

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

YANTIS COMPANY,

Respondent.

OSHRC Docket No. 15-1697

Appearances:

Carlton C. Jackson, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Calley D. Callahan, Esq. and Donald W. Holcomb, Esq., Knolle, Holcomb, Callahan & Taylor,
Cedar Park, Texas
For Respondent

Before: Administrative Law Judge John H. Schumacher

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. § 659(c) (“the Act”). On May 5, 2015, CSHOs John Lawhorn and Jermaine Thomas observed an individual exiting an unprotected trench located on Maurer Ranch Road, San Antonio, Texas.¹ (Tr. 109). Based on their observations, CSHOs Lawhorn and Thomas initiated an inspection of Respondent’s worksite pursuant to Complainant’s National Emphasis Program on Trenching and Excavations. (Tr. 110–11).

1. This worksite was part of a larger project, which Respondent referred to as the Alamo Ranch 36 Project. (Tr. 509).

As a result of the inspection, on September 9, 2015, OSHA issued a *Citation and Notification of Penalty* (“Citation”) to Respondent, alleging one repeat violation of the Act and proposing a penalty of \$35,000.00. The Citation alleges Respondent failed to provide adequate protection for employees entering into a trench. In response to the allegation, Respondent claims that the violation was the result of unpreventable employee misconduct or, alternatively, that Complainant failed to prove that the acts of its employees were foreseeable.

Respondent submitted its Notice of Contest on September 30, 2015, bringing this case before the Commission. A trial was held on October 25, 2016, after which both parties submitted post-trial briefs.

II. Stipulations and Jurisdiction

The parties stipulated to the following:

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Occupational Safety and Health Act of 1970 (hereinafter “the Act”), 29 U.S.C. § 569(c).
2. Respondent, Yantis Company, is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5).
3. As a result of OSHA Inspection No. 1061230 (the “Inspection”), Respondent Yantis Company was issued a citation (the “Citation”) on September 9, 2015 for a repeat violation of 29 C.F.R. 1926.652(c), with a penalty of \$35,000.00, and Respondent denied the allegations contained in the Citation.
4. On May 23, 2011, the parties entered into an Informal Settlement Agreement related to OSHA Inspection No. 314305095, in which Respondent waived its right to contest the citation and penalties, which citation and penalties were amended per the terms of the Informal Settlement Agreement to a classification of “other than serious” for a violation of 29 C.F.R. 1926.652(a)(1), with a penalty of \$10,780.00.
5. On September 30, 2015, Respondent timely filed a notice of contest in regard to the Citation 1, Item 1 issued on September 9, 2015 in regard to Inspection No. 1061230.

(Tr. 244–45).

III. Factual Background

Respondent is a construction company operating out of San Antonio, Texas. (Ex. C-2). The business is split into four divisions, including utilities; site work; site excavation; and paving, asphalt, and concrete, and employs over 300 employees. (Tr. 156, 248). On May 5, 2015, a crew of Respondent's employees, led by foreman Christopher Esquivel, was installing a new sewer line to connect to the existing main line of the Alamo Ranch subdivision. Respondent referred to this portion of the project as "Alamo 36". (Tr. 89-90; Ex. R-22). According to Respondent's Assistant Safety Manager, Samuel De La Rosa, the particular section of trench that Esquivel's crew was working on was merely one portion of a much larger trench that had been progressively dug up and backfilled over the course of the project.² (Tr. 486-87). The crew was a little slow in starting that morning because it was raining. (Tr. 282-83).

That same day, Compliance Safety and Health Officers ("CSHO") Jermaine Thomas and John Lawhorn were driving around the Alamo Ranch subdivision. (Tr. 113-14). Due to the increased construction activity in the area, the CSHOs decided to drive around and review worksites. (Tr. 112). CSHO Lawhorn testified the worksite at Alamo 36 was empty when they initially drove by. (Tr. 112-13). However, after driving through the subdivision, the CSHOs again drove past the previously unoccupied worksite to find workers standing around the trench. (Tr. 114). As they pulled up, they noticed one worker either exiting or entering the trench via a ladder. (Tr. 115). At that point, CSHO Lawhorn decided to conduct an inspection pursuant to the National Emphasis Program on Trenching and Excavations.

2. De la Rosa also testified that the trench was divided into stations to indicate the distance from the starting point, i.e., Station 300 would be 300 feet from the beginning point. (Tr. 486).

According to CSHO Lawhorn, they first contacted Chris Esquivel,³ who identified himself as the foreman, and requested permission to conduct an inspection. (Tr. 115–17, 123). Esquivel told CSHO Lawhorn that he needed to contact the “safety guy” and that communications should go through that point of contact. (Tr. 120). CSHO Lawhorn testified that he suspended the opening conference at that point; however, he admits that he directed CSHO Thomas to take measurements of the trench and take photographs of the worksite. (Tr. 119; Ex. C-5). The trench measured between 9 and 10 feet deep, 3 to 4 feet wide, and 9 to 10 feet long, and did not have shoring installed nor were the walls sloped to any degree. (Tr. 131, 211, 484; Ex. C-5). Both the CSHO and Respondent’s Assistant Safety Manager, De La Rosa, testified that the walls exhibited fissures, which indicate soil separation. (Tr. 127, 481–82; Ex. C-5). CSHO Thomas testified that he took a soil sample from a spoil pile, which Esquivel indicated came from the trench. (Tr. 235–36). Subsequent analysis showed that the soil was type B.⁴ (Ex. C-9).

After Esquivel concluded his call, he informed CSHO Lawhorn that he would be sending the employees home, at which point CSHO Lawhorn asked CSHO Thomas to take photographs of the license plates of the departing vehicles, in case the need arose for identifying witnesses. (Tr. 120, 122). Esquivel had called Johnathan Granados, Respondent’s Safety Manager, who testified that he arrived at the worksite at some point between 1:20 and 1:25 p.m. (Tr. 324). Granados stated that he did not see any additional photographs or measurements being taken during his time at the worksite, which coincides with CSHO Lawhorn’s testimony that he directed CSHO Thomas to continue taking photographs and measurements. (Tr. 324). Granados participated in an opening conference with CSHO Lawhorn and Esquivel, during which time CSHO Lawhorn told Granados

3. Mr. Esquivel was not called as a witness.

4. Respondent takes issue with both the source of the sample and the chain of custody resulting in the lab’s determination that the soil was type B. As will be discussed later in Section IV.A.1, *infra*, irrespective of the source of the soil sample, the trench was located in previously disturbed soil.

that he had observed an employee in the trench, which, as the pictures illustrate, was neither shored nor sloped. (Tr. 325; Ex. C-5). At that point, CSHO Lawhorn interviewed Esquivel, who requested Granados be present. (Tr. 325).

At some point after they had been pulled from the worksite, the crew was directed to return for interviews with OSHA. (Tr. 70). Of the employees CSHO Lawhorn interviewed, only John Salinas testified at trial. (Tr. 70). After the interviews were conducted, CSHO Lawhorn conducted a closing conference with Granados, during which time he recounted his observations, the scope of his inspection, and indicated that Respondent would be receiving a letter from OSHA. (Tr. 326).

As Granados was walking away from the worksite to confer with his superiors, Michael Shafer and Arnold Briones, he heard Briones shout, “[W]hat the ‘F’ is that guy doing in the trench?” (Tr. 327). At that moment, Granados noticed Esquivel on the same ladder, exiting the trench that had prompted the OSHA inspection. (Tr. 327). De la Rosa testified that he heard CSHO Thomas grant Esquivel permission to enter the trench to gather tools; however, upon cross-examination, it was revealed that Esquivel merely asked whether he “could go and get the small tools?” (Tr. 328, 465–66). Whether permission to enter the trench was expressly granted by CSHO Thomas is unclear as such was not covered during his testimony.

After the inspection had concluded, the crew was directed to return to Respondent’s yard, where they were interviewed regarding that day’s events and ultimately disciplined for their actions (or inaction) during that time (Tr. 69–71, 430). All of the employees present that day were suspended for violating a work rule, which required employees to report hazardous conditions or practices.⁵ (Ex. R-17). Esquivel was not only suspended, but was demoted from his position as foreman, which resulted in a substantial reduction in pay. (Tr. 316, 532; Ex. R-20).

5. One employee, Mario Cervantes, was ultimately fired for conduct unrelated to the inspection itself. (Tr. 312–13).

As a result of the inspection, Complainant issued a citation alleging a repeat violation of 29 C.F.R. § 1926.652(a)(1), which will be discussed in greater detail below.

IV. Discussion

To prove a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994). The key issue in this case is knowledge.

As the following discussion will illustrate, Complainant established the first three elements of its *prima facie* case. As regards the fourth element, however, Respondent contends that the violation was the product of unpreventable employee misconduct, whether by Esquivel as the supervisor or by Christopher Owens, the employee discovered in the trench. By dint of location—the events of this case occurred in Texas, which is in the jurisdiction of the Fifth Circuit Court of Appeals—the Court is confronted with a multi-faceted dispute regarding the respective burdens of proof applicable to the question of knowledge. *See W.G. Yates*, 459 F.3d 604 (5th Cir. 2006) (holding it is Secretary’s burden to establish foreseeability of supervisor’s misconduct); *but see Consol. Freightways Corp.*, 15 BNA OSHC 1317 (No. 86-351, 1991) (placing burden on Respondent to rebut imputation of knowledge). Thus, depending on the employee identified as having committed the misconduct, the respective burdens of proof will shift. Irrespective of that shift, however, the Court finds the facts presented in this case warrant dismissal of the Citation.

Ultimately, Complainant failed to show that the events of May 15, 2015, were anything more than the result of idiosyncratic behavior, which could not have been foreseen by Respondent.

a. Citation 1, Item 1

Complainant alleged a repeat violation of the Act as follows:

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 1926.652(c):

West side of Maurer Ranch Rd., on or about May 5, 2015, employees were exposed to cave-in and/or caught-in hazards while leak checking a previously installed water line inside a previously disturbed trench that was approximately 4 feet in width by 10.5 feet in depth by 41 feet in length and did not have any form of cave-in protection systems in place.

The Yantis Company was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.652(a)(1), which was contained in OSHA inspection number 314305095, citation number 1, item number 1, and was affirmed as a final order on 24 March 2011 with respect to a workplace located a [sic] Mediator Path & Rocket Lane, Converse, TX.

Citation and Notification of Penalty at 6.

The cited standard provides:

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:

- (i) Excavations are made entirely in stable rock; or
- (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.

29 C.F.R. § 1926.652(a)(1).

1. The Standard Applies

The scope and application paragraph of Subpart P, which governs excavations, states, “This subpart applies to all open excavations made in the earth’s surface. Excavations are defined to include trenches.” 29 C.F.R. § 1926.650(a). There is no dispute the excavation at issue was a

trench, which measured approximately 10 feet deep by 4 feet wide by 10 feet long. *See id.* § 1926.650(b) (defining a trench as “a narrow excavation (in relation to its length) made below the surface of the ground”). Based on those measurements, specifically as they relate to depth, the first exception does not apply. *See id.* § 1926.652(a) (exception made for trenches less than 5 feet deep). Further, there is no question that at least one employee, Christopher Owens, was in the trench. (Tr. 468). Thus, on the face of it, the standard applies.

Respondent contends, however, that the trench was dug in stable rock, which, according to the standard, is the other exception to the shoring or sloping requirements imposed by §§ 1926.652(b) or (c). The Commission has held that the burden of establishing an exception to a standard falls to the party seeking to benefit from it. *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522 (No. 90-2866, 1993). In support of its claim that the trench was dug in stable rock, Respondent points out that it had to use a “trencher” in order to remove the dirt from the trench in the first instance. (Tr. 334–35). According to De La Rosa, a trencher, also referred to as a rock saw, is typically used when traditional digging methods, such as the excavator bucket or a hoe ram, are insufficient for the job. (Tr. 472). Most of Respondent’s witnesses testified that the trench was located in stable rock.

The Court finds that Respondent failed to establish an exception to the standard. The term “stable rock” is defined in the regulations as “natural solid mineral material that can be excavated with vertical sides and will remain intact while exposed.” While Respondent presented evidence to show that the material in the trench was difficult to remove with conventional means, there was no testimony from direct witnesses regarding the manner in which the trencher was used, *i.e.*, whether it was used in particularly difficult spots, or whether it was used to dig the entire trench, nor was there any first-hand testimony from Respondent’s witnesses regarding whether the walls

were, in fact, comprised of “natural solid mineral”. In fact, the evidence from Respondent’s witnesses regarding the type of soil in the trench militates against the stable rock exception.

Just as it is Complainant’s burden to establish the soil type to determine the appropriate protective measures, Respondent must proffer convincing evidence to establish that the excavation was dug in stable rock. *See Kaspar, supra*. According to CSHO Lawhorn, Esquivel identified type A, B, and C soil, but had not identified stable rock in the excavation. (Tr. 142). Respondent did not conduct any further analysis of the trench walls after the inspection to suggest otherwise. Further, though Respondent contests the quality of the soil sample taken by CSHO Thomas,⁶ and its subsequent chain of custody, the sample and the appearance of the spoil pile from which it was taken provide additional evidence that, at the very least, the trench was not dug in stable rock. This account is supported by the fact that the laboratory results indicate type B soil. (Ex. C-9). Thus, irrespective of Respondent’s protest that the spoil pile was not wholly representative of the contents of the trench, the testimony is clear that the contents of the spoil pile were, at one point, inside the trench and did not exhibit the characteristics of stable rock such that protective equipment was not required. Salinas and De La Rosa both testified the utility work at this particular location involved tying a new sewer line into the existing main. (Tr. 48, 493).

Also contrary to Respondent’s claim is the testimony of Respondent’s own employees. According to Salinas, he handed a tool to the exposed employee, Christopher Owens, who was reinstalling a coupling that had come loose from the junction when they were digging the trench.⁷

6. Respondent raised objections to the soil sample taken by CSHO Thomas during the inspection and the subsequent chain of custody. According to CSHO Thomas, he took a sample from the spoil pile based on Esquivel’s representation that it came from the trench. Subsequent testimony revealed that the spoil pile likely contained soil from all around the worksite, calling into question whether the spoil pile was representative of the soil in the trench. Notwithstanding the characterization or origin of the sample, however, the weight of the evidence illustrates that the trench, at the point of the line connection, was dug in previously disturbed soil.

7. As noted above, the trenches were backfilled once the pipe was laid; however, in some instances, the trench was backfilled prior to completing the project so that an open hole in the ground would not be left unattended.

(Tr. 51–56). The junction, according to Salinas, is where the new pipe tied into the existing main. (*Id.*). Thus, the employee was standing in an unprotected trench, which was dug in previously disturbed soil. Based on the conditions and location of the work, De La Rosa also believed the trench at issue contained previously disturbed soil. (Tr. 495). Given the testimony of De La Rosa and Salinas, coupled with the foregoing discussion, the Court finds the point in the trench at which the new sewer line was being tied into the existing main was located in previously disturbed soil.

According to Appendix A of Subpart P, previously disturbed soil is characterized as Type B “except those which would be otherwise classified as Type C”. *See* 29 C.F.R. § 1926, Subpart P, App. A, sec. (b); *see also Stark Excavating, Inc.*, 24 BNA OSHC 2218 (No. 09-0004 *et al.*, 2014). Anything other than solid rock does not qualify for the exception found at 1926.652(a)(1)(i). Accordingly, the Court finds Respondent did not meet its burden of proof as to the stable rock exception and finds that the standard applies.

2. The Terms of the Standard Were Violated

Given the condition of the trench, the standard required Respondent to implement protective measures to prevent a cave-in. The standard indicates two potential methods for abatement, including sloping/benching the walls of the trench, or installing shoring. *See* 29 C.F.R. §§ 1926.652(b), (c). The soil type then dictates the proper protective measure. *Id.* Respondent’s trench was neither sloped, benched, nor shored when Esquivel directed Owens to enter the trench to fix the sewer line connection. Accordingly, the terms of the standard were violated.

3. Employees Had Access to the Hazard

As discussed above in Section III, *supra*, Respondent’s employee, Owens, entered the noncompliant, unprotected trench in order to repair a pipe line connection. Salinas testified that he handed a tool to Owens when he was in the trench to facilitate the repair. (Tr. 52). None of

these points were refuted by Respondent. Accordingly, the Court finds Respondent's employee was exposed to the hazard.

4. Respondent Did Not Have Knowledge of the Condition

As stated previously, the crux of this case is knowledge. The foregoing discussion illustrates that, notwithstanding some discrepancies in detail, Respondent's worksite had a non-compliant, unprotected trench with an employee inside of it. The question is whether Respondent should be held responsible for the violation.

“Congress quite clearly did not intend . . . to impose strict liability: The duty was to be an achievable one Congress intended to require elimination only of preventable hazards.” *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568 (5th Cir. 1976) (quoting *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265–66 (D.C. Cir. 1973)). “Nothing in the Act . . . makes an employer an insurer or guarantor of employee compliance [with the Act] at all times.” *Id.* at 570 (quoting *Brennan v. OSHRC*, 511 F.2d 1139, 1144 (9th Cir. 1975)). Instead, “the Act seeks to require employers to protect against preventable and foreseeable dangers to employees in the workplace.” *W.G. Yates & Sons Co., Inc. v. OSHRC*, 459 F.3d 604, 607 (5th Cir. 2006). Thus, in order to establish Respondent had knowledge of the condition, Complainant must show “that the cited employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition.” *N & N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000). Reasonable diligence requires, amongst other things: the formulation and implementation of adequate work rules; training programs to ensure work is safe; adequate supervision, including workplace inspection, anticipating potential hazards, and taking measures to prevent violations. *Id.* The actual or constructive knowledge of a supervisor can be imputed 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.” *Consol. Freightways Corp.*, 15 BNA OSHC 1317 (No. 86-351, 1991) (citing *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982)) (emphasis in original).

The uncontroverted testimony is that Esquivel directed Owens, a subordinate employee, to enter the unprotected trench to fix a pipe sleeve that had been damaged when backfill was being removed from the trench. According to Salinas, when Esquivel directed Owens to enter the trench, Salinas said, “We can’t get in there. We don’t have no shoring.” (Tr. 50). In response, Esquivel stated it wasn’t going to take that long, so they should make the connection and cover the hole back up. (Tr. 50). After that, the crew placed a ladder in the trench, and the employee got in to place the sleeve on the pipe. (Tr. 50). At that point, CSHOs Lawhorn and Thomas arrived. (Tr. 50).

Either Owens, as the employee who entered the trench, or Esquivel, who directed him to do so, could serve as the reference point for the violation. Herein lies the wrinkle—because this case occurred in the Fifth Circuit, the Court is obliged to apply the case law of that circuit. *See Brooks Well Servicing, Inc.*, 20 BNA OSHC 1286 (No. 99-0849, 2003) (holding “[w]hen the law of the circuit to which a case would likely be appealed differs from the Commission’s case law, we apply the law of that circuit”). Insofar as the misconduct is committed by a supervisor, the Fifth Circuit holds it is the Secretary’s burden to prove that the misconduct of the supervisor was foreseeable. *W.G. Yates*, 459 F.3d 604. This is contrary to Commission precedent, as well as the holdings of other circuit courts, which places the onus on the employer to rebut the imputation of its supervisor’s knowledge through evidence of training and supervision. *See, e.g., Danis-Shook Jt. Venture XXV v. Secretary of Labor*, 319 F.3d 805, 811–12 (6th Cir. 2003) (holding supervisor’s knowledge of his own misconduct can be imputed to establish employer knowledge because such

misconduct “raises an inference of lax enforcement and/or communication of the employer’s safety policy”). Regardless of which party owns the burden, however, the question is essentially the same: were the acts of the supervisor foreseeable? This is the case whether Esquivel was merely a passive observer, through whom Respondent’s knowledge of the violative act is imputed, or whether he was an active participant in the misconduct. Because either question will ultimately be resolved on the basis of Esquivel’s training and supervision, the Court shall focus on him.

Complainant contends that focusing on Esquivel as the bad actor is contrary to Fifth Circuit precedent. *See W.G. Yates*, 459 F.3d 604, *supra*. Specifically, Complainant argues the holding of *Yates* is inapposite because of the manner in which the supervisor was involved in the misconduct. The Court finds that this is a distinction without a difference. In *Yates*, the supervisor physically participated in the misconduct—the foreman was working without fall protection on a slope with a precipitous drop-off and his employees were wearing their harnesses backwards. *Id.* at 605. The Fifth Circuit resolved the question of the foreman’s misconduct by determining whether the Secretary proved the foreman’s actions were foreseeable, as the Court proposes here. *Id.* at 609.

While the situation presented in this case is slightly different, the Court finds the analysis is the same. Esquivel was not merely a passive observer of his subordinate’s misconduct; he directed the employee to enter the trench in contravention of the standard. This is misconduct in and of itself. *See, e.g., Rawson Contractors, Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003) (analyzing misconduct defense from standpoint of foreman that ordered employees into unprotected trench); *CBI Svcs., Inc.*, 19 BNA OSHC 1591 (No. 95-0489, 2001) (analyzing misconduct defense from standpoint of supervisors that directed misuse of crane). Accordingly, Respondent can be charged with knowledge only if Esquivel’s knowledge of his own misconduct is imputable to Yates. *Id.* at 609. Such imputation is proper only if Complainant establishes that

Esquivel's conduct was foreseeable. In order to prove Esquivel's conduct was foreseeable, Complainant must show that Respondent's safety policy, training, supervision, and discipline were insufficient. *Id.* at 608–609.⁸

i. Safety Policy, Training, and Supervision

Respondent had a clear set of work rules to prevent this type of violation from occurring. Respondent's Excavation and Trenching Policy states, "At no time will an employee enter a trench or an excavation that is 5 feet deep or greater, and is not properly sloped, shored, benched, sheeted, braced, or otherwise supported." (Ex. C-18). In addition to the policies governing trenches and excavations, Respondent also has a Trenching and Excavation Program, the purpose of which is to "ensure compliance with the OSHA Excavation Standard A competent person will never allow workers to be exposed to unsafe trench conditions, no matter how short the exposure will be!" (Ex. C-19). The Program subsequently lists the duties of the competent person, including steps for determining soil classification, training responsibilities, and understanding the appropriate protective measures commensurate with soil type. (Ex. C-19). In addition, Respondent has consolidated much of this knowledge into a simple mandate known as the "4-10 Rule". (Tr. 271–72). This rule dictates two distances—4 feet and 10 feet—which represent benchmarks indicating when trench protection should be used or staking out minimum distances away from work areas or operating equipment. (*Id.*).

Complainant does not dispute Respondent had an adequate work rule, but he contends the work rule was not adequately communicated. The Court disagrees. Will McCoy, Respondent's

8. The Court's analysis of this question is basically the same as the analysis of the affirmative defense of supervisory misconduct—in both cases, the ultimate question to be resolved is foreseeability. The only difference is to which party that burden devolves. Even if the Court merely focused on the question of whether Esquivel's knowledge of Owens' actions should be imputed, the ultimate issue of knowledge would still be resolved by determining whether Esquivel's failure to properly supervise was foreseeable. *See Consol. Freightways Corp.*, 15 BNA OSHC 1317 (No. 86-351, 1991).

former hiring official, testified as to the content of Respondent's Orientation program, including providing the employees with above-discussed policies and procedures; giving them an opportunity to review the policies and having them sign an acknowledgement that the document has been read and understood; and showing a safety video, which contained a segment on trenching and excavations. (Tr. 408–17). Each of these activities is indicated and verified on the New Hire Check Lists for each of the employees present on the day of the OSHA inspection. (Ex. R-17 to R-21). By McCoy's own admission, not all employees read the entire set of policies; however, orientation is not the only method by which the rules regarding excavation and trenching are communicated. *See Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011 (No. 90-2668, 1992)

In addition to orientation, Respondent uses a series of mechanisms to ensure that its policies are understood and implemented. Respondent utilized ToolBox Safety Trainings, which were small sessions that took place at the worksite on an area of concern, *e.g.*, foot protection, gasoline, and hard hats. (Tr. 278; Ex. R-23). Although the specific rule at issue was not covered by ToolBox talks during the relevant period, the Court notes that in less than a month-and-a-half, Respondent implemented seven different sessions, each about a different topic, illustrating its general commitment to communication and training. (Ex. R-23). Further, each worksite supervisor and his crew performed a Job Safety Analysis every morning. (Tr. 257). The JSAs introduced into evidence illustrate the hazards addressed and discussed by Esquivel and his crew, including multiple discussions of the hazards associated with open trenches (cave-ins) and the steps necessary to abate them (sloping, shoring, benching). (Ex. R-26).

Respondent also holds a bi-annual excavation and trenching class with everyone in the division. (Tr. 274). More poignant, however, is the fact that this crew received trenching and excavation training from De La Rosa on March 24, 2016, or slightly more than a month prior to

the OSHA inspection. (Ex. R-39). Complainant points out that neither Luis Revilla nor Mario Cervantes, who were present on the day of the OSHA inspection, received De La Rosa's training and argues that this failure of proof is somehow indicative of Respondent's failure to adequately communicate its work rule. This line of argument is misguided. First, neither Revilla nor Cervantes was an employee of Respondent on March 24, 2016, each being hired in the early part of April. (Ex. R-18, R-19). Second, both Revilla and Cervantes received orientation training, which, as described above, covered Respondent's Trench and Excavation policy. (*Id.*). Third, there is no evidence that either Revilla or Cervantes was engaged in conduct that violated the Act such that a question remained as to their comprehension of that particular work rule. Finally, merely because Cervantes and Revilla were not employees on the date of this particular training does not mean that Respondent failed in its duties to communicate the rules, especially in light of the program described above.

Although Complainant does not contest that Respondent took steps to discover violations through proper supervision, the Court finds a review of how Respondent accomplishes this is both germane to the question of supervision and to the issue of whether Respondent adequately communicated its rules and policy. The record illustrates that Esquivel's crew was a group of fairly new employees. (Ex. R-17 to R-21). As such, De La Rosa, who is in charge of conducting worksite examinations, conducted at least four unannounced inspections of Esquivel's crew prior to the OSHA inspection. (Ex. R-33 to R-36). De La Rosa testified that these inspections not only serve to ensure compliance with company policy, but also provide an opportunity for on-the-job training in a manner that is not available in the classroom during orientation. (Tr. 444). The Court finds these inspections, one of which occurred one week prior to the OSHA inspection, to be persuasive because in every inspection log, De La Rosa indicated that the trench was properly

shored or otherwise compliant. This evidence was buttressed by Salinas, who not only testified that he told Esquivel not to send Owens into the trench, but also stated that his crew, led by Esquivel, had used appropriate protection throughout that same period of time. (Tr. 78). Further, according to Salinas' testimony, Esquivel recognized that he was violating the rule but opted to proceed anyway. (Tr. 50). Put simply, insofar as the inspection reports reveal that the worksite trench was compliant on an almost weekly basis, Respondent had repeated confirmation that its work rules were understood and had no basis to assume otherwise such that additional training (over and above what was provided) was necessary. *See Pressure Concrete*, 15 BNA OSHC 2011 ("A reasonably prudent employer would attempt to give instructions that can be understood and remembered by its employees, and would make at least some effort to assure that the employees did, in fact, understand the instructions.").

Particularly damaging to Complainant's case is the testimony of Rodney Koch, Esquivel's superintendent. Koch testified that he visited the Alamo 36 worksite on the morning of the inspection and met with Esquivel, who told him that they had found the leak and needed some shoring to get down in the hole. (Tr. 511). Koch told Esquivel that there was shoring available at another worksite just three or four blocks down the street. (Tr. 511). Esquivel never followed up with Koch about the need for additional, or different, shoring. (Tr. 512).

The foregoing illustrates the myriad ways in which the trenching policy was communicated to the crew generally, and to Esquivel specifically. To recap, in the roughly two-month period of Esquivel's employment with Respondent, he went through orientation, which included a segment on trenching; he attended an additional training on trenching roughly one month after he was hired; he performed JSAs, identifying hazards and abatement related to trenching; he was the subject of multiple, internal inspections that revealed his crew was in compliance with the trenching policy;

and he was reminded of that very same policy on the morning of the OSHA inspection. Based on the foregoing, the Court finds Complainant failed to prove that the work rule was not adequately communicated.

ii. Discipline

The remaining point of contention regarding knowledge is the question of whether Respondent adequately enforced the trenching policy through a system of progressive discipline. Complainant points to two deficiencies, which he believes illustrate Respondent's failure to adequately enforce its rules. First, Complainant contends that, although Respondent introduced a voluminous amount of documentation illustrating the implementation of its disciplinary policy, the only reports of discipline related specifically to the trenching policy dated back to 2012, or two-and-a-half years prior to the inspection. (Ex. C-59). Complainant also points out that some of these previous discipline reports were in response to an OSHA inspection and not the result of Yantis discovering violations of its own work rules. Second, Complainant contends that, even with respect to this incident, Respondent failed to properly discipline its own employees, noting that: (1) even after the inspection took place, Esquivel re-entered the unprotected trench in plain view of three of his supervisors; (2) there is no report indicating Esquivel was written up in accordance with the disciplinary program; and (3) none of the other employees present complied with, or were disciplined for violating, Respondent's policy to call the safety manager upon witnessing the violation.

Although the Court was not presented with a complete record of every single trenching violation observed and written up by Respondent, Respondent nonetheless presented 37 pages of violation history, dating back to 2007. (Ex. R-58). This voluminous record, in a general sense, conveys that it takes its responsibilities seriously as to all work policy violations, and the particular

write-ups further illustrate enforcement of the particular rule at issue. Simply because the sample write-ups introduced at trial were older does not mean that subsequent violations in the log did not involve similar subject matter. In that respect, it was Complainant's obligation to illustrate a deficiency in the disciplinary program; however, he only illustrated a gap in the record it was his obligation to fill. By all accounts, Respondent's employees are disciplined for violations of company policy and OSHA standards, and Respondent has illustrated that employees have been disciplined in the past for violations of the specific policy at issue. Complainant has not shown (as he possesses the burden) that Respondent was recalcitrant in its duty to discipline, nor has he shown that Respondent failed to issue proper discipline in this case.

Complainant's arguments regarding the discipline meted out in this case have more to do with documentation than actual implementation of discipline; in one case, Complainant is just plain wrong. According to the testimony of De La Rosa, the entire crew on Alamo 36 was disciplined. (Tr. 467-68). Each crew member, including Esquivel, has a Disciplinary Action Form in his personnel file, and each one of those forms indicates that the crew member was suspended for his role in the violation. (Ex. R-17 to R-21). In some instances, this actually represented a form of progressive discipline because certain crew members had received written warnings for other violations committed in the weeks leading up to the inspection. (Ex. R-18 to R-20). Esquivel, according to the testimony of multiple management officials, was both suspended and subsequently demoted from his position as foreman, which Granados testified constituted a significant reduction in wage. (Tr. 316). Although no documentation of the demotion was introduced into evidence, the Court credits the testimony of Granados, De La Rosa, and Briones, to support a finding that Esquivel was, in fact, disciplined as such. Further, though there is no documentation that Esquivel was specifically disciplined for his subsequent foray into the

unprotected trench, the testimony of Respondent's management team convinces the Court that the entirety of Esquivel's actions on the day of the inspection were taken into consideration when he was disciplined.

Based on the foregoing, the Court finds Complainant failed to prove that the actions of Esquivel were foreseeable. Accordingly, Citation 1, Item 1 shall be VACATED.

V. CONCLUSION

As stated repeatedly above, this case hinged on the question of knowledge. The parties addressed a myriad of other issues, including the veracity of CSHO Lawhorn's testimony, the quality of the soil sample taken, and the propriety of taking photographs and measurements while an opening conference is pending. Ultimately, however, none of these ancillary issues had any significant impact on the resolution of this case. The first three elements of Complainant's *prima facie* case were easily proved, irrespective of the credibility or admissibility issues addressed by Respondent, because the facts necessary to prove them were generally agreed upon by all of the witnesses who testified. As to knowledge, however, the Court finds Complainant failed to show a deficiency in Respondent's training and safety program such that Respondent should be held responsible for the actions of a supervisor that, by all accounts, acted contrary to the law, his training, and contemporaneous warnings from both a subordinate and his supervisor.

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 and its associated penalty are hereby VACATED.

SO ORDERED

Date: April 18, 2017
Denver, Colorado

/s/ _____
John H. Schumacher
Judge, OSHRC