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.

ANGEL BROTHERS ENTERPRISES, LTD.,
Respondent.

OSHRC Docket No. 16-0940

ON BRIEFS:

Louise McGauley Betts, Senior Attorney; Charles F. James, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Merritt B. Chastain, III, Esq.; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Houston, TX
For the Respondent

DECISION

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued a willful citation to Angel Brothers Enterprises, Ltd. alleging a failure to protect an employee in an excavation from cave-ins as required by 29 C.F.R. § 1926.652(a)(1) with a proposed penalty of $70,000.[1] Following a hearing, Judge Heather A. Joys affirmed the citation as willful, rejected Angel's unpreventable

[1] Section 1926.652(a)(1) states: "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."

employee misconduct defense (UEM), and assessed a $35,000 penalty. For the reasons discussed below, we affirm.

BACKGROUND

Angel is a construction contractor that digs approximately 1,200 to 1,400 excavations on various projects each year. On December 8, 2015, Angel began working on the installation of a concrete drainage pipe alongside a road in LaPorte, Texas. During the first two days of this project, Angel protected its employees who were laying pipe inside an excavation—which the project foreman determined was dug in Type C soil—by benching its walls.[2] On the second day, Angel's field safety manager, Kevin Bennett, conducted a safety inspection of the worksite. During his inspection, Bennett informed the foreman, Salvador Vidal, that he would need to use a trench box on the following day because by then, the excavation would be too close to an intersection to allow for benching or sloping. Vidal told Bennett that he had a trench box at the worksite and that he would use it when it was needed. Bennett documented this conversation on an "Angel Visit Safety Form," which both he and the foreman signed. Bennett planned to return the next day to conduct another safety inspection of the worksite.

At approximately 8:30 am the following day, an OSHA compliance officer arrived at the worksite to conduct an inspection. At that time, Vidal admitted to the CO that he had allowed an employee to work in the excavation, which was no longer benched and lacked the trench box. After being informed that an OSHA inspector was at the worksite, Bennett arrived at around 9:00 am. Vidal explained to Bennett that he did not use the trench box as they had discussed the previous day because the employee only needed to be in the excavation for a brief period, and he did not want to aggravate motorists by blocking the entrance to a neighborhood with the excavator he would need to use to install the trench box.

[2] Type C soil is the least stable of the three soil types identified under the excavation standard. *See* Appendix A to Subpart P ("Excavations") of Part 1926 (categorizing soil and rock deposits into "a hierarchy of Stable Rock, Type A, Type B, and Type C, in decreasing order of stability"). The standard includes benching as "a method of protecting employees from cave-ins by excavating the sides of an excavation to form one or a series of horizontal levels or steps, usually with vertical or near-vertical surfaces between levels," 29 C.F.R. § 1926.650(b), and it is a permissible method for meeting the cited cave-in protection requirement. 29 C.F.R. §§ 1926.652(a)(1), 652(b) ("*Design of sloping and benching systems*"). Another permissible method is sloping, which requires the sides of the excavation to be sufficiently inclined to prevent cave-ins. 29 C.F.R. § 1926.650(b).

DISCUSSION

To prove a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies; (2) the terms of the standard were violated; (3) at least one employee had access to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). We turn first to the issue of knowledge, the only element of the Secretary's burden of proof that Angel disputes on review.

Knowledge

A supervisor's knowledge of a violative condition is imputable to the employer. *Calpine Corp.*, 27 BNA OSHC 1014, 1018 (No. 11-1734, 2018), *aff'd*, 774 F. App'x 879 (5th Cir. 2019) (unpublished). However, the Fifth Circuit held in *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604, 605-09 (5th Cir. 2006) that a foreman's knowledge of his own failure to wear fall protection was not imputable to the employer unless the Secretary could establish that the foreman's violation was foreseeable.[3] The court reached this conclusion after interpreting its earlier precedent, *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568-69 (5th Cir. 1976), as holding that a "supervisor's knowledge of his own malfeasance is *not* imputable to the employer" without a foreseeability showing since otherwise the employer would be "strictly and absolutely liable," which was not "the intent of the Congress." *Yates*, 459 F.3d at 608-09 (emphasis in original) (quoting *Horne*, 528 F.2d at 571).

Before the judge, Angel argued that *Yates* applies here because foreman Vidal's "own malfeasance"—instructing a subordinate employee, Salvador Fonseca, to enter the unprotected excavation—caused the violation. The judge rejected this argument, finding that "this is not a *Yates* situation" because Angel's foreman was "not working alone," "was not the exposed employee," and "did not participate in the violative conduct." The judge concluded, therefore, that

[3] The alleged violation at issue here took place in Texas, where Angel's headquarters is located, so the Commission's decision could be appealed to either the Fifth Circuit or the D.C. Circuit. *See* 29 U.S.C. § 660(a) (parties may appeal to circuit where worksite is located or employer is headquartered; employer may also appeal to D.C. Circuit). In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted).

because the Fifth Circuit has "no clear precedent" barring imputation of foreman Vidal's knowledge under these factual circumstances, the Commission's own precedent allowing imputation applies.[4]

On review, Angel renews its argument that *Yates* applies, arguing that Fonseca entered the unprotected excavation "at the express direction of [foreman Vidal], who admitted that the decision to allow [the employee] to enter the trench was his alone and that if he opposed it as he should [have,] the violation would not have occurred." According to Angel, Vidal's conduct squarely lines up with that of the foreman in *Yates* and therefore, the judge erred in not applying the court's rationale here. The Secretary maintains that it is immaterial whether Vidal directed Fonseca into the excavation because the foreman had knowledge of his subordinate's violative conduct—Fonseca's entry into an unprotected excavation—and thus *Yates* is inapposite.[5]

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[4] The judge pointed out that in *Empire Roofing Co. Se., LLC*, 25 BNA OSHC 2221, 2224-27 (No. 13-1034, 2016), *aff'd*, 711 F. App'x 570 (11th Cir. 2017) (unpublished), then Commissioner MacDougall stated in her concurring opinion that the knowledge of a supervisor who "created the violative condition to which . . . his subordinate [was] exposed" should not be imputed, but nonetheless concluded that imputation was proper because the relevant circuit in the case (the Eleventh), which has precedent regarding imputation that is similar to *Yates* as discussed *infra* in footnote 8, had not yet addressed that particular factual scenario.

Commissioner Attwood notes that the Eleventh Circuit rejected Commissioner MacDougall's argument and affirmed the Commission's decision. *Empire*, 711 F. App'x at 574.

Commissioner Laihow notes, however, that the Eleventh Circuit did not necessarily agree with Commissioner MacDougall's view that the supervisor had in fact "created" the violative condition at issue. *Id.* Although the court appeared to agree that the supervisor at least "facilitated the violation" and that it would not have occurred but for his actions, the court stated that the violation did not exist "merely" as a result of the supervisor's actions. As such, the court did not directly address the issue of whether a supervisor's knowledge can be imputed when the supervisor creates the violative condition, but is not exposed to said condition.

[5] The Secretary disputes Angel's contention that Vidal "direct[ed]" Fonseca into the trench and there is testimony supporting both parties' positions. The CO testified that Vidal "directed [the employee] to get in the trench." As for Vidal, he first said that he did not "ask any employee to enter the trench," but when questioned more specifically as to whether he ever "ask[ed]" Fonseca to enter the excavation, he replied, "We talked about it," and then agreed that the "result of this talk" was that Fonseca "ended up going into the excavation." When asked "[w]hose decision was it to allow Mr. Fonseca to enter the excavation?" he replied, "Mine." But Vidal also claimed that he "didn't order" Fonseca to go into the excavation. He said that Fonseca was trained as a competent person to recognize excavation hazards, that he considered Fonseca his "right-hand man," and that they made a "mutual decision" to proceed without a trench box. Resolving this dispute, however, is unnecessary because, as we find below, Vidal's knowledge can be imputed to

We agree with the judge that it is not clear whether *Yates* would control here. Even if we assume the facts surrounding Fonseca's exposure are as Angel characterizes them (i.e., that Vidal "direct[ed]" Fonseca to enter the excavation), it is not evident the Fifth Circuit would require a foreseeability showing.[6] Indeed, although the court in *Yates* held that the foreman's "knowledge of his *own malfeasance*" could not be imputed absent a foreseeability showing, it did so in a context where that "malfeasance" constituted the violation itself. *Id.* at 608 (emphasis added). And at the same time the court observed in relation to another uncontested violation that the foreman's apparent condonation of two subordinates' failure to wear fall protection presented the "ordinary context" in which a "supervisor's knowledge of an employee's unsafe conduct is imputable to his 'master', the employer." *Id.* at 609 n.7. Thus, it is not clear whether *Yates* would apply here because Vidal's "own malfeasance" was not a violation of the cited standard (i.e., he did not enter the unprotected excavation himself),[7] but his alleged ordering of Fonseca into the excavation appears to go beyond the type of conduct the Fifth Circuit contemplated as presenting the "ordinary context."[8] Under these circumstances, we apply Commission precedent, which permits imputation

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Angel under Commission precedent, even when the facts in this regard are viewed most favorably to the company.

[6] The only other circuit to which this case could be appealed, the D.C. Circuit, has expressed skepticism of the requirement that the Secretary prove foreseeability when supervisory misconduct is alleged as the basis for knowledge, but has not yet decided its own position. *Wayne J. Griffin Electric, Inc. v. Sec'y of Labor*, 928 F.3d 105, 109 (D.C. Cir. 2019) ("Given the background common law of agency, we are skeptical of such a [foreseeability] requirement. But Griffin barely briefed the issue, and we need not decide it.")

[7] Angel contends that in a subsequent decision, *Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386 (5th Cir. 2013) (unpublished), the Fifth Circuit took a "broader view of the rule adopted in *Yates*" by applying a foreseeability analysis even though the supervisor involved was not the one "committing the misconduct." In that case, the company was cited for failing to ensure that a crane operator was qualified. *Id.* at 388. According to the court, that violation was directly committed by a supervisor, who failed "to train [the crane operator]" and "familiarize" him with the crane, "to ensure that [he] had passed the requisite tests," and "to *directly* supervise" him. *Id.* at 388-89. In any event, whether it would have been permissible to impute that supervisor's knowledge of his own violative actions was not an issue before the court; it found knowledge based on the conduct of company officials above the supervisor. *Id.*

[8] Two cases arising in the Eleventh Circuit involve circumstances similar to those here: *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832 (11th Cir. 2016) and *Empire Roofing Co. Se. v. OSHRC*, 711 F. App'x 570 (11th Cir. 2017) (unpublished). In *Quinlan*, a foreman and his subordinate both failed to wear fall protection while working together on a ledge. *Id.* at 834-35. In assessing the issue of knowledge, the court considered the effect of its holding in *ComTran*

of Vidal's knowledge of Fonseca's presence in the unprotected excavation to Angel.[9] *See Calpine Corp.*, 27 BNA OSHC at 1020-21; *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096 n.4 (No.

Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304 (11th Cir. 2013), which, like *Yates*, prohibits the imputation of a supervisor's knowledge of his own misconduct absent a foreseeability showing. Although the foreman also engaged in the violative conduct, the court determined that his knowledge of the subordinate's failure to wear fall protection could be imputed without a foreseeability showing. *Id.* at 841. The court reasoned that there was "little or no difference between the classic situation in which the supervisor sees the violation by the subordinate and disregards the safety rule," and "the instant situation in which the supervisor sees the violation and pitches in and works beside the subordinate to expedite the job." *Id.*

In *Empire Roofing*, a foreman transported himself and two subordinate employees to a roof in an aerial lift, with none of them being tied off for fall protection. 711 F. App'x at 571, 574. Just as Angel argues here, the employer argued that the supervisor's knowledge of the subordinates' presence in the raised lift without being tied off could not be imputed because the supervisor "facilitated the violation" since he operated the lift's controls. *Id.* at 574. The Eleventh Circuit disagreed, finding that the supervisor's knowledge of his subordinates' failure to tie off could be imputed because the supervisor's misconduct was distinct from the violative conduct: "[A]lthough the foreman operated the lift, his subordinates did not violate [29 C.F.R.] § 1926.453(b)(2)(v) by merely riding in it. Rather, the violation occurred when the subordinates failed to use fall equipment during the ride." *Id.* The court added that there was no indication that the foreman "caused his subordinates' failure to use belts and lanyards." *Id.*

[9] Chairman Sullivan and Commissioner Laihow agree that the Fifth Circuit has not yet squarely addressed the situation presented here. They note, however, that similar fairness concerns discussed by the court in *Yates* are also implicated here. *See Yates*, 459 F.3d at 608 ("[f]undamental fairness . . . require[s] that one charged with and penalized for [a] violation be shown to have caused or at least to have knowingly acquiesced in, that violation.") (quoting *Horne Plumbing*, 528 F.2d at 570). Chairman Sullivan and Commissioner Laihow agree with the concerns expressed by former Commissioner MacDougall in *Empire* regarding whether Eleventh Circuit precedent would preclude imputation in a situation similar to the one posed here:

> That Empire's foreman created the violative condition raises a fairness concern with imputing the foreman's knowledge to Empire that may be considered akin to that discussed in *ComTran*. Whether it is a supervisor acting alone or a supervisor creating a hazardous condition to which he exposes both himself and his subordinates, the supervisor has not merely overlooked the misconduct of other employees—he has in fact created it. Certainly the "eyes and ears" of an employer are greatly impaired whenever its supervisor create[s] the violative condition.

Empire Roofing, 25 BNA OSHC at 2226 (MacDougall, Commissioner, concurring). In this case, there is no dispute that the day prior to the OSHA inspection, Vidal was expressly directed by Bennett to use a trench box. Despite acknowledging and agreeing to this direction, however, Vidal completely ignored it. There is also no dispute that, as foreman, Vidal was in charge of the worksite and did not object to Fonseca's entry into the trench without the trench box. *Cf. Empire Roofing,* 711 F. App'x at 574 (finding it permissible to impute a supervisor's knowledge of

10-0359, 2012) (Commission "follow[s] [its] own precedent" where the circuit court "has neither decided nor directly addressed [an] issue") (quoting *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1110-12 (No. 97-1918, 2000)).[10]

Unpreventable Employee Misconduct (UEM)

Angel next contends that the judge erred in rejecting its UEM defense. To establish the defense, an employer must prove that it had: "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *Manganas Painting Co.,* 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). Where the employer alleges that a supervisor is involved in the unpreventable misconduct, "[its] burden of proof [is] more rigorous and the defense more difficult to establish" because such involvement "is strong evidence that the employer's safety program is lax." *CBI Servs., Inc.*, 19 BNA OSHC 1591, 1603 (No. 95-0489, 2001) (quoting *L.E. Meyers Co.*, 16 BNA OSHC 1037, 1041 (No. 90-0945, 1993)), *aff'd,* 53 F. App'x 122 (D.C. Cir. 2002).

The judge found that Angel had work rules to prevent the excavation violation and took steps to discover violations of those rules but did not prove that it adequately communicated its rules to employees or that it effectively enforced them when it discovered violations. On review, the Secretary does not dispute that Angel had adequate work rules and took steps to discover violations. We therefore only address whether Angel established the adequate communication and effective enforcement elements of its UEM defense.

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subordinates' failure to wear fall protection where there was no indication that the supervisor "caused his subordinates' failure to use belts and lanyards"). *Id.* Despite these concerns, Chairman Sullivan and Commissioner Laihow do not see a sufficient reason to overturn longstanding Commission precedent on the issue, particularly when neither of the relevant circuits has yet to address the circumstances presented here.

[10] Commissioner Attwood disagrees with her colleagues' suggestion in the previous footnote that there is something unfair about imputing foreman Vidal's knowledge of the violation to Angel under the circumstances here. In his capacity as foreman, Vidal either ordered Fonseca to enter the unprotected trench, or reached a decision with Fonseca authorizing him to do so. Vidal then stood by, watching Fonseca work in the unprotected trench in violation of the trenching standard. Vidal was not merely endangering himself, like the foreman in *Yates*; he was willfully endangering a subordinate employee. In Commissioner Attwood's view, there is nothing "unfair" about imputing Vidal's knowledge of this willful violation to Angel. *See Wayne J. Griffin*, 928 F.3d at 109 (expressing skepticism about knowledge foreseeability requirement given common law of agency).

Adequate Communication of Rules

When evaluating whether an employer has adequately communicated its rules, "the Commission considers evidence of whether and how work rules are conveyed." *United Contractors Midwest, Inc.*, 26 BNA OSHC 1049, 1052 (No. 10-2096, 2016). The judge concluded that Angel failed to adequately communicate its excavation safety rules based on her finding that the training it claimed to provide employees was either insufficient or was never provided since there was no written documentation to support the company's claim that the training took place. Specifically, the judge found that Angel did not provide Vidal and his crew members, all of whom spoke Spanish and were not fluent in English, with copies of the company's safety program in Spanish. In addition, she found that Angel submitted no supporting documentation to prove its claim that it conducted toolbox safety talks on OSHA's excavation requirements.

On review, Angel argues that the judge "selective[ly] pars[ed] the testimony" to infer that the company did not communicate its excavation safety rules to employees. In addition, Angel contends that the judge inappropriately focused on what she perceived to be a lack of written documentation even though she conceded that such documentation is not required. For the following reasons, we agree with Angel that the record supports its assertion of adequate communication.

To establish this element of the UEM defense, the Commission does not require that a safety rule be written "as long as the safety rule is clearly and effectively communicated to employees."[11] *GEM Indus. Inc.*, 17 BNA OSHC 1861, 1863 n.5 (No. 93-1122, 1996), *aff'd*, 149 F.3d 1183 (6th Cir. 1998). Indeed, in *United Contractors*, the Commission found that an employer adequately communicated its excavation safety rules where it explained the rules in orientation trainings for new employees, toolbox talks, and annual training sessions, and an employee involved in the violation at issue was told the same day that he needed to protect the excavation. 26 BNA OSHC at 1052. The evidence presented in this case is almost identical.

[11] This is not to say that Angel lacks a written excavation safety program. On the contrary, Angel's safety manual was submitted into evidence and it includes a section addressing excavations and directing employees to comply with § 1926.652. Vidal acknowledged receiving this written excavation policy but maintained—as the judge found—that it was not provided to him in Spanish. This is consistent with Bennett's testimony that he did not recall seeing any copies of the safety program in Spanish prior to OSHA's inspection. Likewise, Angel provides laminated cards with the essentials of its excavation policy written on them, but it is not clear from the record whether the information is provided in Spanish.

There is no dispute that, following a 90-day probationary period, Angel requires all of its excavation crew members to undergo competent person training administered by a third-party safety expert that covers OSHA's excavation requirements, and that these employees are required to re-take this training every two years thereafter.[12] This training is also provided in the employee's primary language, so Vidal and his crew were all given this training in Spanish. In addition to the competent person training, Director of Safety Brad Porterfield testified that the company "beefed up [its] new employee orientation" after OSHA issued the company a citation in 2014 alleging a willful violation of § 1926.652(a)(1). As a result, all new excavation employees receive orientation training in a classroom setting that covers excavation safety in both English and Spanish; the employees are required to pass a test on the material covered in the training before being allowed to work.[13] Porterfield also testified that in 2015, the year the violation at issue here occurred, its excavation employees were given several toolbox talks covering excavation safety rules, including one covering Angel's excavation safety manual. A chart listing the topics covered at these 2015 toolbox talks was submitted into evidence and supports Porterfield's testimony.

Unlike the judge, we are not persuaded that testimony from Vidal and Bennett contradicts Porterfield's claims in this regard.[14] It is true that Vidal did not recall if he conducted any toolbox safety talks during the first three days of the project at issue here (i.e., December 8, 9, and 10, which were a Tuesday, Wednesday, and Thursday), but he added that "[n]ormally we have them on Monday morning." And he did not testify that the 2015 toolbox talks listed by Porterfield were

[12] We reject the Secretary's contention that this training is not evidence that Angel communicated its excavation safety rules absent proof that the company expressly informed employees that they were required to comply with the OSHA rules taught in the training. By requiring its employees to attend these training sessions, the company was communicating its expectation that OSHA's excavation safety rules will be followed.

[13] This program is documented in Angel's safety manual, which describes the "Safety Orientation of New Employees" as follows: "The new employee will be indoctrinated by their immediate supervisor on specific hazards and safety rules related to their job before they start work," and upon completion, "shall be tested and . . . confirm that all items are understood." We note that although Vidal testified that excavation safety was not addressed in his new employee orientation, he began working at Angel approximately six years prior to the March 2017 hearing, which was before the company changed its orientation program in response to the 2014 citation.

[14] The judge made no credibility determinations regarding these witnesses. *See Metro Steel Constr. Co.*, 18 BNA OSHC 1705, 1706 (No. 96-1459, 1999) (Commission will ordinarily defer to a judge's demeanor-based witness credibility findings).

not provided; to the contrary, he agreed that several of these sessions took place. The Secretary relies on testimony from Vidal as evidence that the only training he received from Angel concerned "traffic control," but it is clear from the context of his statement that Vidal was referring to training directly administered by Angel, as opposed to the excavation safety training he acknowledges receiving from a third party.[15] As for Bennett, the judge viewed his testimony that he did not recall if any of Vidal's crew on the cited project had been trained in 2015 as undermining Porterfield's testimony about the various toolbox talks given that year. But again, in context, it is clear Bennett simply meant that he did not recall if the crew had received the bi-annual *competent person* training in 2015, not that he did not know if the crew had received *any* safety training at all that year.[16]

Finally, in addition to the competent person training, orientation training sessions, and toolbox talks, there is no dispute that Vidal was expressly instructed by Bennett the day prior to the violation that a trench box was required. *See United Contractors*, 26 BNA OSHC at 1052 (finding adequate communication includes instruction to employee on day of violation to use cave-in protection). Indeed, Vidal confirmed that he understood that he was violating Angel's excavation safety rules by allowing Fonseca to enter the unprotected excavation. Taken together, we find that this evidence—Bennett's contemporaneous instruction coupled with Angel's various methods of targeted training—is more than sufficient to meet Angel's burden of proving adequate communication.

Effective Enforcement of Rules

"To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred." *Gem Indus.*, 17 BNA OSHC at 1865. There is no dispute here that Angel monitors its worksites for safety rule compliance. The company employs "field safety managers," such as Bennett, who conduct frequent inspections of Angel's worksites. Porterfield testified that after the 2014 citation, the company increased these inspections such that they occur on at least four out of

[15] Shortly before his statement about the traffic control training, Vidal was asked if he would agree that Angel did not provide excavation training, and he replied, "Not at Angel Brothers. . . . The company sent us elsewhere [for the excavation training]."

[16] Bennett was asked if he was aware of any "training or retraining on Angel Brothers written trenching and excavation policies" that Vidal's crew received in 2015. Although counsel did not specify any particular training in his question, immediately before this testimony counsel asked Bennett a series of questions regarding Angel's requirement that employees receive competent person training every two years.

every five workdays, and on all five days if the excavation is more than five feet deep. Bennett confirmed that he follows this inspection schedule and stated that he sometimes inspects on all five days. It is also undisputed that he intended to inspect Vidal's worksite on the same day that the CO arrived to inspect, but the CO arrived first. Field safety managers also perform "safety audits" of worksites, which are more in-depth versions of safety inspections.[17]

As to enforcement, however, the judge found that the record establishes that Angel did not effectively enforce its safety rules upon discovering violations. Specifically, she focused on what she viewed as Bennett's failure to identify or correct Vidal's answers to three questions about cave-in protection on a "Pre-Task Plan" form for the cited project on three consecutive days. The judge considered this three-day pattern together with Bennett's apparent acceptance of it as analogous to the facts in *Dana Container, Inc.*, 25 BNA OSHC 1776 (No. 09-1184, 2015), *aff'd*, 847 F.3d 495 (7th Cir. 2017), in which the Commission found that a consistent failure to correct errors on "entry permit" forms demonstrated a lack of enforcement.[18] The judge also cited Angel's failure to discipline Fonseca and another employee present at the worksite,[19] as well as Vidal's failure to comply with a direct instruction from his supervisor to use a trench box.

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[17] During both the weekly inspections and safety audits, field safety managers document any observed safety problems on a form. The inspection form is reviewed with the foreman, and both sign it. Safety audits require completion of a form with a longer checklist of potential safety issues.

[18] In *Dana Container,* all 28 of the "entry permit" forms the company produced to the Secretary contained errors, including 11 completed by a supervisor, and the Commission found that the facility manager's failure to correct those errors established that the company failed to enforce its safety program. 25 BNA OSHC at 1780-82. Based on this evidence, the Commission rejected the company's UEM defense. *Id.* at 1783 n.15.

[19] The record is unclear as to what the other employee's precise role was at the worksite, but Vidal confirmed that the employee was present and watched Fonseca work in the excavation. The judge noted that this employee, along with Fonseca, did not refuse to work or report the unsafe condition (entry into the unprotected excavation) despite a prominent direction in Angel's safety manual to do so ("**ANY EMPLOYEE THAT FEELS THAT ANY CONDITION OF THE TRENCH OR EXCAVATION IS UNSAFE THEY SHALL IMMEDIATELY REFUSE TO WORK AROUND OR ENTER THE AREA WITHOUT RETALIATION . . . . THE UNSAFE CONDITION SHALL BE REPORTED . . . FOR IMMEDIATE CORRECTIVE ACTION**.") (emphasis in original). Although she viewed this as proof that employees did not fear reprisal for violating company safety rules, we see the opposite as the more likely possibility with regard to the other employee present that day—that he had a greater fear of disobeying Vidal and was not simply disregarding this admonition to speak out. As for Fonseca, we address his lack of discipline below.

This inquiry presents a close question, particularly since we agree with Angel's contention on review that some of the evidence relied on by the judge lacks relevance here.[20] Nonetheless, we find that Angel has failed to meet its burden to produce evidence that it effectively enforces its excavation safety rules when it discovers violations.

Angel is a large company with around 1,000 employees, and it digs 1,200 to 1,400 excavations every year. The company's "Discipline Policy" states that rule violations can result in discipline and describes 4 types: verbal, written, suspension without pay, and discharge.[21] But the company points to only two instances where it documented discipline for employees who violated company safety rules. Both occurred after an OSHA inspection discovered the violation—the first involved the termination of the foreman involved in the 2014 citation who had previously been warned for violating an excavation safety rule and the other involved a final written warning to Vidal for the violation at issue here. According to Porterfield, in the five years prior to the hearing, OSHA conducted five inspections of Angel worksites and cited the company

[20] First, the judge's finding that Vidal incorrectly filled out the pre-task form over the course of three days is unsupported. The three questions were: (1) "Is the trench shield 18" above ground surface to prevent objects from falling in?"; (2) "Is the trench shield no more than 2 feet from the bottom of the excavation?"; and (3) "Is the trench box in good condition without obvious damage?" The form gives three response options—"Yes," "No," and "N/A"—and Vidal circled "yes" in response to all three. In the judge's view, the answer to these questions "was clearly 'No,' " and by circling "yes," Vidal was "indicat[ing] a trench box was being use[d], when it was clear that it was not." But the most appropriate answer to the first two questions was "N/A" since the box was not being used yet. As for the third question, the trench box's condition could be unrelated to its use so the correct answer was not "clearly 'No.' " In any event, Vidal could not have been intending to falsely claim that a trench box was being used because he circled "Sloping/Benching" on the form, rather than "Trench Shield [or] Hydraulic Shoring," to identify the protection method that was in fact being used. Although his answers to these questions might suggest he was filling out the forms in a cursory manner, we disagree this reflects that he did not fear discipline.

Second, the judge appears to have assumed that Bennett had reviewed the pre-task forms and ignored these purported errors. But as Angel contends, prior to OSHA's inspection in this case, field safety managers were not required to review the pre-task forms—the forms were "primarily used to focus the foremen on the safety considerations and required excavation dimensions before commencing work each day." Bennett testified that at the time of the inspection, his own practice was to review the pre-task forms, but he did not say whether he had actually reviewed Vidal's pre-task forms *during* the cited project, agreeing only that he reviewed them *after* he learned OSHA was inspecting the site.

[21] Although Porterfield testified that Angel's discipline policy is "progressive," he also stated that what type of discipline an employee receives would depend on the circumstances.

for violations of § 1926.652(a)(1) on four out of those five inspections (including the citation at issue in this case, and the 2014 citation that led to the foreman's termination). Porterfield acknowledged that Angel did not take any of these prior citations "to trial." This means the company was aware of at least two additional violations of OSHA's excavation standards but produced no evidence that it had investigated and/or disciplined the employees involved. In addition, we agree with the judge that Angel's post-inspection decision to discipline Vidal but not Fonseca—who was described as Vidal's "right-hand man"—cuts against a finding that Angel effectively enforces its safety rules even when violations are discovered by OSHA.[22]

Moreover, this limited record of post-inspection discipline can only be considered in assessing this element of the UEM defense when "viewed in conjunction with pre-inspection discipline." *Precast Serv., Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995), *aff'd per curiam*, 106 F.3d 401 (6th Cir. 1997) (unpublished); *see also Am. Eng'g & Dev. Corp*, 23 BNA OSHC at 2097 ("[P]ost-inspection discipline alone is not necessarily determinative of the adequacy of an employer's enforcement efforts."). Porterfield testified that Angel had "terminated plenty of employees for unsafe acts." But he did not say whether those involved pre-inspection violations and in fact, proceeded to describe only the post-inspection termination of the foreman responsible for the 2014 citation. And although Angel produced records of safety audits that it conducted at Vidal's worksites to support its claim that his crew in particular had an exemplary safety record (and therefore, discipline was unnecessary), the company submitted no records of audits of any of its other crews, so it is not clear whether other crews were equally compliant. Finally, Bennett testified that he "frequently" finds "irregularities" when he inspects excavation worksites, such as a spoil pile being too close to an excavation, a problem he documented at Vidal's worksite the day before OSHA's inspection. But apparently none of these irregularities, including Vidal's spoil pile infraction, were met with discipline.

[22] Chairman Sullivan disagrees with his colleagues that Angel's decision to not discipline Fonseca demonstrates ineffective enforcement. In his view, it was reasonable for Angel to conclude that discipline was not warranted since Fonseca was acting at the direction of his supervisor, Vidal, who the Chairman considers to be responsible for the violative condition at issue here. Commissioner Laihow agrees that Vidal was ultimately responsible for the violative condition, but finds that effective enforcement would have included disciplining Fonseca for his role in the violation.

Having failed to provide adequate documentation demonstrating even a single example of discipline resulting from any of its own monitoring (i.e. not relating to an OSHA inspection), we cannot find on this record that Angel has met its burden of showing that it effectively enforces rule violations when they are discovered.[23] *See Cooper/T. Smith Corp. D/B/A Blakely Boatworks, Inc.,* 2020 WL 1692541, at *3 (No. 16-1533, 2020) (employer failed to prove effective enforcement under UEM defense because there was "no documentary evidence that Blakely enforced any of its safety-related work rules before [the violation]"); *Precast Serv.*, 17 BNA OSHC at 1455-56 (employer failed to prove effective enforcement under UEM defense because it "introduced no evidence that prior to [the project OSHA inspected] it had subjected an employee to termination, suspension, docked pay, or even a written reprimand or a verbal warning for failure to comply with a work rule."); *see also Fla. Gas Contractors, Inc.*, 27 BNA OSHC 1799, 1801-02 (No. 14-0948, 2019) (employer's failure to provide documentation supporting claimed instances of discipline was a factor weighing against a UEM defense). We therefore agree with the judge that Angel failed to establish its UEM defense.

Willful Characterization

Finally, Angel contends that the judge erred in characterizing the violation as willful. "The hallmark of a willful violation is the employer's state of mind at the time of the violation—an intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff'd,* 268 F.3d 1123 (D.C. Cir. 2001). "A willful violation is differentiated by 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, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). This state of mind is evident where "the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind

[23] Chairman Sullivan and Commissioner Laihow agree that a lack of disciplinary examples is not necessarily dispositive evidence that an employer lacks a sufficient enforcement program. The burden is, however, on the employer to show that all the elements of the UEM defense are met. *Calpine Corp.*, 20 BNA OSHC 1014, 1021 (No. 11-1734, 2018) (The "evidentiary burden . . . rests with [the employer] since UEM is an affirmative defense."). In this case, Angel has not met its burden given the lack of documentation of disciplinary instances, combined with the lack of other evidence supporting its claim that it has an effective enforcement program.

such that if it were informed of the standard, it would not care." *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citation omitted).

In concluding that foreman Vidal's actions reflected a "clear cut case of a willful violation," the judge pointed out that Vidal had been expressly informed by his supervisor the day before that a trench box was required, but he nevertheless deliberately opted to not use a trench box despite knowing that he could no longer bench or slope the excavation's walls. The judge concluded that as a supervisor, Vidal's state of mind could be imputed to Angel to establish willfulness. *See Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000). On review, Angel restates its claim that Vidal's state of mind cannot be imputed to the company because his actions were unforeseeable and constituted unpreventable employee misconduct, an argument we have rejected above. To the extent the company also contends that the foreman's willful state of mind cannot be imputed to it without a foreseeability showing by the Secretary, we reject that claim for the same reasons.

We agree with the judge that Vidal's actions reflect a willful state of mind. The parties do not dispute that he was expressly put on notice by Bennett of the need to use a trench box, that he understood OSHA's excavation rules, and that he knew a trench box was required and consciously decided not to use one. *See Daniel Constr. Co.*, 9 BNA OSHC 1854, 1859 (No. 12525, 1981) (violation willful where company's project safety engineer informed project superintendent and another supervisor of need to comply with standard and they failed to do so); *Stark Excavating, Inc.*, 24 BNA OSHC 2218, 2227 (No. 09-0004, 2014) (consolidated) (excavation violation willful where supervisor allowed employee to work in an unprotected excavation with the knowledge that it violated the OSHA standard), *aff'd*, 811 F.3d 922 (7th Cir. 2016); *MVM Contracting Corp.*, 23 BNA OSHC 1164, 1167-68 (No. 07-1350, 2010) (same); *Fiore Constr. Co.*, 19 BNA OSHC 1408, 1409-10 (No. 99-1217, 2001) (same).

Accordingly, we affirm the violation as willful and assess a penalty of $35,000.[24]

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: July 28, 2020

[24] As neither party has addressed the penalty assessed by the judge, we assess the same amount. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming penalty assessed by judge where not in dispute).

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant v. Angel Brothers Enterprises, LTD., Respondent.	OSHRC Docket No.: **16-0940**

Appearances:

Michael Schoen, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Merritt B. Chastain, III, Esquire, Ogletree Deakins Nash Smoak & Stewart, P.C.
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

On December 10, 2015, a compliance safety and health officer (CSHO) for the Occupational Safety and Health Administration was driving on Sens Road in LaPorte, Texas. As he passed an intersection, he observed an employee of Angel Brothers Enterprises, Ltd. (Angel Brothers) working in an excavation. Believing the excavation to be unsafe, the CSHO parked his vehicle and conducted an inspection of the worksite. As a result of the inspection, the Secretary issued a one-item Citation and Notification of Penalty to Angel Brothers on May 9, 2016. The Citation alleges a willful violation of 29 C.F.R. § 1926.652(a)(1), for failing to provide an adequate system to protect against cave-ins for an employee working in an excavation. The Secretary proposed a penalty of $70,000.00 for the Citation.

Angel Brothers timely contested the Citation. I held a hearing in this matter on March 7 and 8, 2017, in Houston, Texas. Except for the element of employer knowledge, Angel Brothers does not dispute the Secretary's proof of a violation of 29 C.F.R. § 1926.652(a)(1): It acknowledges one of its employees was working in an unsafe excavation in the presence of an

Angel Brothers supervisor. It contends, however, the violative conduct was not foreseeable and that it resulted from the unpreventable misconduct of its supervisory employee. Angel Brothers also contends, in the event I affirm the violation, the Secretary mischaracterized the violation as willful and the penalty should be reduced. The parties filed briefs on July 5, 2017.

For the reasons that follow, I **AFFIRM** the Citation as willful and assess a penalty of $35,000.00.

JURISDICTION AND COVERAGE

Angel Brothers timely contested the Citation and Notification of Penalty on May 31, 2016. The parties stipulate the Commission has jurisdiction over this action and Angel Brothers is a covered business under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act) (Tr. 11). Based on the parties' stipulations and the record evidence, I find the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Angel Brothers is a covered employer under § 3(5) of the Act.

BACKGROUND

On December 8, 2015, Angel Brothers began a project to install a concrete drainage pipe near Sens Road in LaPorte, Texas. Foreman Salvador Vidal supervised the project (Tr. 149-150, 198). The first two days of the project, Vidal and his crew were able to bench the walls of the excavation in compliance with § 1926.652(a)(1) (Tr. 91). Kevin Bennett, a field safety manager for Angel Brothers, visited the worksite the second day of the project (Tr. 78). He noted progress on the excavation the next day would bring it closer to the roadway, and he was concerned about the proximity of the spoil pile to the excavation. He discussed the situation with Mr. Vidal.

> [The crew members] were trenching, installing a concrete drain culvert. And as … they were trenching, the jobsite got a little bit more restricted due to the roadway and the right-of-way. And at that time, they had a spoil pile that would be on the east side of the project. And I told Mr. Salvador [Vidal] that he was going to need a trench box because he wouldn't have room to move the spoil pile far enough back from the edge of the trench. So I recommended him to get a trench box as he progressed on installing the pipe.

(Tr. 90)

Mr. Bennett documented this discussion in an *Angel Visit Safety Form* (Exh. R-7). Under the heading *List Hazards Identified* on the form, Mr. Bennett wrote, "Found spoil [pile] less than 2 feet from edge of trench[;] educate Salvador and crew as to why this is a hazard and need to be corrected. Recommend use of trench box for employee protection." (Exh. R-7, p. 2) Angel Brothers owns its own trench boxes and had one available for the Sens Road project. It was located approximately 200 feet from the excavation. Mr. Vidal knew how to assemble and place a trench box in an excavation (Tr. 91, 163-64, 168).

On December 10, 2015, the crew dug the excavation closer to the roadway. Mr. Vidal inspected the excavation and completed a *Trench or Excavation Pre-Task Plan,* in which he documented the measurements of the excavation as 8.5 feet deep, 40 feet long, and 13 feet wide (Exh. R-6, p. 3). He was aware the excavation was dug in Type B soil and that some form of a protective system was required to comply with § 1926.652(a)(1) (Tr. 158-159).

Angel Brothers had the equipment necessary to install a trench box in the excavation on December 10. It had the trench box itself, as well as a trackhoe and cables needed to lower the trench box into the excavation (Tr. 168). Employee S.F. was Mr. Vidal's "right-hand man" on the crew.[25] Mr. Vidal and Employee S.F. discussed whether or not to place the trench box in the excavation before work began. They reached a "mutual decision" to not use the trench box (Tr. 170). Mr. Vidal stated, "I thought I would do it faster and because I had the intersection, and I couldn't block the intersection. And I had the machine [the trackhoe], and I couldn't block the intersection mainly." (Tr. 200) Mr. Vidal designated another crew member as a lookout in the event of a cave-in and instructed Employee S.F. to enter the excavation. Employee S.F.'s task in the excavation was to "make the sand be level in order to lay down the pipe." (Tr. 161)

Employee S.F. was in the unprotected excavation for 10 to 15 minutes (Tr. 171). During that time, CSHO David Waters "just happened to be driving by and noticed some people, a ladder in a trench and saw that it wasn't properly—it wasn't made safe. It was over 5 feet and didn't have shoring or benching." (Tr. 42) CSHO Waters parked his vehicle and walked over to the worksite. By the time he arrived, no one was in the excavation. CSHO Waters held an opening conference with Mr. Vidal. He took measurements and photographs, and he interviewed

[25] To preserve confidentiality, I substitute pseudonyms for the names of Angel Brother's nonsupervisory employees.

employees. Approximately 30 minutes later, field safety manager Bennett arrived at the worksite (Exhs. C-1 through C-4; Tr. 42-44).

Mr. Bennett asked Mr. Vidal why there was no trench box in the excavation. Mr. Vidal told him "he was in a hurry because he had part of a driveway—the entrance to a subdivision, and he was catching a lot of grief from residents and the public, so he was trying to hurry and get across that driveway." (Tr. 126) The Secretary subsequently issued to Angel Brothers the Citation that gave rise to this proceeding.

THE CITATION

The Secretary's Burden of Proof

> The Secretary has the burden of establishing the employer violated the cited standard.
>
> 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) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Angel Brothers does not dispute the elements of applicability, noncompliance, and employee access to the violative condition.

Alleged Violation of 29 C.F.R. § 1926.652(a)(1)

Item 1 alleges, "[O]n December 10, 2015, at the jobsite located along Sens Road in LaPorte, Texas, employees were conducting work within an unprotected trench with Type B soil. The trench was over five feet in depth."

> Section 1926.652(a)(1) 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:
> ...
> (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

(1) Applicability of the Cited Standard

Section 1926.652(a)(1) appears in *Subpart P—Excavations* of the 1926 Construction Standards. Section 1926.650(a) provides that Subpart P "applies to all open excavations made in the earth's surface. Excavations are defined to include trenches." Here, Angel Brothers dug an excavation in the earth's surface next to Sens Road in LaPorte, Texas. The parties stipulated, "29 C.F.R. 1926.652(a)(1) was applicable to the work being performed by Respondent's employees at Respondent's worksite location of 2900 Sens Road, LaPorte, Texas, 77571, on or about December 10, 2015, which was the subject of OSHA Inspection No. 1112301." (Tr. 12) I find the cited standard applies.

(2) Noncompliance with the Terms of the Standard

Mr. Vidal documented the excavation as being 8.5 feet deep and 13 feet wide (Exh. R-6, p. 3). CSHO Waters took photographs of the excavation (after the concrete pipe had been placed and the excavation partially backfilled (Tr. 75)). The walls of the excavation were near vertical, with no sloping. The Secretary and Angel Brothers "agree that the type of soil located at Respondent's worksite location . . . was sandy clay, cohesive type B soil." (Tr. 12)

There was one bench at 5 feet. This configuration does not comply with the *Appendix B to Subpart P of Part 1926—Sloping and Benching.* ("Configurations of sloping and benching systems shall be in accordance with Figure B-1.") (Exh. C-2; Tr. 47-48) Based on the photographic evidence and CSHO Waters' testimony, I find Angel Brothers failed to provide an adequate protective system to prevent cave-ins.

(3) Employee Access

Employee S.F. worked in the unsafe excavation for 10 to 15 minutes (Tr. 171). The Secretary has established Angel Brother's employee had access to a cave-in hazard.

(4) Employer Knowledge

Mr. Vidal was the supervisor of the Sens Road project. He was aware the excavation was unsafe, and he knew Employee S.F. was working in it. Under Commission precedent, "when 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." *Dover*

Elevator, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). This includes a supervisor's knowledge of his or her own misconduct. *Deep S. Crane & Rigging Co*., 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012), *aff'd, Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386 (5th Cir. 2013) (unpublished). The Secretary argues Mr. Vidal's knowledge of the violative condition of the excavation should be imputed to Angel Brothers.

This case arose in Texas, under the jurisdiction of the Court of Appeals for the Fifth Circuit. Where a decision could be appealed to a particular circuit, the Commission will apply the law of that circuit even though its precedent differs from that of the Commission. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067-68 (No. 96-1719, 2000). In *W.G. Yates v. OSHRC,* 459 F.3d 604 (5th Cir. 2006), the Fifth Circuit held, "[A] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employee's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *Id.* at 609 (emphasis in original). Angel Brothers argues Mr. Vidal's knowledge may not be imputed to it unless the Secretary first establishes such misconduct was foreseeable.

The Secretary counters *Yates* does not apply to the facts of this proceeding. In *Yates,* two OSHA compliance officers observed a crew foreman working on a slope along with two crew members. The foreman was working on the slope "without any form of fall protection, and [the foreman's] two crewmen [were] wearing their harnesses backwards." *Id.* at 605 Based on the foreman's failure to use fall protection, the Secretary cited Yates for a violation of § 1926.501(b)(1). The Secretary also cited Yates for a violation of § 1926.501(a)(2), for permitting the two crew members to wear their harnesses incorrectly. The ALJ affirmed both violations. After the Commission declined discretionary review, Yates appealed to the Fifth Circuit, but only with regard to the violation involving the foreman's misconduct. The Fifth Circuit vacated the citation and remanded the case, holding, "[T]he Secretary, not Yates, bears the burden to establish that *the supervisor's violative conduct* was foreseeable." *Id.* at 609 (emphasis added).

Here, the Secretary argues, OSHA "did not cite Angel Brothers on the basis of Mr. Vidal himself entering the trench. Instead, OSHA cited Angel Brothers because [Employee S.F.] entered an unprotected trench in plain sight of his foreman, Mr. Vidal…. Mr. Vidal had actual knowledge of *the employee's violative conduct* because he literally stood at the edge of the

trench and looked down while [Employee S.F.] performed his work in the unprotected areas." (Secretary's brief, pp. 8-9) (emphasis added)

The Secretary's argument is in line with a concurring decision written by Chairman MacDougall in *Empire Roofing Company Southeast, LLC*, 25 BNA OSHC 2221 (No. 13-1034, 2016). That case arose from an OSHA inspection of an Empire Roofing worksite in Florida, under the jurisdiction of the Eleventh Circuit. A foreman for Empire Roofing had used an aerial lift to transport materials and two employees to the roof of a building. Neither the foreman nor the employees were tied off while being transported, in violation of § 1926.453(b)(2)(v). The ALJ found the foreman's actual knowledge of the violative conduct should be imputed to Empire Roofing. Empire Roofing disagreed, citing *ComTran Grp., Inc. v. U.S. Dep't of Labor,* 722 F.3d 1304 (11th Cir. 2013), which holds it is not fair to impute a supervisor's knowledge of his own misconduct in a situation where the employer's supervisor created the hazard. In such a situation, the Secretary must prove (as in the Fifth Circuit) that the supervisor's misconduct was foreseeable.

Chairman MacDougall noted "the *ComTran* decision left open whether a supervisor's knowledge can be imputed, absent evidence of foreseeability, in a situation where the supervisor's misconduct not only creates the hazard, but in doing so he puts his subordinate(s) in concurrent violation of a standard." *Empire Roofing* at 2225. She went on to discuss a subsequent Eleventh Circuit case, *Quinlan Enterprises v. Secretary of Labor,* 812 F.3d 832 (11th Cir. 2016), in which a supervisor and his subordinate simultaneously violated an OSHA standard. An OSHA compliance officer observed Quinlan's foreman and his crew member working side by side on the edge of a 15-foot high wall without fall protection. The ALJ imputed the foreman's knowledge of the violative conduct to Quinlan and affirmed the cited violations. She concluded *ComTran* applies only in situations where the supervisor acts alone and not where he or she has knowledge of the misconduct of a subordinate. The Commission declined discretionary review, and Quinlan appealed to the Eleventh Circuit.

> The Eleventh Circuit held in *Quinlan* that the general rule regarding imputation should apply—in other words, a supervisor's knowledge of a subordinate employee's violative conduct should be imputed to the employer. *Quinlan*, 812 F.3d at 841. The court reasoned that the situation in *Quinlan* was analogous to the ordinary situation, which it described as "the supervisor is on the scene looking on, sees the subordinate employee violating a safety rule, knows there is such a

> violation, but nonetheless allows it to continue." *Id.* In the opinion of the court, the situation in *Quinlan*—in contrast to *ComTran*—involved a supervisor and a subordinate employee who simultaneously engaged in violative misconduct, which did not present a fairness problem. *Id.*

Empire Roofing, 25 BNA at 2226.

Chairman MacDougall found,

> [T]he facts of [*Empire Roofing*] lie between *ComTran* and *Quinlan.* Like *ComTran*, the supervisor in this case was the source of the violative condition—Empire's foreman entered the lift and transported himself and his subordinates to the roof without using fall protection. If not for the foreman's manner of operation of the lift, no violation of the cited standard would have occurred. Unlike *ComTran*, two subordinate employees were involved in the violative misconduct. Like *Quinlan,* this case involves a supervisor and subordinates who engaged in the same violative misconduct. However, Quinlan's supervisor and subordinate simultaneously engaged in the misconduct. Here, Empire's foreman did not simply observe a subordinate engaged in misconduct and decide to either overlook the violation or pitch-in and work beside the subordinate; instead, there is more—he created the violative condition to which he and his subordinates were exposed. Thus, this case does not present the ordinary situation described by the *Quinlan* court where the supervisor was "looking on, sees the subordinate employee violating a safety rule, knows there is such a violation, but nonetheless allows it to continue." *Id.* at 841. That Empire's foreman created the violative condition raises a fairness concern with imputing the foreman's knowledge to Empire that may be considered akin to that discussed in *ComTran*. Whether it is a supervisor acting alone or a supervisor creating a hazardous condition to which he exposes both himself and his subordinates, the supervisor has not merely overlooked the misconduct of other employees—he has in fact created it. Certainly the "eyes and ears" of an employer are greatly impaired whenever its supervisor created the violative condition.

Id.

Chairman MacDougall then concluded that, since there was no case law in the Eleventh Circuit addressing the specific situation arising in *Empire Roofing,* lying as it does between *ComTran* and *Quinlan*, Commission precedent should be applied. "Given there is no clear precedent in the Eleventh Circuit upon which Empire can rely to avoid imputing its foreman's knowledge to it and the Commission's precedent requires imputing the knowledge of a supervisor's own misconduct to his employer, I agree the Secretary has established Empire had actual knowledge of its employees' violation of the cited standard." *Id.* at 2227

Applying this analysis to the present case, I determine it is not a *Yates* situation. Mr. Vidal was not working alone and he was not the exposed employee. This case is similar to *Empire Roofing,* in that the supervisor "did not simply observe a subordinate engaged in misconduct and decide to either overlook the violation or pitch-in and work beside the subordinate; instead, there is more—he created the violative condition to which . . . his subordinate [was] exposed." *Id.* at 2226 The difference is Mr. Vidal, unlike the supervisor in *Empire Roofing,* did not participate in the violative conduct. Given there is no clear precedent in the Fifth Circuit upon which Angel Brothers can rely to avoid imputing Mr. Vidal's knowledge to it, I conclude Commission precedent applies and Mr. Vidal's actual knowledge of the violative conduct is imputed to Angel Brothers.

The Secretary has established Angel Brothers had actual knowledge of the violation of § 1926.652(a)(1). He has proven Angel Brothers violated the cited standard.[26]

Foreseeability or, Alternatively, the Unpreventable Employee Misconduct Defense

The issues of foreseeability and employee misconduct are intertwined. **"**Foreseeability is established by showing that the employer's safety policy, training, and discipline are inadequate." *S. J. Louis Constr. of Texas*, 25 BNA OSHC 1892, 1900 (No. 12-1045, 2016). "The affirmative defense of employee misconduct requires a showing that the employer 1) has established work rules designed to prevent the violation, 2) has adequately communicated these rules to its employees, 3) has taken steps to discover violations, and 4) effectively enforced the rules when violations have been discovered." *Yates,* 459 F.3d at 609, n.7.

Angel Brothers argues it has "established the defense of unpreventable supervisor misconduct such that Vidal's knowledge of the safety violations that he himself actually created cannot be attributed to Angel for purposes of assessing liability and responsibility for the violation of the OSHA standard at issue." (Angel Brother's brief, pp. 27-28).

[26] Because I have determined *Yates* does not apply to the facts of this case, the Secretary need not prove foreseeability in order to establish knowledge. For purposes of review, however, I include an analysis of foreseeability in the following section addressing Angel Brother's unpreventable employee misconduct defense. I find, in the alternative, the Secretary established Mr. Vidal's supervisory misconduct was foreseeable based on the inadequate communication and enforcement of Angel Brother's safety program.

Mr. Vidal's position as a supervisor raises the bar for proving the affirmative defense for Angel Brothers.

> When the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee. *Daniel International Co. v. OSHRC*, 683 F.2d 361, 364 (11th Cir., 1982); *Daniel Construction Co*., 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027 at pp. 32,672 (No. 16265, 1982). Where a supervisory employee is involved, 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. *Id.* 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, 1017 (No. 87-1067, 1991).

Angel Brothers began focusing on its safety program in September of 2014 (Tr. 280). Prior to that, safety had not been a priority. Bradley Porterfield is the director of safety for Angel Brothers. He had held that position for almost ten years at the time of the hearing (Tr. 216-217, 271-272). He conceded OSHA had cited the company for violations of the excavation standard four times since 2012, not including the Citation at issue. The previous citations were for willful, repeat, and serious violations of the excavation standard (Tr. 272-273).

Mr. Porterfield testified that, after firing a foreman for a second offense for violating the excavation standard, he took steps to improve Angel Brother's safety program. "We beefed up the new employee orientation to make sure that everything was being covered within tests and languages. I made sure all that was going good. . . . I started training the—all the foremen in competent person. And the operators, by the way. Operators and foremen in competent person, 8-hour." (Tr. 281)

Angel Brothers argues its current "safety program, excavation procedures, and the training of employees is quite comprehensive and have served to eliminate employee and foremen oversights." (Angel Brother's brief, p. 9) It contends Mr. Vidal acted as a rogue employee who ignored the company's safety policies on December 10, 2015. The Secretary contends Angel Brothers failed to effectively communicate its work rules and enforce the rules when it discovered violations.

As the court noted in *Yates*, "[T]he required considerations for [the unpreventable employee misconduct] affirmative defense closely mirror the foreseeability analysis required to

determine if a supervisor's knowledge of his own misconduct, contrary to the employer's policies, can be imputed to the employer." *Yates,* 459 F.3d at 609 The difference is the allocation of the burden of proof: The Secretary has the burden of proving foreseeability if the case arises in a circuit where a supervisor's knowledge of his or her own misconduct is not imputed to the employer as a matter of course; the employer has the burden of proving employee misconduct as an affirmative defense.

I find, for the reasons that follow, the Secretary has established Mr. Vidal's conduct was foreseeable, and Angel Brothers failed to establish the unpreventable employee misconduct defense.

(1) Angel Brothers Had Established Work Rules Designed to Prevent the Violation

Angel Brothers had a written *Safety Manual* in effect at the time of OSHA's inspection (Exh. R-1; Tr. 222). Section II of the *Safety Manual* addresses *Excavation and Trenching* and has subparts specifically addressing *Sloping and Benching Options, Support System Options,* and *Competent Person.* Section II ends with three trenching decision flow charts, the third of which is *Shoring and Shielding Options.* It instructs employees to follow manufacturers' data when using trench boxes (shields), in compliance with § 1926.652 (Exh. R-1, p. 17).

I find Angel Brothers had written work rules in its *Safety Manual* designed to prevent the violation of § 1926.652(a)(1).

(2) Angel Brothers Failed to Adequately Communicate Its Work Rules to Its Employees

"[I]n assessing the adequacy of communication, the Commission considers evidence of whether and how work rules are conveyed." *United Contractors Midwest Inc.,* 26 BNA OSHC 1049, 1052 (No. 10-2096, 2016). It is undisputed Mr. Vidal and his crew members received general competent person training for excavation in Spanish (Exh. R-5). Angel Brothers has failed to establish, however, it adequately communicated its work rules to its employees.

Mr. Vidal supervised a crew of seven men on December 10, 2015.[27] They all spoke Spanish as their first language. Mr. Vidal testified they neither spoke nor read English with fluency. Mr. Vidal testified with the aid of an interpreter (Exh. R-6, p.3, § 26; Tr. 153, 209).

[27] At the hearing, Mr. Vidal confirmed the presence of six employees listed by the Secretary's counsel as being present the day of the inspection (Tr. 153). The Secretary's counsel omitted one name that appears in the *Pre-Task Plan* for

Mr. Vidal was questioned regarding the safety training provided by Angel Brothers.

> Q. Do you agree that any training Angel Brothers gave you when you were first hired was based on documents written in English?
>
> A. The documents were written in English, but the instructors spoke to us in Spanish.
>
> . . .
>
> Q. During your period of employment as a foreman, have you ever seen any written policies or procedures on trenching and excavation safety written in Spanish?
>
> A. No.

(Tr. 175-177)

Director of safety Bradley Porterfield testified Angel Brothers provided its employees written instructions in both English and Spanish. He stated foremen received copies of safety topics each week, written in English and Spanish, accompanied by a sign-off sheet. No documentation was provided for the safety topics (Tr. 287-291). Field safety manager Kevin Bennett does not speak Spanish (Tr. 91-92). Mr. Bennett testified he did not recall ever seeing copies of the safety program written in Spanish prior to the December 10, 2015, OSHA inspection (Tr. 98).

Mr. Porterfield was asked directly about the lack of documentation for the existence of the safety program written in Spanish.

> Q. Do you see before you today in Respondent's trial exhibits any of the materials you've mentioned yesterday or today in your testimony that were written in Spanish to be provided to employees?
>
> A. No.

(Tr. 310-11)

Angel Brothers has the burden of proving it adequately communicated its work rules to its employees. The record establishes the foreman and the crew members working at the Sens Road project spoke Spanish and were not fluent in English. Mr. Porterfield's testimony that

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December10, 2015, under the heading *Pre-Task Safety Briefing Signatures* (Exh. R-6, p. 3). The signature section establishes seven employees, not six, were present that day.

Angel Brothers provided its Spanish-speaking employees with a safety program written in Spanish is contradicted by Mr. Vidal and unsupported by documentation.

Mr. Vidal did not recall holding a toolbox meeting with his crew during the Sens Road project, and he conceded had he held one, it would have been documented. Angel Brothers provided no such documentation (Tr. 179-180). Field safety manager Kevin Bennett testified he did not provide specific trenching and excavation safety instruction or training to underground crews. "As far as specific training, I do not. I make recommendations and suggestions as far as the actual trench safety itself to improve the safety for the employees." (Tr. 83) Mr. Bennett stated he would be informed if any of Angel Brother's employees were scheduled for safety training. He did not recall if any of the crew members present the day of the OSHA inspection had received training during the year prior to the inspection (Tr. 139-140).

Mr. Porterfield testified Mr. Vidal and his crew received excavation safety training several times during the fall of 2015, but provided no documentation of the purported training. He was questioned specifically regarding a safety talk utility crew supervisors purportedly gave to their crews the third week in October 2015 on "Excavation Manual" training.

> Q. I'm talking about a copy of the actual materials that were provided via Mr. Bennett and whomever else to Mr. Vidal. Do we have as an exhibit those materials that were physically and literally provided to Mr. Vidal for that training?
>
> A. I don't have them here, so I'm assuming they were not requested.
>
> Q. That would be an incorrect assumption. In terms of mounting your claim of [unpreventable] employee misconduct, it would be your company's responsibility to provide those. So in terms of any Spanish copies of materials provided for week 3, "Excavation Manual" training, do you see in the materials before you any of that?
>
> A. No.
>
> Q. In terms of the tracking of the completion of those, you've mentioned a couple of times the—I guess, the rosters and some of the material that they're supposed to complete, correct?
>
> A. Yes.
>
> . . .
>
> Q. So you believe that you did receive back a completed sign-in sheet from Mr. Vidal's crew, indication that the training had taken place on week 3 of October 2015?

A. I believe so.

Q. Do you see that document in the materials before you?

A. No.

(Tr. 290-91)

An employer is not required to have written work rules and is not required to document the steps taken to communicate safety rules and to discover violations. However, in this case, Angel Brother's claim it provided training is contradicted by Mr. Vidal (who was still employed by the company at the time of the hearing and who showed no animus towards it) and otherwise unsupported by documentation. "Absent such documentation, [the employer] cannot persuasively argue that it effectively communicated the rules to its employees." *P. Gioioso & Sons, Inc. v. Occupational Safety & Health Review Comm'n,* 115 F.3d 100, 110 (1st Cir. 1997) ("[T]here is no reason why a factfinder must accept an employer's anecdotal evidence uncritically. And in this instance, we agree with the ALJ that the absence of any vestige of documentary proof was not only a relevant datum but a telling one.").

I find Angel Brothers did not adequately communicate its work rules regarding excavation safety to its employees.

(3) Angel Brothers Took Adequate Steps to Discover Violations

Angel Brother's field safety managers conduct daily inspections at their assigned worksites. Mr. Bennett testified regarding his procedure when he visits a worksite. "When I arrive on the site, I evaluate the trench or excavation and ensure there's proper shoring, sloping, benching, whatever that particular site may require, given the soil type, and evaluate other potential hazards versus whether that be struck-by hazards or potential congestion problems with the jobsite as far as equipment, things of that nature." (Tr. 84) The field safety managers document the inspection in an *Angel Visit Safety Form* (Exh. R-7). They also review the *Trench or Excavation Pre-Task Plan* completed by the worksite foreman (Exh. R-6).

The field safety managers document any potential hazards and deficiencies identified at the worksite and make recommendations for safe operation as the work progresses (Tr. 108). The field safety manager and the foreman review the report and sign it. The report is transmitted electronically to Mr. Porterfield, who reviews it (Tr. 108-109, 238-239).

On paper (and electronically), Angel Brothers appears to have an adequate safety plan and method for discovering violations. Closer examination, however, reveals inadequacies in the company's program. Angel Brother's failure to follow up on the obvious inaccuracies in the completed *Pre-Task Plans* demonstrates a failure to enforce the company's program.

(4) Angel Brothers Failed to Effectively Enforce Its Work Rules When Violations Were Discovered

"To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred." *Gem Indus., Inc.,* 17 BNA OSHC 1861, 1865 (No. 92-1122, 1996), *aff'd* 149 F.3d 1183 (6th Cir. 1998).

Mr. Bennett testified the first thing he does on a worksite visit as field safety manager is review the *Pre-Task Plans.* "It gives me a general idea of what task the crew is performing that day[.]" (Tr. 105) Mr. Vidal was questioned regarding his daily completion of the *Pre-Task Plans*. Questions 19, 20, and 21 of that form ask, respectively, "Is the trench shield 18" above ground surface to prevent objects from falling in?"; "Is the trench shield no more than 2 feet from bottom of excavation?'; and "Is the trench box in good condition without obvious damage?" Mr. Vidal had circled "Yes" for all three questions for each of the December 8, 9, and 10, 2015, forms (Exh. R-6, pp. 1-3). He had not used a trench box on any of those days.[28]

First, Mr. Vidal was asked specifically about the *Pre-Task Plan* for December 10, 2015, the day of the OSHA inspection.

> Q. Looking down at box numbers 19, 20 and 21. Do you see that?
>
> A. Yes.
>
> Q. Why did you circle "yes" to each of those three questions if no trench box had been installed?
>
> A. Because I thought of using it and that's why I checked it. And then I made a decision not to use it. It was a confusion that I made.
>
> Q. This was a confusion that you circled 19, 20 and 21?
>
> A. Yes.

[28] Question 3 on each form states, "Circle the Method Planned for the Excavation/Trench: Sloping/Benching [or] Trench Shield [or] Hydraulic Shoring[.]" Mr. Vidal selected "Sloping/Benching" on each form (Exh. R-6, pp. 1-3).

Q. Look at page 2 of Exhibit R-6, Mr. Vidal. …Do you see on page 2 you also circled 19, 20 and 21 for a trench shield on those days?

A. Yes.

Q. Were you confused on that day as well?

A. I believe so.

Q. Look on page 1 of Exhibit R-6, Mr. Vidal. … This is the pre-task plan for December [8], 2015, correct?

A. Yes.

Q. And you also circled boxes 19, 20 and 21 "yes" for having a trench shield. Do you see that?

A. Yes.

Q. Why were you confused on December the 8th, two days before the OSHA inspection?

A. Because normally I fill this form out early in the morning. Sometimes I decide –- I plan on doing it one way and then I get confused and do it the other way.

Q. So each of these pre-task plans for December 8th, December 9th and December 10th all include circles that you did use a trench shield or a trench box, correct?

A. Yes.

Q. But you did not use a trench shield or trench box on any of those days, correct?

A. No.

Q. So you would agree that that's false information?

A. Yes.

(Tr. 171-173)

Mr. Bennett stated he reviewed the *Pre-Task Plans* first thing whenever he visited a site. Yet, he failed to note on December 9, 2015, that Mr. Vidal had responded "Yes" to questions for which the answer was clearly "No." On all three forms, Mr. Vidal also failed to respond "Yes" or "No" to questions 22, 23, and 24 (Exh. R-6, pp. 1-3).[29] The similarities of the three forms support an inference that Mr. Vidal fills out the English-language form in a cursory manner, without paying attention to the information sought.

[29] Respectively, "Is the trench box within 3 inches of trench wall?"; "Is fall protection observed for working around trench box?"; and "Is trench box certification onsite?".

I find the facts in this case analogous to the facts in *Dana Container, Inc.,* 25 BNA OSHC 1776 (No. 09-1184, 2015), *aff'd* 847 F.3d 495 (7th Cir. 2017). *Dana* Container arose in the Seventh Circuit, but also could have been appealed in the Third Circuit, where, as in the Fifth and Eleventh Circuits, the Secretary must prove a supervisor's misconduct was foreseeable before his or her knowledge may be imputed to the employer. The Commission analyzed the supervisor's misconduct both in terms of foreseeability and the unpreventable employee misconduct defense.

In *Dana Container*, a supervisor was required to complete tank entry permits for employees entering trailer tanks to wash them. The Commission found the use of the tank entry permit program was "a reasonable method to discover violations of its rules. . . . Dana could readily discover such violations by reviewing the tank entry permits, which the Facility Manager at the Summit facility acknowledged he did." *Id.* at 1780 The Commission found, however, "each of the 28 entry permits Dana produced to the Secretary had an error or omission, and 11 of those deficient permits—nearly 40%—were completed by [the supervisor charged with misconduct,] Supervisor A." *Id.* The Commission held "the Facility Manager's failure to follow up on the permit deficiencies he observed demonstrates a failure to enforce the company's program." *Id.* at 1782 Mr. Bennett was onsite December 9, 2015, and he reviewed the *Pre-Task Plan* for that day. The *Pre-Task* plan indicated a trench box was being used, when it was clear that it was not. Mr. Bennett did not follow up on this inaccuracy.[30]

> Moreover, the Facility Manager never disciplined Supervisor A or anybody else for either the deficient permits or the violations of Dana's safety rules evident on the face of those permits, lending further support to our finding that Dana failed to effectively enforce its rules. Furthermore, Supervisor A admitted that he violated the work rules at issue here because he "was tired, it was cold, and [he] wanted to try to just finish that trailer." *See Jensen*, 7 BNA OSHC at 1480 ("[T]he fact that a

[30] In *S.J. Louis Constr.,* the Commission disagreed with the ALJ's application of *Dana Container's* analysis to that case. There, six out of 40 permits were completed with errors. The Commission stated, "SJL's field safety supervisors examine completed entry permits, immediately note whether there are any deficiencies, and discuss with the employee the importance of properly documenting atmospheric testing and properly completing entry permits. Thus, we find that these few errors do not amount, as the Secretary suggests, to employee violations that are too numerous to find that SJL's safety rules were effectively enforced." *S.J. Louis Constr.,* 25 BNA OSHC at 1899. Here, three out of three, or 100%, of the *Pre-Task Plans* adduced by Angel Brothers were inaccurate. The inaccurate *Pre-Task Plans* were completed over consecutive days giving rise to the inference Mr. Vidal customarily completed the forms in this manner. Mr. Bennett examined at least one of the forms and failed to detect any deficiency. I find the fact pattern in *Dana Container* is more relevant to the case before me than that of *S.J. Louis Constr.*

> supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax.") (citing *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 n.38 (D.C. Cir. 1973)). Supervisor A's own permits, on their face, show numerous violations of Dana's work rules, and his conduct on the day of the accident is consistent with those previous violations, all of which support the conclusion that he did not fear disciplinary action for violating Dana's safety rules. This misconduct, combined with the company's apparent acceptance of deficient entry permits without repercussions, establishes that Dana failed to enforce its safety program.
>
> Accordingly, we conclude that Supervisor A's misconduct was foreseeable, and thus his knowledge of his own misconduct would be properly imputable to Dana even under Third Circuit precedent.

Id. at 1782-1783

Here, Mr. Vidal admitted he did not use a trench box in the excavation on December 10, 2015, (despite being instructed to by his field safety manager the day before) because he thought he "could do it faster" by omitting safety precautions (Tr. 200). This violative conduct was a "mutual decision" reached between Mr. Vidal and Employee S.F., his "right-hand man." (Tr. 170) The fact the supervisor and his most trusted crew member actually weighed the pros and cons of using a required protective system and decided together to proceed without it supports the conclusion they did not fear disciplinary action. Indeed, Angel Brothers never disciplined Employee S.F.

Mr. Vidal's easy dismissal of the company's safety policy and the direct instructions from his supervisor are "strong evidence that the implementation of the policy is lax." *Id.* As with Supervisor A in *Dana Container*, Mr. Vidal's misconduct, combined with the company's apparent acceptance of inaccurate *Pre-Task Plans* without repercussions, establishes Angel Brothers failed to enforce its safety program. In *Dana Container,* the Seventh Circuit concluded the "Commission was entitled to find that the uncorrected permit violations exhibited a pattern of disregard for the rules at Dana. Even in the face of a robust written program, lax disregard of the rules can send a message to employees that a company does not make safety a priority. In such an environment, conduct such as [the supervisor's] is reasonably foreseeable." *Dana Container, Inc. v. Sec'y of Labor,* 847 F.3d 495, 500 (7th Cir. 2017).

The OSHA inspection occurred on December 10, 2015. Angel Brothers issued Mr. Vidal a written warning on April 19, 2016, four months after the date of the infraction (Exh. C-7).[31] Employee S.F., who entered the excavation after discussing the use of the trench box with Mr. Vidal, was not disciplined (Tr. 210). The crew member Mr. Vidal set as a lookout likewise was not disciplined (Tr. 214).

Mr. Porterfield testified both Employee S.F. and the designated lookout had received competent person training and had the authority to stop work if they observed a hazardous condition (Tr. 313). He agreed a competent person who does not stop work when he sees a hazard violates the safety policy of Angel Brothers (Tr. 314).

Angel Brother's *Safety Manual* states,

> **ANY EMPLOYEE THAT FEELS THAT ANY CONDITION OF THE TRENCH OR EXCAVATION IS UNSAFE THEY SHALL IMMEDIATELY REFUSE TO WORK AROUND OR ENTER THE AREA WITHOUT RETALIATION FROM ANOTHER EMPLOYEE, MANAGER OR COMPANY REPRESENTATIVE. THE UNSAFE CONDITION SHALL BE REPORTED TO THE SUPERVISOR, SAFETY FIELD MANAGER, SAFETY DIRECTOR OR THE OWNERS OF THE COMPANY FOR IMMEDIATE CORRECTIVE ACTION.**

(Exh. R-1, p. 13) (emphasis in original)

The *Trench or Excavation Pre-Task Plan* also serves as a signature sheet for the crew members present at the worksite each day. Immediately below the signature section is this statement:

> Any employee has the right to STOP work or refuse to sign this "Pre-Task plan" if they believe the job task has uncontrolled hazards that may lead to employee injury or failing to meet company safe work requirements. Employees may contact the Safety Director at [phone number].

(Exh. R-6, pp. 1-3)

[31] To the Secretary, Angel Brother's written warning issued to Mr. Vidal on April 19, 2016, was a "half-hearted reprimand," in part because the company took so long to issue it (Secretary's brief, p. 21). Mr. Porterfield, who has sole authority to decide disciplinary action for Angel Brothers, testified he was dealing with a serious illness in his family around the time of the inspections, which resulted in the delay (Tr. 254-256). I do not find the four-month delay between the violative conduct and the written warning, standing alone, to be significant in determining the element of enforcement. I do find, however, the failure of Angel Brothers to enforce any form of discipline over Employer S.F. and the lookout is evidence Angel Brothers failed to enforce its work rules.

Angel Brothers had a crew of seven employees plus Mr. Vidal at the Sens Road project worksite on December 10, 2015. Mr. Vidal and Employee S.F. discussed whether or not to use the trench box for 15 minutes that morning. The excavation was in plain sight (CSHO Waters observed its unsafe condition as he drove by) and Mr. Vidal set an employee as a lookout when Employee S.F. entered it. Yet not one of the crew members refused to work in the area or reported the unsafe condition of the excavation to a higher authority, despite the bolded, underlined, and capitalized admonition found in the *Safety Manual* or the statement appearing after the signature section of the daily *Pre-Task Plan*. This communal failure to adhere to the quoted safety rules indicates Angel Brother's work rules did not effectively enforce its safety program. "Where all the 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." *Gem Indus., Inc.,* 17 BNA at 1865.

I find Angel Brothers failed to effectively enforce its work rules when violations were discovered.

CONCLUSION

Based on the foregoing analysis, I find the Secretary proved the communication of Angel Brother's safety program was ineffective and its disciplinary aspect was inadequate. Therefore, the misconduct of Mr. Vidal in failing to use a trench box in the excavation was foreseeable. Furthermore, Angel Brothers failed to establish it effectively communicated its work rules and that it enforced its safety program, and so did not meet the requirements of the unpreventable employee misconduct defense.

I affirm the violation.

CHARACTERIZATION

The Secretary characterized the violation of § 1926.652(a)(1) as willful.

> The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety."' *Kaspar Wire Works, Inc.*, 18 BNA OSHC at 2181, 2000 CCH OSHD at p. 48,406 (citation omitted). [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 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, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, pp. 41,256 57 (No. 89-433, 1993). This state of mind is evident where "the employer was actually aware, at the time of the violative act, 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." *AJP Constr. Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004)(emphasis and citation omitted).

Thomas Indus. Coatings, Inc., 23 BNA OSHC 2082, 2091 (No. 06-1542, 2012).

Mr. Vidal's state of mind may be imputed to Angel Brothers. *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000) ("The state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful."). I find this is a clear cut case of a willful violation. The day before the OSHA inspection, Mr. Bennett, one of Mr. Vidal's supervisors, told him directly that he needed to use a trench box the next day. Angel Brothers had a trench box available at the work site and the equipment necessary to lower the trench box in the excavation. The day of the OSHA inspection, Mr. Vidal and Employee S.F. discussed whether or not to use the trench box. Mr. Vidal had measured the excavation and recorded the depth as 8.5 feet. Although the parties stipulated the excavation was dug in Type B soil, Mr. Vidal testified he was treating it as Type C soil. When asked why, Mr. Vidal stated, "Because there was traffic on one side. And there was a [concrete] pipe on the other side and so because of the vibration produced by the traffic I classified it as Type C." (Tr. 158) Therefore, Mr. Vidal had observed the traffic and resulting vibrations and concluded they exacerbated the unsafe condition of the excavation. Despite this, Mr. Vidal directed Employee S.F. to enter the excavation without an adequate protective system in place and watched him as he did so.

Mr. Vidal showed a conscious disregard for the requirements of § 1926.652(a)(1) and plain indifference to the safety of his "right-hand man." His awareness of the illegality of the conditions of the excavation was heightened by Mr. Bennett's instruction to him the day before that he needed to use a trench box on December 10. The record establishes Mr. Vidal had a heightened awareness of the requirement of an adequate protective system in the excavation and he consciously disregarded it. His willful state of mind is imputed to Angel Brothers. The Secretary has established the violation was willful.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The gravity of the violation is high. Mr. Vidal sent one employee into the excavation for 10 to 15 minutes. The walls of the excavation were almost vertical and were over the employee's head. No precautions were taken against injury to the employee (posting a lookout does not provide meaningful protection against collapse (Tr. 73)). The likelihood of death or serious physical injury was high. Angel Brother's own *Safety Manual* states, "In the United States there are between 75 and 100 fatalities annually due to trench cave-ins. The majority of fatalities occur when workers are crushed or suffocated in trenches from 7 to 12 feet deep, by soil weighing 100 lb. per cubic foot." (Exh. R-1, p. 12)

I do not credit Angel Brothers for good faith based on the awareness of Mr. Vidal that the excavation was unsafe. *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048 (No. 91-2834E, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices).

The record is lacking persuasive evidence for two of the statutory factors. CSHO Waters's testimony is sparse on details. He stated OSHA gives "a reduction if it's a small company, but they didn't get any reduction, because they are a large company." (Tr. 58) The Secretary did not adduce further evidence of the size of the company. CSHO Waters testified regarding the history of OSHA's inspections of the company, but the Secretary did not introduce copies of the previous citations into the record.

I am hampered in my ability to consider the size of the employer because the record does not indicate what the CSHO means by "a large company." As for history, although Mr.

Porterfield confirmed OSHA had cited Angel Brothers four times prior to the current Citation, the Secretary neglected to introduce copies of the citations or the settlement agreements the parties entered as a result. Accordingly, I lack complete information regarding history.

Upon due consideration of the relevant factors, to the extent evidence exists for them, I assess a penalty of $35,000.00 for the willful violation of § 1926.652(a)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

Item 1 of Citation No. 1, alleging a willful violation of § 1926.652(a)(1), is **AFFIRMED** and a penalty of $35,000.00 is assessed.

SO ORDERED.

/s/

HEATHER A. JOYS

Administrative Law Judge
Atlanta, Georgia

Date: October 13, 2017