Bielema, to assist him with the physical assessment of the excavation. (Tr. 487). CSHO Strain conducted an opening conference with Volk, who contacted Kevin Wilkins, Respondent's northern region risk manager, to inform him of the inspection. (Tr. 41-42). While CSHO Strain waited for Bielema to arrive, he conducted interviews of Respondent's employees, including Volk and Davis. (Tr. 44, 71-74, Ex. C-10, C-11). Eventually, Wilkins and Respondent's head of risk management, Scott Ketcham, arrived at the worksite. (Tr. 155, 658).

After Bielema arrived, he and CSHO Strain took a number of measurements of the excavation. As a result of the inspection, Complainant issued a two-item serious citation and a one-item willful citation. Each of these citation items are discussed below.

IV. Findings of Fact and Conclusions of Law

A. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to:

United Contractors Midwest, Inc. dba R.A. Cullinan & Son, Inc. had an employee exposed to struck-by/crushing hazards from the swing radius of

the excavator, which was not barricaded to warn and prevent employee entrance.

Among the feasible means of abatement would be to comply with the Association of Equipment Manufacturers [sic] for Hydraulic Excavators requirements for swing radius protection.

1. Facts

In order to dig the excavation at the worksite, Respondent used a John Deere 690 E LC hydraulic excavator. (Ex. J-1). At its most basic, the excavator is comprised of two primary parts—the tracks and the rotating superstructure, which contains the cab. (Tr. 207–208). The superstructure rotates around a center pivot point, which allows the excavator to rotate 360-degrees. (Tr. 206, 559). In order to prevent the excavator from tipping over while carrying a load, the superstructure is equipped with a counterweight, which is situated on the back of the excavator cab. (Tr. 209, 559, Ex. R-53, R-54). When the superstructure rotates around the pivot point, the counterweight swings over the tracks, and, depending on how the cab is oriented, the counterweight will overhang the tracks. (Tr. 283–84). This overhang creates what is known as the swing radius.³³ (Ex. R-54 at 115-1). The swing radius creates a pinch point between the tracks and the rotating superstructure, which, if not properly controlled, poses a hazard to any employee that enters into the area.

Although the parties came to different conclusions as to the exact measurement of the swing radius and amount of overhang, the Court finds that the most accurate measurement of the swing radius is reflected in the specification sheet of the operator's manual. (Ex. R-54). The two key measurements for the purposes of determining the area of danger are the amount of overhang when the superstructure is parallel to the tracks and the amount of overhang when the superstructure is perpendicular to the tracks. Based on the specifications, the counterweight

³³. Although the boom and bucket are also attached to the superstructure, CSHO Strain testified, and the Court accepts, that the swing radius hazard is limited to the overhang created by the counterweight. (Tr. 284). This understanding is confirmed by the specification sheet in the operator's manual. (Ex. R-54).

extends over the front or rear of the tracks by 1 foot, 8.5 inches when the superstructure is parallel to the tracks. When the superstructure is perpendicular to the tracks, the counterweight extends 3 feet, 9.5 inches beyond the sides.³⁴

The parties agree that barricades had not been placed around the excavator while it was being used to dig the excavation; however, the photographs of the excavator show that it had a sign affixed to its body in two locations that stated “stay clear of the swing radius.” (Ex. J-1, R-52). Complainant contends that Respondent recognized the hazard posed by the swing radius of the excavator and that barricades should have been used to provide warning of, and prevent entrance into, the swing radius. Respondent contends that it implemented adequate measures such as training, communication, and eye contact to prevent exposure to the hazard.

Respondent has a general, corporate safety manual as well as an excavation-specific safety manual. (Ex. C-4, C-5). Each of these manuals has provisions that address the swing radius hazard. Specifically, the corporate safety manual provides: “The swing radius of a crane and/or other equipment, such as cherrypickers, shall be barricaded with caution tape, marked with cones or other means to warn employees from entering the area and encountering pinch points.” (Tr. 418–19, Ex. C-4). The excavation safety manual provides: “The swing radius of the equipment being used to excavate will be properly demarcated with barrels, cones, barricades, caution tape, or the like, to warn employees of the impending hazard.” (Tr. 418, Ex. C-5). According to Ketcham, the supervisor on duty was expected to determine whether to use a barricade or some other method, which is why he drafted the work rules in somewhat open-ended fashion. (Tr. 419, 468–69, 613). Thus, as was the case at this particular worksite, Respondent could utilize options such as training, employing an experienced excavator operator,

³⁴. These lengths are based upon the difference between the swing radius, indicated in the specifications as D¹, and one-half of the length (or width) of the excavator, indicated as B and I, respectively. (Ex. R-54 at 115-1). Because no testimony was given as to the size of the tracks, or “shoes”, the Court utilized the largest measurement available.

communication between employees, observation, and eye contact to prevent entry into the swing radius. (Tr. 430–31, 607–608, 615–17). Ketcham testified that barricades were more appropriate on projects involving confined spaces, such as a bridge deck, because heavy equipment tends to be stationary and the likelihood of entering the swing radius is greater. (Tr. 611–12).

Respondent opted to use communication, eye contact, and observation on the Route 8 project because it claims that the excavator was continually moving³⁵ and thus made using barricades an unworkable option. Specifically, Davis testified that he and his crew were aware that they needed to stay out of the swing radius. (Tr. 563). He also testified that he kept watch to ensure that no one would enter the area. (Tr. 560, 62). Davis said that, based upon his work history with the excavator operator, Larry Lohnes, he usually knew when Lohnes was about to swing the excavator and that they made eye contact with one another to ensure that they were on the same page. (Tr. 562, 565). Davis stated that the only time he would enter the swing radius was to communicate with Lohnes or to hand him a cup of water, at which time he knew that Lohnes would not attempt to swing the excavator. (Tr. 564). Davis stated that he knew he would be safe if he remained four to five feet away from the front of the tracks and approximately seven to eight feet from the sides. (Tr. 564). Likewise, Vonderheide also testified that he made a conscious effort to stay 30 to 40 feet away from the counterweight and that he would position himself so that the operator would be able to see him. (Tr. 758–60, 765).

CSHO Strain observed Davis standing in close proximity to the tracks of the excavator; however, he did not measure how close Davis actually was. (Tr. 210–12, Ex. C-16, C-19, C-20).

CSHO Strain also testified that Leichtenberg was exposed to the hazard as he exited the

³⁵. The specific process involved: (1) the excavator digging a portion of the excavation measuring approximately 15 feet in length; (2) rotating the excavator back outside the excavation to attach a segment of pipe to the backhoe bucket and moving it into the excavation; (3) connecting the pipe; and (4) rotating the excavator back out of the excavation to collect fill material, which was then placed in the section where the pipe segment was installed. (Tr. 544–46).

excavation on the north end. (Tr. 211). Complainant's biggest concern in this regard was the fact that there was nothing to notify employees of or prevent them from entering into the swing radius of the excavator. Although the counterweight had signs affixed to its body that stated "stay clear of the swing radius", these signs were not highly visible and were located on the tail of the counterweight, which does not provide much warning to an individual: (i) standing to the side of the cab, (ii) to the front of the cab; or (iii) exiting the excavation. (Ex. J-1, R-52, R-53). In support of her position that Respondent's preventative measures were inadequate, Complainant introduced the Association of Equipment Manufacturer's Safety Manual ("AEM Manual") for hydraulic excavators, which states: "Before starting to excavate, set up safety barriers to the sides and rear of your swing pattern to prevent anyone from walking into the working area." (Ex. C-13). The AEM Manual is also consistent with Respondent's own policy.

2. Analysis

To establish a *prima facie* violation of Section 5(a)(1) of the Act, also known as the general duty clause, Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co.*, 17 BNA OSHC 1869 (No. 92-2596, 1996). The Court finds that Complainant has established each of the elements of a Section 5(a)(1) violation.

With respect to the first element, the Court finds that there is ample evidence to establish that the swing radius of the excavator presented a hazard to employees at Respondent's worksite. Respondent contends that Complainant proved nothing more than a "potential" hazard posed by the swing radius of the excavator. *See Pelron Corp.*, 12 BNA OSHC 1833 (No. 82-388, 1086) ("Defining the hazard as the 'possibility' that a condition will occur defines not a hazard but a

potential hazard.”). In other words, Respondent argues that Complainant failed to prove that the steps it took to prevent the hazard were inadequate. The Court disagrees. First, after reviewing Respondent’s safety manuals,³⁶ as well as the AEM Manual, the common thread is a system that, at the very least, warns employees that they are entering into the zone of danger. (Ex. C-4, C-5, C-13). Although this could theoretically be accomplished by the use of a spotter or “stim” man, whose sole responsibility would be to warn employees that they were in the zone of danger, Respondent had no such policy or practice in place; rather, Respondent relied on a vague system of communication through eye contact and mutual understanding of work habits and experience. (Tr. 565–66). Respondent’s foreman, Davis, made this clear when he testified that he never really learned this system; he just knew it. (Tr. 561). In that regard, he stated that he received information about barricades and cones being used with cranes and cherry pickers, but that he did not recall that information being discussed with respect to an excavator. (Tr. 561). Further, Davis also testified that he did not have to communicate with his employees about the swing radius hazard because “everyone was fully aware of it.” (Tr. 563). In the Court’s view, Respondent’s system is little more than a post-hoc justification for its failure to abide by the requirements of its own excavation safety manual, which required that the area be marked with “barrels, cones, barricades, caution tape, or the like.” (Ex. C-5). Nor does the Court find that the signs affixed to the back of the counterweight satisfy this obligation because they would only be visible to someone standing directly behind the cab and would not provide adequate warning as to the extent of the hazardous area for those employees in front of or to the side of the excavator.

The foregoing also establishes the second element—employer or industry recognition of the hazard. The AEM Manual, Respondent’s corporate safety manual, and Respondent’s excavation safety manual all address the swing radius as a hazard—thus, in this case there is both

³⁶. By Ketcham’s own admission, Respondent’s own excavation safety manual superseded Chapter 18 of the corporate safety manual.

employer and industry recognition of the hazard. (C-4, C-5, C-13). Clearly, Respondent recognized the hazard considering that it went so far as to provide policies and procedures to address it. In addition, Respondent stipulated that it recognized the hazard posed by the excavator's swing radius. (Tr. 79–80).

Respondent also contends that Complainant failed to prove that anyone was exposed to the swing radius hazard. The Commission, however, does not require definitive proof of actual exposure to the hazard; rather, the question is whether employees have access to the hazard. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). Access to a hazardous condition exists “if there is a ‘reasonable predictability’ that employees ‘will be, are, or have been in’ the ‘zone of danger.’” *Kokosing*, 17 BNA OSHC 1869 (citing *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994)). Although CSHO Strain did not specifically measure the distance between Davis and the tracks of the excavator, the photographs show that Davis was standing close to, if not in, the zone of danger. (Ex. C-15, C-16, C-18). Likewise, in another photograph, one of the laborers, Leichtenberg, is shown exiting the trench in close proximity to the tracks of the excavator. (C-20). Respondent introduced evidence showing that the excavator moved along the trench as new pipe segments were installed. While Respondent argues that this suggests the infeasibility of installing barricades or warning devices, the Court finds that this fact illustrates the importance of using proper warnings or barricades because the swing radius/zone of danger is a moving target that changes with the location of the excavator. The Court finds it is reasonably predictable that, without proper warning, one of the employees, in the course of their duties, would end up in the swing radius of the excavator. This is especially the case with Davis, who is shown in multiple photographs standing/working in close proximity to the excavator. Operating simply on the basis of “just knowing” the location of the hazard is insufficient when the zone of danger changes based on the location of the excavator and an individual's location

relative to the excavator's cab. An employee's knowledge of the hazardous area based upon a verbal rule is not an adequate substitute for instituting the types of protections recognized under the AEM Manual or the Respondent's policies. *Tobacco River Lumber Company*, 3 BNA OSHC 1059, 1064 (No. 1694, 1975) ("Mental fences might serve to reduce the probability of intentional entry but they do nothing to prevent accidental entry.").

The Court also finds that the hazard was likely to cause death or serious physical harm. All of the individuals that testified agreed that exposure to the swing radius hazard could result in serious crushing injuries and potentially death. (Tr. 218, 561, 612). For the same reasons, the Court also finds that the violation was serious. See *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp.*, 15 BNA OSHC 15 BNA OSHC 2072 (No. 88-0523, 1993).

The defense of infeasibility requires an employer to prove that: (1) the means of compliance prescribed by the standard are technologically or economically infeasible, or necessary work operations are technologically infeasible after implementation; and (2) there are no feasible alternative means of protection or an alternative method of protection was used. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1993-95 CCH OSHD ¶ 30,485 (No. 91-1167, 1994). See also *A. J. McNulty & Co.*, 19 BNA OSHC 1121, 1129 (No. 94-1758, 2000). The employer has the burden of proving infeasibility of compliance. *State Sheet Metal*, 16 BNA OSHC 1155, 1161 (No. 90-2894, 1993). The Court finds Complainant established that the use of a barricade or other warning devices was a feasible and effective means to eliminate or materially reduce the hazard. Respondent contends that, in light of the fact that the excavator has to move laterally along the excavation, using barricades or some other warning device, such as cones, would not be feasible because they would have to be constantly repositioned. Further, Respondent argues that because the workers have to be in front of the excavator during sewer

line installation, the proposed abatement illustrated in the AEM Manual would not protect its employees from the swing radius hazard. First, the Court finds that the act of repositioning the barricades or other warning devices, although not ideal, is not infeasible. While installing the sewer pipe segments and backfilling, the excavator was moving from the south side of the excavation to the north side. This means that the proposed barricades or warning devices would have to be moved in the same direction as the excavator. To the extent that moving the barricades along with the excavator proved to be inconvenient,³⁷ Respondent could also create a wider area for the excavator to operate within, thus eliminating the need to constantly reposition the barricades or warning devices. Second, although the workers may be in front of the excavator during the installation, the work of attaching pipe segments and disconnecting them in the base of the excavation occurs at the end of the boom and bucket, which is far outside the swing radius hazard discussed above and referenced in Exhibit R-54. Finally, Complainant proved that the use of barricades or warning devices would materially reduce the hazard by creating a clear line of demarcation (which is required by Respondent's own excavation safety manual) that indicates the extent of the swing radius hazard and warns and/or prevents employees from entering that area. The Court notes that the abatement outlined by the Complainant is none other than the abatement set forth in the Respondent's own policies, which illustrates that Respondent recognizes that such abatement measures are feasible. In light of the foregoing, the Court finds that Complainant has established a violation of Section 5(a)(1) of the Act. Accordingly, Citation 1, Item 1 will be AFFIRMED.

³⁷. The Court would note that although a proposed method of abatement may be inconvenient, this does not equate to unworkable or infeasible.

B. Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

29 C.F.R. 1926.651(c)(2): 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:

United Contractors Midwest, Inc. dba R.A. Cullinan & Son, Inc. had two employees working an excavation at a depth of 7 ft., and the employer did not provide a safe means of egress from the excavation.

To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991).

The cited standard applies specifically to trench excavations. According to 29 C.F.R. § 1926.651(b), a trench is defined as “a narrow excavation (in relation to length) made below the surface of the ground. In general the depth is greater than the width, but the width of the trench (measured at the bottom) is not greater than 15 feet (4.6m).” An excavation, on the other hand is defined as “any man-made cut, cavity, trench or depression . . . formed by earth removal.” 29 C.F.R. § 1926.651(b). Thus, by definition, all trenches are excavations; however, not all excavations are trenches. By agreement of the parties, the area addressed by the citation is limited to the circular area at the north end of the excavation. This area was approximately 7 to 8 feet deep and measured approximately 13 to 17 feet wide.³⁸ (Tr. 91, 140–42, 149, Ex. J-2). Because the excavation’s width was greater than its depth, the excavation is not a trench. Thus,

³⁸. Although no measurement was taken of the trench at the bottom, the Court finds that, when the slope of the east and west walls are taken into consideration, the width of the trench at the bottom was still greater than the depth of the trench. (Ex. J-2).

the cited standard does not apply. Accordingly, Citation 1, Item 2 will be VACATED.

C. Citation 2, Item 1

Complainant alleged a willful violation of the Act in Citation 2, Item 1 as follows:

29 C.F.R. 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) sloping and benching systems, or paragraph (c) support systems, shield systems, and other protective systems:

United Contractors Midwest, Inc. dba R.A. Cullinan & Son, Inc. had two employees working in an excavation at a depth of 7ft., and the employer did not provide cave-in protection in accordance with 1926.652(a)(1).

1. Facts

The Excavation

As noted above, in Section IV.B, the excavation at issue measured 7 to 8 feet deep and was approximately 13 to 17 feet wide. CSHO Strain and Bielema also took measurements of the walls of the excavation, which surrounded the newly installed manhole. They made the following observations: (1) the wall to the southeast of the manhole had a slope of 72 degrees; and (2) the wall to the north of the manhole had a slope of 40 degrees. (Tr. 149, 181–82, Ex. C-25). The wall to the southwest of the manhole had a cut in it, which required to CSHO Strain and Bielema to take two separate measurements: (1) below the cut, the wall measured 2 feet, 3.5 inches in height and had a slope of 80 degrees; and (2) above the cut, the wall measured 4 feet, 4 inches in height and had a slope of 87 degrees.³⁹ (Tr. 141–42, Ex. C-24). The slope of the walls in these areas was of particular concern to Complainant because CSHO Strain and Bielema identified footprints, tools, and equipment adjacent to the walls. (Tr. 140, Ex. J-2).

³⁹. Respondent points out that no measurement was taken of the width of the cut, which it refers to as a cutback. However, given the steep slope of the two separate angle measurements, and considering the photographs illustrating the cut, the Court ascribes no significance to this cut as a method of cave-in protection. (Ex. C-29). As will be discussed below, the excavation was dug in Type B soil, which would require cutbacks/benches that have a ratio of 1:1 (height to width). This cut appears to be nothing more than a scrape from the excavator. Respondent did not provide any testimony that this particular cut was formed with the intent to protect against cave-ins; in fact, Davis testified that he thought the slope, standing alone, was sound. (Tr. 555).

Davis testified that he had tested the soil of the excavation around 7:20 a.m. and found a compressive strength of more than 1.5 tsf (tons per square foot). (Tr. 534–36, 538, Ex. C-9). Accordingly, he characterized the soil as Type A. This was reflected in his daily report. (Ex. C-9). During the inspection, CSHO Strain also took three samples of the soil. (Tr. 92). The results of Complainant’s soil testing showed that the soil had a compressive strength of 0.75 tsf, which is properly characterized as Type B. (Ex. J-1). Respondent also took additional samples of the soil and also found that it was Type B. (Ex. J-1).

On-Site Management – Ken Volk and James Davis

As noted above in Section III, when CSHO Strain arrived at the worksite, he observed Davis and Volk standing at the edge of the excavation. Davis was the foreman in charge of the excavation, and Volk was the project manager/superintendent⁴⁰ in charge of the Route 8 project as a whole. Neither Volk nor Davis claimed to be aware that certain walls of the trench were out of compliance with the standard. (Tr. 555, 716). Nevertheless, both Volk and Davis were responsible for the safety and health of the employees working underneath them and had the authority to direct the work and correct safety violations. (Tr. 456–57, Ex. C-4).

Davis testified that approximately 40–50% of the work he performed for Respondent was underground. (Tr. 530, 572). Davis also testified that he had worked with the excavator operator, Lohnes, repeatedly over the course of 20 years and that Lohnes was adept at properly sloping the walls of excavations. (Tr. 540). Specifically, Davis stated that he does not measure the slope of the walls—relying instead upon visual observation—and that he “usually just rel[ies] on an operator to get it right” (Tr. 539, 553). As a result of Complainant’s findings during this inspection, Davis was fired by Respondent. (Tr. 590–91).

Volk testified that he has 22 years of experience as a project manager and that

⁴⁰. The Court shall use these terms interchangeably as the parties did at trial. The Court ascribes no significance to the particular term because it is the nature of the duties performed that are controlling.

approximately 70% of the projects that he supervises involve excavations. (Tr. 727). On the day of the inspection, Volk visited the worksite around lunchtime and approximately 20 minutes prior to the beginning of the inspection. (Tr. 713–16). In the interim, he had visited the other sites that were a part of the Route 8 project. (Tr. 713–15). During the time he was at the worksite in question, he stated that he did not pay careful attention to the sloping because he was watching the crew install the new manhole at the north end of the excavation, where CSHO Strain found the non-compliant walls. (Tr. 716). Volk testified that, in light of breadth of his duties on the Route 8 Project, he did not usually determine whether an excavation was properly sloped and instead relied upon his foreman to make that determination. (Tr. 716–17, 731). This, he claims, was due to the fact that he could not recall the specific sloping requirements without looking them up. (Tr. 717–18). Volk testified that, as a result of the inspection, he was verbally reprimanded by the board of directors and his year-end bonus was cut. (Tr. 718). Ketcham testified that Volk was not terminated in light of the breadth of his duties as a project manager and his reliance upon Davis. (Tr. 662).

Respondent's Safety Program

Scott Ketcham has been the risk manager for Respondent since 1999. He wrote the safety policies, including the corporate safety manual and the excavation safety manual, provided annual training, and conducted site visits. (Tr. 439–40). Ketcham supervised a staff of four risk management personnel that were assigned to different regions. (Tr. 440). Kevin Wilkins was responsible for the northern region, which included the worksite at issue in this case. (Tr. 388, 461).

In 2005, R.A. Cullinan & Son, Inc. received a citation for cave-in protection violations. In response to that citation, Respondent provided training on excavations and instituted its excavation safety manual, which was designed to replace Chapter 18 of the Respondent's

corporate safety manual. In addition, Respondent hired an independent consultant, Greg Swinson of Safety Management Resources, to perform inspections of its jobsites for a period of six to eight months. (Tr. 654–55). Ketcham testified that Swinson found no violations on the sites that he inspected. (Tr. 654–55).

Respondent conducts safety training once every year in January or February and invites its supervisory personnel and individuals that it anticipates may become supervisory personnel. (Tr. 443). This training usually lasts one day and typically includes a discussion of excavation safety. (Tr. 443, 619, Ex. R-33 to R-37). In addition to the annual training provided to supervisory personnel, Respondent also provides annual orientation training for new employees, which includes a review of the minimum safe work rules and the issuance of personal protective equipment. (Tr. 452–53, 455). Supervisors are also expected to provide tool-box talks and on-site training. (Tr. 443).

As part of its safety program, Respondent has a written disciplinary policy that is contained within the corporate safety manual. (Tr. 446, Ex. C-4). The disciplinary policy is a progressive system of enforcement that begins with a verbal warning and, if policies are repeatedly violated, ends with termination. Ketcham pointed out, however, that intermediate steps can be skipped over depending on the severity of the violation. (Tr. 448–49). In order to determine whether rules were being complied with, Respondent would conduct unannounced inspections of its jobsites. (Tr. 461, 650). Prior to April 20, 2010, Ketcham does not recall any of these inspections uncovering non-compliant excavations. (Tr. 655). In that regard, Respondent introduced evidence of a number of written disciplinary actions; however, it was unable to produce any documentation of the actions taken against Volk or Davis.

Ketcham and Wilkins both visited the worksite prior to the April 20, 2010 inspection. Approximately ten days prior to the inspection, Ketcham testified that he visited the worksite

because he knew that excavation work would be required. (Tr. 656–57). He spoke with Davis for about 20 minutes and reminded him to comply with the trenching requirements, reminding him of the need for a ladder, personal protective equipment, and soil typing. (Tr. 657). Wilkins had visited the site a number of times in 2009 when the project began and also visited twice in 2010 prior to the inspection. He testified that he also discussed the excavation program with Davis. (Tr. 786–87). In addition, Earl Koch, construction manager, dispatch, visited the worksite to determine whether any manpower changes were needed. (Tr. 744–46). Koch testified that he told Davis to “lay it back” if the excavation got any deeper. (Tr. 747).

Violation History

Part of the reason for Complainant alleging a willful violation of the cited standard is that Respondent has previously been cited for failure to comply with 29 C.F.R. 1926.652(a)(1). The earlier citations were issued to R.A. Cullinan & Son, Inc. in 1998, 2002, and 2006. (Ex. C-40, C-41, C-42). As noted above, R.A. Cullinan & Son, Inc. was merged with two other companies to form United Contractors Midwest, Inc. (Respondent). (Ex. C-55). Since the time of the merger, Respondent has been governed by the same corporate safety manual and has had the same corporate risk manager, Scott Ketcham, who started with the company in 1999. (Tr. 395, 408). For the purposes of this case, the Court finds that it is appropriate to consider the citations issued in 2002 and 2006 to R.A. Cullinan & Son, Inc., because there is a clear nexus between the two entities, as well as substantial continuity in that the nature of the business (road work), the area served, the customers, and the risk management personnel are substantially the same. *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286 (No. 00-1402, 2010).

2. Analysis

Prima Facie Case

Prior to determining whether a willful violation occurred, the Court must ascertain whether a violation occurred in the first instance. To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991). Based on the foregoing, the Court finds that the standard applies and was violated.

The cited standard requires protective systems in excavations that are greater than five feet in depth. 29 C.F.R. § 1926.652(a)(1). The excavation at issue ranged from 7 to 8 feet in depth. Thus, the standard applies. Further, the terms of the standard were violated. The parties agree that the soil in the excavation was Type B. (Ex. J-1). Accordingly, the maximum allowable slope, or allowable configurations for sloping and benching systems, is determined in accordance with Appendix B to Part 1926, Subpart P. *See* 29 C.F.R. § 1926.652(b)(2). Type B soil requires a maximum allowable slope of 1 horizontal to 1 vertical, or 45 degrees. *See* Part 1926, Subpart P, Appendix B. The two problem areas in this particular excavation were sloped at 72 degrees on the east wall and between 80 and 87 degrees on the west wall. Therefore, the terms of the standard were violated.

CSHO Strain observed two of Respondent's employees in the excavation at the time that he arrived. (Tr. 196). In addition, he also observed footprints and tools in the base of the trench near the improperly sloped walls. (Tr. 140). This satisfies the third element of Complainant's *prima facie* case.

Complainant has also established its *prima facie* case of employer knowledge. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 193 WL 275823 at *7 (No. 91-862, 1993) (“[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer’s safety program.”). Both Davis and Volk were present on the worksite, looking into the trench, and observed the violative condition. There is no question that they were supervisory employees. Accordingly, Complainant has established its *prima facie* case.

Although Complainant has established its *prima facie* case, Respondent contends that, in light of its safety program, it has taken reasonable measures to prevent the occurrence of the violation. *See id.* (holding that employer can rebut *prima facie* showing of knowledge by taking reasonable measures to prevent violations). Respondent poses a two-part argument in this regard. First, Respondent relies on a line of case law from various circuit courts of appeal that have recommended the Commission adopt a test requiring the Secretary to prove that the supervisor’s conduct was foreseeable. *See, e.g., W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006). Second, Respondent contends that it has established the defense of unpreventable supervisory misconduct.

The Court declines to adopt the test of foreseeability for the purposes of rebutting Complainant’s *prima facie* case of employer knowledge. The Commission, which the Court is obliged to follow, has not adopted this test, nor has the Seventh Circuit, which is the court of appeals for Illinois. The cases cited by Respondent do not suggest otherwise. The Commission in *Diamond Installations* merely references, in a footnote, the fact that a number of circuit courts of appeal have adopted the test of foreseeability, but it did not apply that test to make the determination that the Secretary established the element of knowledge. *Diamond Installations*,

21 BNA OSHC 1688 at n.5 (No. 02-2080, 2006). Further, the administrative law judge in *W.G. Yates & Sons Constr. Co.*, 22 BNA OSHC 1196 (No. 03-2162, 2008), applied the foreseeability test upon remand orders from the Fifth Circuit and not based upon application of Commission precedent. The proper method to rebut Complainant's *prima facie* case is through the use of the employee misconduct defense.

Affirmative Defense

In order to prove the affirmative defense of employee misconduct, it is the employer's burden to prove that: (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *GEM Industrial, Inc.*, 17 BNA OSHC 1861 (No. 93-1122, 1996). "[W]here a supervisory employee is involved in the violation the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Daniel Constr. Co.*, 10 BNA OSHC 1549 (No. 16265, 1982). "A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

Based on the foregoing findings of fact, the Court finds that Respondent has established elements (1), (3), and (4) of the affirmative defense of unpreventable employee misconduct. First, it clearly had work rules designed to prevent the violation. (Ex. C-4, C-5). Second, its risk management team employed unannounced visits to worksite to ensure compliance with those work rules. And, in response to the 2006 violation, Respondent also employed an independent auditor to ensure compliance with the work rules. Third, based on the documentation of disciplinary actions introduced as Exhibit R-32, it appears that Respondent effectively enforces

the rules that it expects to be followed.⁴¹ (Ex. R-32). The problem, however, is that it does not appear that Respondent adequately communicated the rules to its supervisory personnel.

The Court's primary concern with respect to Respondent is that not one, but both supervisory personnel on the worksite failed to address a clear violation of the excavation standard. Complainant identified two separate locations in the excavation where the slope was as little as 30 and as many as 40 degrees steeper than what is required for Type B soil. Furthermore, even if Davis had properly analyzed the soil as Type A, the slope was still 19 to 34 degrees too steep. Davis' and Volk's failure to address this glaring violation is compounded by the fact that both Ketcham and Wilkins were able to look at the excavation and recognize that the walls were non-compliant. (Tr. 660, 817–18). There is clearly a disconnect between the expectations of Respondent's risk management team and the implementation of the rules by Respondent's supervisory personnel. It is true that Respondent has annual training that typically involves an excavation component. (Ex. R-33, R-34, R-36, R-37). It is also true that Davis was told multiple times in the week leading up to the inspection that he needed to be "dialed in" to the excavation requirements.⁴² (Tr. 786). The failure in this case, however, was not just about the communication of specific rules that were to be followed—though Davis' failure to address the slope and Volk's stated inability to recognize that there was a problem does raise some flags—rather, Respondent's failure is not adequately communicating *who* is responsible for ensuring the safety and health of the employees at the worksite.

According to Respondent's corporate safety manual, superintendents and foreman are expected, among other things, to: (1) ensure proper implementation of the Safety and Health Program; (2) develop a safe work plan in advance of each stage of a project; (3) be accountable

⁴¹. This was a closer call, however. See *GEM Industrial, Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) ("Where all employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule.").

⁴². Though the Court would note that, in terms of adequately communicating the rules, telling someone to follow the rules is little different than admonishing an employee to "be safe".

for unsafe acts by employees; and (4) conduct regular job site safety inspections. (Ex. C-4). The problem, however, is that Volk testified that he relied on Davis to ensure that details like adequate sloping were addressed. Davis, in turn, stated that he relied on his operator “to get it right.” In other words, what is lacking in this system is accountability. Now, it is not unreasonable to expect that subordinates will do their jobs correctly; however, as Respondent’s safety program succinctly states, it is incumbent upon supervisory personnel to *ensure* that they do so. In this case, that did not happen; instead, at each level of supervision the responsible person claimed to be relying on the person below him. The lack of understanding regarding the safety requirements, coupled with the failure of any supervisor to take responsibility for the safety and health of Respondent’s employees, makes it clear that Respondent has failed to adequately communicate the rules and effectively ensure the accountability of its supervisors. As such, the Court finds that Respondent failed to establish that the violation was the result of unpreventable employee misconduct.

Classification

“A willful violation is one committed with either intentional disregard of or plain indifference to the requirements of the Act or a standard.” *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). “[I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference.” *Hern Iron Works*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). In other words, Complainant must show that, at the time of the violative act, the employer was either actually aware that the act was unlawful or “that it possessed a state of mind such that if it were informed of the standard, it would not care.” *Propellex Corp.*, 18 BNA

OSHC 1677 (No. 96-0265, 1999). Thus, it is not enough to show that Respondent was merely careless or displayed a lack of diligence. *Beta Constr. Co.*, 16 BNA OSHC 1435 (No. 91-102, 1993). The Commission has found such heightened awareness where an employer has been previously cited for a violation of the standard in question, is aware of the standard's requirements, and is on notice that a violative condition exists. See *J.A. Jones*, 15 BNA OSHC 2201; *D.A. & L Caruso, Inc.*, 11 BNA OSHC 2138, 2142 (No. 79-5676, 1984).

Good faith efforts to correct a particular hazard can negate a claim of willfulness; however, the Commission applies a test of objective reasonableness to determine whether an employer acted in good faith. *J.A. Jones*, 15 BNA OSHC 2201 (citing *A.P. O'Horo*, 14 BNA OSHC 2004, 2013 (No. 85-369, 1991); *Calang Corp.*, 14 BNA OSHC 1789 (No. 85-319, 1990). Thus, an employer "is not necessarily spared from a finding of willfulness by taking any measure, regardless how minimal, to enhance employee safety." *Id.* (citing *Coleco Indus.*, 14 BNA OSHC 1961 (No. 87-2007, 1992).

The Court finds that Respondent's violation was willful. Complainant established Respondent's heightened awareness of the illegality of the condition by showing: (1) Respondent violated the same standard in 2002 and in 2006; (2) Respondent was aware of the standard's requirements in that it implemented an excavation-specific safety manual, employed an independent inspector, and instituted excavation safety as a part of its annual training seminar; and (3) Davis and Volk were on notice of the violative condition, as they were both present at the edge of the excavation prior to the beginning of the inspection and yet did nothing to abate the hazard. See *J.A. Jones*, 15 BNA OSHC 2201.

It is not enough, however, to merely say that Respondent was on notice of the condition and allowed the condition to exist. *Id.* Nor is it sufficient to establish that the condition was so obvious that Respondent should have known of the violative condition. See *Sec'y of Labor v.*

Amer. Wrecking Corp., 351 F.3d 1254 (D.C. Cir. 2003). Complainant must prove that Respondent was either actually aware of the condition or that it was plainly indifferent to employee safety. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003). There is nothing in the record to suggest that Davis or Volk were specifically aware of the improperly sloped walls and made a conscious decision to proceed with the manhole installation in the face of the violation. That said, the Court finds that both Davis and Volk were plainly indifferent to the safety of Respondent's employees.

Both Davis and Volk have extensive experience in the road construction industry and both testified that 40–70% of the projects that they work on involve excavations. Notwithstanding their extensive experience, both of them failed to recognize a clear violation of the excavation standard. Now, as the Court previously stated, mere negligence is not sufficient to establish a willful violation; however, this is not a case of merely failing to recognize an obviously hazardous condition. Rather, this is a case of what the Court will refer to as institutional indifference. The gist of Volk's testimony is that, although he went to annual trainings that discussed the excavation standards and worked on projects that regularly involved excavations, he was not well-versed in the specific requirements because it had been so long since he had worked in one. Accordingly, he testified that he left it to his foreman to ensure that the excavation was compliant even though his responsibilities included ensuring proper implementation of Respondent's safety and health program and conducting regular job site safety inspections. Thus, Respondent put a man in a supervisory role that lacked the knowledge and wherewithal to carry out his responsibilities. Similarly, Davis testified that he would "just leave it up to the operator" to ensure conformity with the standard. The superintendent/project manager relied on the foreman and the foreman relied on the operator, which left no one in a supervisory role to ensure conformity with the standard. Respondent suggests that this "pass the

“buck” mentality does not constitute indifference because there is a justified need for someone like Volk or Davis to be able to rely on their subordinates to execute their work safely and properly, especially when the scope of management’s duties extends beyond checking the slope of an excavation. In this case, though, the attitude that “someone else will handle it” extended all the way down the chain of supervision until the ultimate responsibility devolved to the very people whom the standards are designed to protect.

Respondent argues that it exercised good faith, which can negate a finding of willfulness. *See Rawson*, 20 BNA OSHC 1078. In this regard, Respondent does not argue that Davis’ determination that the excavation was compliant was objectively reasonable; rather, Respondent argues that, by virtue of its safety program and response to the 2005 OSHA inspection, it has acted in good faith to prevent excavation hazards. While the Court recognizes the thorough nature of Respondent’s safety program, the Court finds that the “pass the buck” mentality among Respondent’s supervisors illustrates the sort of institutional indifference to employee safety that cannot negate a finding of willfulness.

V. PENALTY

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer’s prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995);

Allied Structural Steel, 2 BNA OSHC 1457 (No. 1681, 1975).

Respondent owns a large road construction company and employs over 600 employees. With respect to Citation 1, Item 1, CSHO Strain based his assessment of a \$2,250 penalty on the fact that employees were exposed to severe crushing injuries and potentially death; however, he also indicated that there was a low probability of exposure to the hazard. With respect to Citation 2, Item 1, CSHO Strain based his assessment of a \$63,000 penalty on the fact that two employees were observed in an inadequately protected trench, which exposed each of them to a cave-in hazard. CSHO Strain found that the probability of an accident occurring was likely considering Respondent's failure to address the obvious hazard, a fissure running parallel to the west side of the excavation, and the vibration caused by trucks driving on Route 8, which was adjacent to the excavation. Further, falling soil from a collapsing excavation can cause serious crushing injuries, broken bones, and even death. (Tr. 197). Based on the totality of the circumstances presented here and above, the Court finds that the penalties assessed on Citation 1, Item 1 and Citation 2, Item 1 are appropriate.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED and a penalty of \$2,250.00 is ASSESSED.
2. Citation 1, Item 2 is VACATED.
3. Citation 2, Item 1 is AFFIRMED and a penalty of \$63,000.00 is ASSESSED.

Date: February 4, 2013
Denver, Colorado

/s/ _____
Patrick B. Augustine
Judge, OSHRC