SECRETARY OF LABOR, Complainant, v. SOUTHWESTERN BELL TELEPHONE COMPANY, Respondent.	OSHRC Docket No. 98-1748

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

The issues before us are whether Southwestern Bell Telephone Co. ("SWBT") violated excavation safety standards that require employers to: (1) have a competent person inspect excavations as needed throughout the employees' work shift; and (2) provide adequate cave-in protection in excavations. For the following reasons, we affirm the decision of Administrative Law Judge Benjamin R. Loye finding serious violations of both provisions.[1]

BACKGROUND

On August 7, 1998, two employees of SWBT were repairing telephone lines in an unshored trench that was roughly six feet deep, with nearly vertical sides, adjacent to 5 Mile Road in Alton, Texas. Compliance Officer ("CO") Antonio Fuentes, Jr., of the Secretary of

[1]SWBT has requested oral argument concerning the issues on review. Upon review of the record, judge's decision and briefs, however, we conclude that oral argument is unnecessary.

Labor's Occupational Safety and Health Administration ("OSHA"), drove by on his way to another worksite, and he stopped to inspect the trench.

After an opening conference, he measured and found that the depth of the trench varied between 5.7 and 6.4 feet. Its width was generally six feet. No protective system was being used. The parties stipulate that the soil was classified as Type B. OSHA requires that such soil be sloped back to not more than 45 degrees, measured from the horizontal plane, or protected by some other means, none of which SWBT used. 29 C.F.R. § 1926.652(b).

The employees in the trench ("technicians") were Arturo Santana and Juan Garza. Santana testified that Manuel Serrano, a SWBT contractor, had excavated the pit deeper than planned, and that Serrano's son Hector told Santana it needed shoring. Santana further testified that he passed that information on to his supervisor, Joyce Beck, who told him she didn't feel the excavation was dangerous, and to go ahead with his work. Santana testified that he had received training regarding excavations and trenching, but that he believed Beck had the authority to override his concerns about the excavation. CO Fuentes testified that both Santana and Garza stated that Beck had not seen the finished trench. Fuentes further testified that when Beck arrived at the work site, she admitted knowing the depth of the trench.

Ronnie Jimenez, SWBT's area manager for installation and repair and Beck's direct supervisor, testified that the employees in the excavation had a shared responsibility with Beck, under company policy, to make sure the work was done safely. Under SWBT policy, any employee may refuse to work where there would be exposure to serious dangers. SWBT had comprehensive written safety rules, and CO Fuentes testified that the company's employee training program was adequate. After SWBT received the citation, it suspended Beck without pay for a week. It did not discipline Santana or Garza.

DISCUSSION

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was

noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions. *E.g., George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1932, 1999 CCH OSHD ¶ 31,935, p. 47,388 (No. 94-3121, 1999). *See, e.g., Trinity Indus., Inc. v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000) ("[t]o prove the knowledge element of its burden, the Secretary must show that the employer knew, or with exercise of reasonable diligence could have known of the non-complying condition"). There is no dispute here that the cited standards apply, that the trench did not have the required protective system, and that two employees had access to the noncomplying conditions. SWBT argues, however, that Santana and Garza were "competent persons," that they did a proper inspection, and that the evidence is insufficient to show that it knew or reasonably could have known of its supervisor's failure to properly inspect the trench herself and provide the required protective system.

Item 1: Alleged failure to inspect excavation properly

The cited provision, section 1926.651(k)(i), requires that a "competent person" conduct inspections "as needed throughout the shift" for evidence of potential cave-ins and other excavation hazards.[2] The judge found:

> Southwestern admits that Joyce Beck was the competent person on site. Although Southwestern argues that the employees working under Beck's supervision were also competent persons, and had a shared responsibility for safety and under company policy were authorized to refuse to work in the unshored excavation, it is clear that Beck had *de facto* authority over the work site, which neither Santana nor Garza thought to challenge. Only Beck,

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[2]That provision states in full:

> 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.

> therefore, had actual authority to take the corrective measures necessary to eliminate the hazard.
>
> The uncontroverted evidence establishes that Beck did not see and, therefore, could not have inspected the finished trench prior to the start of work. The violation is established.

On review, SWBT renews its argument that its "technicians" in the trench, Santana and Garza, were "competent persons" under the standard, and that they did the requisite inspection. We disagree. The definition of "competent person" in the excavation standards is:

> [O]ne who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous or dangerous to employees, *and who has authorization to take prompt corrective measures to eliminate them*.

29 C.F.R. § 1926.650 (emphasis added). SWBT argues that Santana and Garza were competent persons because Johnnie Escobedo, its regional safety manager, testified that its employees could decline to work where they would be exposed to serious dangers. That fact does not make them "competent persons," however. To be considered a competent person, an employee must have the authority to "take prompt corrective measures" regarding the physical hazards in the working conditions. Here, that meant the authority to order the steps required to bring the physical conditions into compliance -- installing shoring or one of the protective systems described in section 1926.652(b) or (c). Thus, although Santana and Garza may have had a form of "shared responsibility" for safety at the worksite, they lacked the requisite authority to abate hazards. We, therefore, conclude that they were not "competent persons" for purposes of the excavation standards.

Judge Loye found that Beck was the only "competent person" at the site, and that she failed to conduct the inspections required under the standard. We agree with the judge that the evidence establishes that Beck failed to inspect the trench after it was completed and before the technicians began their work in it, and thus she failed to carry out the standard's requirements. She was aware that the trench had been dug more than five feet deep, and the

need for such an inspection is underscored by the excavator's warning, passed on to Beck by Santana, that the trench needed shoring. In these circumstances, we need not reach the question whether Beck actually qualified as a competent person.

We also find that, as the supervisor on this jobsite, Beck's actual knowledge of her failure to carry out the standard's requirements is clearly imputable to SWBT. In order to avoid responsibility for her failure, SWBT would have to establish that it could not have prevented it. To do so, SWBT would have to at least offer evidence that it had established work rules designed to prevent the violation, had adequately communicated those work rules to its employees (including supervisors), had taken reasonable steps to discover violations of those rules, and had effectively enforced the rules in the event of infractions. *E.g., Dover Elevator Co.*, 15 BNA OSHC 1378, 1382, 1991-93 CCH OSHD ¶ 29,524, p. 39,849 (No. 88-2642, 1991).

SWBT argues that it had a comprehensive safety program designed to prevent excavation hazards. CO Fuentes testified that he believed SWBT's employee training program was adequate. Santana testified that he was given annual training in safety measures regarding excavation and trenching. Floyd Dietzmann, SWBT's director of installation and repair for South Texas, testified that the site supervisors are required to conduct monthly safety meetings for the non-supervisory employees and to observe each one's work practices twice a month.[3] In addition, Escobedo testified that he visited site supervisors ("outside managers") to "review the managers' safety binders, make sure that they're complying with the plan, conducting their safety meetings, conducting their observations. And I also conduct

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[3]Dietzmann stated:

> [W]e require the supervisors to make two observations per person per month. They're supposed to observe the people out there on the job to ensure they're doing a good job. And that all evolves as part of the training of that individual. We keep extensive safety records on each individual that are reviewed by the safety personnel, both on a local basis and a state basis.

safety observations in the field with the technicians" (non-supervisory crew members such as Santana and Garza).

SWBT did not produce, and we have not found, evidence that it monitored its *site supervisors'* actual worksite compliance with the specific safety requirements at issue here. Reasonable steps to monitor compliance with safety requirements are part of an effective safety program, just as are work rules designed to prevent each regulated hazard. *See L. E. Myers Co.*, 16 BNA OSHC 1037, 1041, 1993-95 CCH OSHD ¶ 30,016, p. 41,127 (No. 90-945, 1993). Although SWBT had a safety program and conducted site visits, there is no evidence that either the program or the visits pertained to enforcing the competent persons' obligation to perform trench inspections. Unlike our dissenting colleague, we find that SWBT's evidence is, therefore, insufficient to rebut the Secretary's prima facie showing of actual knowledge.[4] Accordingly, we find that SWBT failed to take reasonable steps to

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[4]Commissioner Weisberg recognizes that under Commission precedent an employer can avoid the imputation of knowledge based on supervisory misconduct by establishing that it "took reasonable measures to prevent the occurrence of the violation." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993). In rebutting the Secretary's prima facie showing of supervisory knowledge, an employer may avoid imputation of that knowledge by coming forward to show that it had work rules addressing *the cited hazard* that were adequately communicated to supervisors and effectively enforced. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1815, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992).

Commissioner Weisberg notes that his dissenting colleague appears to suggest that general evidence of safety rule enforcement presented by an employer is sufficient to rebut the Secretary's prima facie proof of knowledge. However, the Commission has held that it is not enough for an employer to establish that its safety rules in general have been communicated and enforced. The employer must show that it has effectively communicated and enforced the specific rule or rules that are at issue. *Hamilton Fixture*, 16 BNA OSHC 1073, 1090, 1993-95 CCH OSHD ¶ 30,034, p. 41,185 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994).

In the instant case, the employer has presented no evidence of reasonable efforts to monitor and discover whether supervisors were complying with the cited standard requiring daily and frequent inspection of excavations by a competent person. SWBT's regional safety manager Escobedo testified that he "conduct[s] ongoing training reviews, where [he] will

(continued...)

monitor its site supervisors' compliance, and we impute its supervisor's knowledge of the violative condition to it. *Cf. Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050-51, 1993-95 CCH OSHD ¶ 30,652, pp. 42,525-27 (No. 91-3467, 1995) (only *reasonable* monitoring efforts are required).[5]

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[4](...continued)
go to the work centers and ask to review the manager's safety binders, make sure that they're complying with the plan, conducting their safety meetings, conducting their observations." However, SWBT was not cited for an employee training violation but rather for failure by a competent person to inspect an excavation and failure to provide adequate protective system in the excavation. Neither the above statement by Escobedo nor his general testimony that "[he] also conduct[s] safety observations in the field with the technicians" is evidence that SWBT monitored compliance by its supervisors with the excavation safety standards at issue.
Accordingly, where SWBT has failed to come forward with any *relevant* rebuttal evidence, *i.e.*, evidence that its supervisors were adequately trained concerning the excavation safety standards at issue or that reasonable steps were taken to discover violations by its supervisors of those specific excavation safety standards or to enforce those standards, Commissioner Weisberg believes that it is unnecessary in this case to address which party bears the burden of persuasion or to determine the quantum of evidence needed for an employer to rebut prima facie proof of knowledge.

[5]In Chairman Rogers' view, regardless of which party bears the burden of persuasion of employer knowledge in the circumstances, the Secretary's evidence clearly preponderates that the knowledge of supervisor Beck should be imputed to SWBT. Its rebuttal evidence was not even relevant to the specific safety requirements at issue. Further, she respectfully disagrees with Commissioner Visscher's suggestion in his dissent that it would be appropriate to follow the same burden-shifting approach here that the Supreme Court applies in employment discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., where the plaintiff's prima facie case of discrimination rests on a legal presumption. *E.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In those cases, the Court addressed the allocation of burdens in the context of "the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 254, 255 & nn.8, 10. The Court gave the plaintiff the benefit of a "legally mandatory" presumption to establish the prima facie case. *Id.*
As the Court clarified in those cases, however, it was resolving the burden of production and proof *in the context of Title VII* -- there is no indication that it was changing the (continued...)

Thus, we find that the Secretary has established the requisite employer knowledge of the violative conditions, and we affirm the violation.

Item 2: Alleged lack of adequate protective system in excavation

The cited provision, section 1926.652(a)(1), requires an adequate protective system designed in accordance with the standard, for excavations five feet or deeper that are not made entirely in stable rock.[6] SWBT does not dispute that the excavation here required such a protective system, that none was installed, and that its employees were exposed to the resulting conditions. Its sole defense is, once again, that the evidence is insufficient to prove that it reasonably could have known that Beck would fail to provide an adequate protective system. As discussed above, we reject that contention, because SWBT did not present

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"preponderance of the evidence" test generally, or as that test applies to knowledge questions. *St. Mary's*, 509 U.S. at 504 ("[w]e granted certiorari to determine whether, in a suit against an employer alleging intentional racial discrimination in violation of § 703(a)(1) of Title VII . . . , the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff."); *Burdine*, 450 U.S. at 250 ("[t]he *narrow question* presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment [under Title VII], the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, non-discriminatory reasons for the challenged employment action existed.") (emphasis added). While the court in *New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 108 (2d Cir. 1996) (*"NYSEG"*) cited *Burdine* as an example of a burden-allocation rule which could be used in the context of proving knowledge, the court made it clear that "the Commission might select some other rule. . . . [I]ts experience and expertise in the occupational safety field place it in the best position to formulate a workable rule . . . ."

[6]That section states in full:

> (a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
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> (i) Excavations are made entirely in stable rock; or
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> (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

evidence that it took feasible measures to prevent the violation, including reasonable monitoring steps regarding its site supervisors' compliance with protective system requirements.

Penalties

SWBT objects to Judge Loye's penalty assessments. The judge assessed the Secretary's proposed penalties of $1350 for Item 1 and $2250 for Item 2. SWBT represents that the excavation in question existed for only one work day. Santana gave the opinion that it was not actually dangerous, because the ground was like "solid cement" due to lack of recent rain. SWBT had a comprehensive written safety program and cooperated fully with OSHA's inspection. There was no evidence of prior violations, and CO Fuentes testified that SWBT had had no serious, willful, or repeat violations in the previous three years. The record also shows that SWBT's management was committed to safety.

On the other hand, although a cave-in was unlikely, the probable result if one occurred would be serious injury or death. SWBT is a large employer, and the violations here were aggravated by the fact that the excavator had warned SWBT's supervisor of the need for trench protection. On balance, we think the judge's penalty assessments were appropriate. *See* 29 U.S.C. § 666(j) (Commission shall give due consideration to appropriateness of penalty with respect to size of employer's business, gravity of violation, and employer's good faith and history of previous violations).

Thus, we affirm the judge's findings of violations as to both items on review and his penalty assessments of $1350 and $2250, respectively.

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: September 27, 2000

VISSCHER, Commissioner, dissenting:

This case turns on the quantum of evidence an employer must produce in order to rebut a prima facie showing of employer knowledge based upon the direct knowledge or misconduct of a supervisor. For the reasons that follow, I disagree with the majority's conclusion that SWBT failed to rebut the Secretary's prima facie showing and must therefore dissent from their decision to affirm the two violations here.

It is well established that the Secretary bears the burden of proving the employer's knowledge of the violative condition or practice in the workplace. *Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000). Though the knowledge of a supervisor may be imputed to the employer, the courts and the Commission have held that an employer must have an opportunity to rebut the conclusion that it should be charged with a supervisor's knowledge. *See Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984)("[t]he participation of the company's own supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not, standing alone, end the inquiry into foreseeability"); *Pride Oil Well Service*, 15 BNA OSHC 1809, 1815 1991-93 CCH OSHD ¶ 29,807, pp. 40,585 (No. 87-692, 1992) (as rebuttal of Secretary's prima facie showing of supervisor knowledge, employer may avoid imputation of that knowledge by coming forward to show that it had work rules addressing the cited hazard that were adequately communicated to supervisors and effectively enforced).[1]

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[1]*See also L.R. Willson and Sons v. Secretary of Labor*, 134 F. 3d 1235, 1240 (4th Cir.), *cert. denied*, 525 U.S. 962 (1998)("despite a finding of knowledge of the violation on the part of a supervisory employee, the [Secretary bears] the burden of proving that the supervisory employee's acts were not unforeseeable or unpreventable") (citing *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396, 401(4th Cir. 1979); *Western Waterproofing Co. v. Marshall*, 576 F.2d 139, 144 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978)(employer is "excused from responsibility for acts of its supervisory employees" upon a showing "that the acts were contrary to a consistently enforced company policy, that supervisors were adequately trained in safety matters, and that reasonable steps were taken

(continued...)

Thus is it clear that in a case where the Secretary shows that a supervisor knew of the violative condition, the employer's knowledge is established if the employer fails to submit *any* rebuttal evidence showing that it had work rules to prevent the violative condition or practice and that it communicated, monitored and enforced those rules. In *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1538, 1991-93 CCH OSHD ¶ 29,617, p. 40,101-02 (No. 86-360, 1992)(consolidated), for example, the Commission found that knowledge was established where the employer failed to show that it had work rules dealing with the root causes of the cited crane overlifts.

On the other hand, some Commission decisions have suggested that an employer bears no less of an evidentiary burden on rebuttal than when attempting to prove the affirmative defense of unpreventable employee misconduct. *See, e.g., A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007-8, 1991-93 CCH OSHD ¶ 29,223, p. 39,129 (No. 85-369, 1991)(rebuttal of prima facie showing of supervisor knowledge treated as synonymous with the affirmative defense of unpreventable employee misconduct). But to require an employer to meet the same evidentiary burden on rebuttal as that required to prove the affirmative defense is to effectively nullify the right of rebuttal and shift the burden of proof to the employer. *See New York State Electric & Gas Corporation v. Secretary of Labor*, 88 F.3d 98, 108 (2nd Cir. 1996) ("*NYSEG*") (where Secretary seeks to establish knowledge based on the inadequacy of an employer's safety program, burden of proof as to the safety program remains on Secretary and may not be shifted to employer).

While it is clear that an employer must provide some evidence in order to rebut the conclusion that it should be charged with a supervisor's knowledge, it is only logical that the burden for rebuttal must be less than the burden of persuasion an employer must meet in order to establish an affirmative defense. While the majority acknowledges the employer's

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to discover safety violations committed by its supervisors"); and *Capital Electric Line Builders of Kansas v. Marshall*, 678 F.2d 128, 129-30 (10th Cir. 1982) (comparable rule for non-supervisory employees).

opportunity for rebuttal, they make no effort to quantify the employer's burden. In *NYSEG*, 88 F.3d at 108, the Second Circuit Court of Appeals suggested that the Commission consider *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a discrimination case in which the Supreme Court described the defendant's burden on rebuttal as the "burden of production." *Id.* at 254. The Court explained the "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Id*. The Court further explained in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) that the defendant has the "burden of producing an explanation to rebut the prima facie case - i.e., the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate nondiscriminatory reason.'" *Id*. at 506-07, quoting *Burdine,* 450 U.S. at 254. In order to rebut the prima facie case, the defendant "need not persuade the court that it was actually motivated by the proffered reasons." *Burdine,* 450 U.S. at 254. Since the defendant's burden is one of production, not persuasion, it "can involve no credibility assessment." *St. Mary's,* 509 U.S. at 509. Once the prima facie proof has been rebutted, the plaintiff "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the [plaintiff's] ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Burdine,* 450 U.S. at 256. The burden of persuasion "remains at all times with the plaintiff." *Id.* at 253.

Turning to the facts in this case, SWBT will be charged with its supervisor Beck's knowledge of the violative conditions and actions that were alleged here unless it provided safety program evidence sufficient to rebut knowledge based on imputation. Reviewing the record, I think it is clear that SWBT did provide such evidence. Not only did it establish that it had work rules to prevent these violations, but that it communicated those rules, monitored for compliance and enforced violations with its employees.

The majority believes that the safety program evidence SWBT produced was not sufficient to rebut the imputation of Beck's knowledge. According to their decision, this is

so even though Escobedo, SWBT's regional safety manager, testified that he regularly checked the records of managers, including Beck's, to insure that they were complying with the company's safety program by conducting safety meetings and inspections. Escobedo also testified that he personally visited field operations in order to monitor employee compliance with company rules. Nonetheless, the majority has decided that SWBT's evidence was insufficient to rebut knowledge based imputation because "we have not found evidence . . . that [SWBT] monitored its *site supervisors'* actual worksite compliance with the specific safety requirements at issue here." (slip op. at 6) (emphasis in original) Their conclusion that Escobedo's monitoring of employees on work sites is not evidence that SWBT was monitoring *all* employees, including supervisors, only makes sense if one can assume that SWBT's supervisors somehow had no interaction with their crew members at these work sites. Furthermore, in finding that SWBT's rebuttal failed because its witnesses did not specifically mention monitoring of supervisors on these specific excavations, the majority is placing the full burden of persuasion regarding the adequacy of its safety program on SWBT. As the above cited cases make clear, this is wrong as a matter of law.

Once SWBT introduced evidence sufficient to rebut proof of knowledge based on the imputation of Beck's knowledge, it was for the Secretary to raise questions about the credibility of the evidence, or to introduce additional evidence to disprove one or more of the safety program elements. For example, the Secretary might have attempted to show that, as the majority has conveniently concluded, SWBT only monitored the field work of its non-

supervisory employees and not supervisors such as Beck. As it is, the Secretary offered *no* evidence in response to SWBT's rebuttal. As the ultimate burden of persuasion remains on the Secretary, I would find that she failed to carry her burden to prove SWBT's knowledge of the violative condition.

/s/
Gary L. Visscher
Commissioner

Date: September 27, 2000

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SECRETARY OF LABOR, Complainant, v. SOUTHWESTERN BELL TELEPHONE COMPANY, and its successors, Respondent.	OSHRC DOCKET NO. 98-1748

APPEARANCES:

For the Complainant:
Stephen E. Irving, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:
James S. Golden, Esq., Southwestern Bell Telephone, San Antonio, Texas

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Southwestern Bell Telephone Company, and its successors (Southwestern) [*see* amendment of caption at Tr. 4-5], at all times relevant to this action maintained a place of business at 5 Mile Road, west of Mayberry Street, Alton, Texas where it was engaged in repairing telephone lines in an excavation. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 7, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Southwestern's Alton, Texas work site. As a result of that inspection, Southwestern was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Southwestern brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 4, 1999, a hearing was held in San Antonio, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.651(k)(1): An inspection of the excavations, the adjacent areas, and protective systems was not conducted by the competent person prior to the start of work and as needed throughout the shift.

> At the excavation site at 5 Mile Line Road, Alton, TX, a competent person did not inspect an excavation prior to entry by employees. The excavation ranged from 6.4 feet to 5.7 feet and employees were exposed to hazards associated with cave-ins.

Facts

Antonio Fuentes, Jr., the OSHA Compliance Officer (CO) testified that on August 7, 1998, he observed and photographed two employees of Southwestern, Arturo Santana and Juan Garza, working in an unshored excavation (Tr. 16-17, 22, 26, 74; Exh. C-10). Fuentes measured the excavation in three different places; the depth of the trench varied between 5.7 and 6.4 feet (Tr. 28). The width of the trench was generally 6 feet (Tr. 29). The banks were nearly vertical (Tr. 24, 28). The parties stipulate that the soil was classified as Type B (Tr. 27).

Arturo Santana, an employee of Southwestern, testified that the pit in which they were working had been excavated by a contractor, Manuel Serrano (Tr. 69). Santana testified that Serrano dug the excavation deeper than planned, and that Serrano's son, Hector, told him that the excavation needed shoring; Santana testified that he passed that information on to his supervisor, Joyce Beck (Tr. 70). Santana testified that Ms. Beck told him she didn't feel the excavation was dangerous, and to go ahead with his work (Tr. 22, 70). Santana admitted that he had received training regarding excavations and trenching (Tr. 71, 98), but testified that he believed that Beck, as his supervisor, had the authority to override his concerns about the excavation (Tr. 70).

Fuentes testified that both Santana and Garza stated that Ms. Beck had not seen the finished excavation (Tr. 21, 75). On Fuentes' request, Joyce Beck, who was not on site upon his arrival, was called to the work site (Tr. 18). Fuentes testified that Beck admitted knowing about the depth of the trench (Tr. 29).

Ronnie Jimenez, Ms. Beck's direct supervisor (Tr. 103), testified that the employees in the excavation had a shared responsibility under company policy to refuse to work in an unsafe excavation (Tr. 111; *See also,* testimony of Floyd Dietzman, Tr. 126). Nonetheless following Southwestern's receipt of

the citation in the above captioned matter, Ms. Beck was suspended without pay for a week (Tr. 105-06). Neither Santana nor Garza were disciplined (Tr. 110).

Discussion

The cited standard provides:

> An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. . ..

A "competent person" is defined at §1926.650 as:

> ...one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

Southwestern admits that Joyce Beck was the competent person on site. Although Southwestern argues that the employees working under Beck's supervision were also competent persons, and had a shared responsibility for safety and under company policy were authorized to refuse to work in the unshored excavation, it is clear that Beck had *de facto* authority over the work site, which neither Santana nor Garza thought to challenge. Only Beck, therefore, had actual authority to take the corrective measures necessary to eliminate the hazard.

The uncontroverted evidence establishes that Beck did not see and, therefore, could not have inspected the finished trench prior to the start of work. The violation is established.

Penalty

A penalty of $1,350.00 was proposed.

CO Fuentes believed that the competent person's failure to inspect and take corrective measures could result in the collapse of the trench. Fuentes testified that a trench collapse could result in asphyxiation, suffocation or the crushing of internal organs, any of which could lead to death (Tr. 35). Fuentes found that the severity of any possible injury was, therefore, high, but that the possibility of a trench collapse in this case was low (Tr. 39). Because Southwestern is a large company, no adjustment for size was made in the proposed penalty (Tr. 39). A 10% adjustment for history was made, because Southwestern had no serious violations within the past three years (Tr. 40). No credit was given for good faith (Tr. 39).

I find that the Secretary's proposed penalty is appropriate and will be assessed.

Serious citation 1, item 2 alleges:

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

> At the excavation site at 5 Mile Line Road, Alton, TX, employees entered and worked in an excavation ranging from 6.4 feet to 5.7 feet deep without an adequate protective system. Employees were exposed to hazards associated with cave-ins.

The Violation

Southwestern does not dispute the existence of the violation, but argues that said violation was the result of the unpreventable employee misconduct of Joyce Beck.

Facts

Johnnie Escobedo, Southwestern's manager of safety, testified that he maintains the training records for the company's work crews in south Texas (Tr. 83). Escobedo testified that in June 1998 he conducted training with Joyce Beck's manager, and all of the managers that are in her group (Tr. 83). Escobedo testified that he reiterated the importance of excavation trenching safety and training with that group (Tr. 83). Escobedo testified that Southwestern provides a "Safety Training Guide for Employees," which contains an examination the applicant must pass before being certified as a competent person in trenching and excavation (Tr. 87; Exh. R-3). Southwestern also uses a training video called "When You Go In" for training its people regarding excavation (Tr. 88; Exh. R-4). Escobedo testified that these documents, as well as Southwestern's more general safety programs (Exh. R-1 through R-6) were available to Southwestern's managers (Tr. 91), and that Joyce Beck had copies of Exh. R-3 and R-4 in a binder in her office (Tr. 95).

Escobedo testified that employees who fail to follow Southwestern's safety policies and regulations may be disciplined, up to and including dismissal (Tr. 94). Joyce Beck was disciplined for her violation of Southwestern's policies (Tr. 105-06, 123)

Discussion

In order to establish an unpreventable employee misconduct defense, the employer must show that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (No. 91-2897, 1995). The Fifth Circuit holds that the burden of proving affirmative defense is with the employer. *See, L.R. Willson and Sons Inc. v. Occupational Safety and Health Review Commission,* 134 F.3d 1235 (4th Cir. 1998).

Here Southwestern introduced ample evidence of a comprehensive written safety program, including training materials addressing the cited hazard, which, if heeded, would have prevented the violation. Southwestern completely failed to show how the training materials were communicated to supervisory

personnel in general, or to Joyce Beck in particular. Southwestern's manager of safety, Escobedo, indicated that Beck's group of managers was cautioned about the importance of trenching and excavation training, but did not indicate that he himself provided that training. Beck had copies of the training materials, but Southwestern provided no evidence that Beck had been made familiar with those materials. There was no evidence indicating what, if any, efforts Southwestern made to discover violations of its work rules. There was no evidence that any employee, other than Joyce Beck, had ever been disciplined for safety violations. Southwestern failed to carry its burden of proof, and its affirmative defense must be rejected.

Penalty

A penalty of $2,250.00 was proposed for this violation. The criteria taken into account by the Secretary are identical to those in the discussion of item 1 above. Because of the direct nexus between the failure to shore and the probability of a trench collapse, I find that the higher penalty for this item is appropriate, and will be assessed.

Serious citation 1, item 3 alleges:

29 CFR 1926.1053(b)(1): Portable ladders were used for access to an upper landing surface and the ladder side rails did not extend at least 3 feet (.9 m) above the upper landing surface to which the ladder was used to gain access:

> At the excavation site at 5 Mile Line Road, Alton, TX, employees used a portable extension ladder that did not extend 3 feet above the upper landing surface. Employees were exposed to slips and falls into an excavation 6.0 feet deep.

Facts

Fuentes testified that the employees in the trench exited by climbing out on a ladder (Tr. 46). He stated that the side rails of the ladder in the trench extended 1.3 to 1.4 feet, rather than the required 36 inches above ground level (Tr. 31). Fuentes further testified that an employee who tripped dismounting the ladder could sprain an ankle, damage a knee, or even break a leg (Tr. 33). Fuentes admitted that the two employees had no difficulty exiting the trench on this occasion (Tr. 46).

Discussion

Southwestern does not contest the facts presented by the CO, but argues that the failure to extend the ladder further was not "serious," in that the potentially hazardous condition did not give rise to a substantial probability of death or serious physical harm as required under §17k of the Act.

This judge does not agree that a broken bone is not "serious physical harm" as contemplated by the Act. The gravity of this violation is, however, overstated, in that the severity of any possible injury, and

the low probability of injury were weighted the same as in item 1, a violation which the CO testified could lead to death.

Taking into account the low gravity of this violation, as well as the statutory factors discussed in item 1, I find that the proposed penalty is excessive. A penalty of $600.00 will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.651(k)(1) is AFFIRMED and a penalty of $1,350.00 is ASSESSED.

2. Citation 1, item 2, alleging violation of §1926.652(a)(1) is AFFIRMED and a penalty of $2,250.00 is ASSESSED.

3. Citation 1, item 3, alleging violation of §1926.1053(b)(1) is AFFIRMED and a penalty of $600.00 is ASSESSED.

/s/

Benjamin R. Loye
Judge, OSHRC

Dated: August 30, 1999