United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. J.D. ABRAMS, LP, Respondent.	OSHRC DOCKET NO. 20-0452

Appearances:

Josh Bernstein, Esq., Department of Labor, Office of the Solicitor, Dallas, Texas
For the Secretary

Steven R. McCown, Esq., Littler Mendelson, P.C., Austin, Texas
Kelli Fuqua, Esq., Littler Mendelson, P.C., Austin, Texas
For Respondent

Before: Judge Christopher D. Helms, U.S. Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

I. Procedural History

On December 3, 2019, J.D. Abrams, LP (Abrams), was engaged in excavation work to install a waterline near the intersection of 183 and I-35 in Austin, Texas (Worksite). After driving

by the Worksite, the area director for OSHA's Austin office sent two compliance officers to investigate what appeared to be an employee working in an unprotected trench excavation. (Tr. 78-79). An inspection of the Worksite was opened that same day. (Tr. 78-79).

As a result of the inspection, OSHA issued a citation and notification of penalty (Citation) to Abrams on February 20, 2020, for two serious violations. The first violation was for an employee working in a trench excavation over five feet deep that was not protected from cave-in. The second violation was for a ladder that did not extend the minimum required three feet above the landing surface. Complaint, Ex. A. The total proposed penalty for the alleged violations was $13,494. *Id.*

Abrams timely contested the Citation. On December 9, 2021, an in-person hearing was held in San Antonio, Texas. Three witnesses testified at the hearing: Robert Ray, OSHA's compliance officer (CO); Ramon Reyes Rivera, Abrams' drainage foreman; and Steven Zbranek, Abrams' vice president of operations. Both parties filed post-hearing briefs.

The key issues in dispute are whether Abrams had knowledge of the hazardous conditions and whether Abrams has proved its affirmative defense of unpreventable employee misconduct.

As set forth below, the Court affirms both serious citation items and assesses a total penalty of $13,494.

II. Jurisdiction

Based on the record,[1] the Court finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5)

[1] The following jurisdictional details were stipulated in the pre-hearing Joint Stipulation Settlement. "1. The Parties stipulate that the Commission has jurisdiction over this proceeding under Section 10(c) of the Occupational Safety and Health Act, 29 U.S.C. Section 659(c) ("Act"). 2. The Parties stipulate that Respondent is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. Section 652(5)." (Tr. 10-11).

of the Act, 29 U.S.C. §§ 652(3) and (5). The Court finds the Commission has jurisdiction over the parties and subject matter in this case.

III. Factual Background[2]

A. Company and Worksite

On December 3, 2019, Abrams was engaged in a large waterline installation project near Interstate 35 and Highway 183 in Austin, Texas (Project or Worksite). (Tr. 23, 30-31; Exs. C-4, C-6, p.2). Abrams is a company of about 500 employees that performs highway construction projects. (Tr. 125). Steven Zbranek, vice-president of operations for Abrams, was responsible for all Abrams' projects.[3] (Tr. 119-20). Steve Clementino was Abrams' general superintendent for the Project. (Tr. 55, 129). Marcio Matute had worked for Abrams about 9 months and was the drainage and roadway supervisor for the Project. (Tr. 129; Ex. C-10). The duties for Mr. Matute and Mr. Clementino included driving the site for progress updates, coordinating with the site's owner, and generally planning the Project. (Tr. 129-30). Ramon Louis Reyes Rivera[4] (Mr. Rivera) was an installation supervisor (or drainage foreman) for Abrams. (Tr. 24, 128).

Mr. Rivera was responsible for the crew that excavated and installed pipe in the trench at the Worksite. (Tr. 124, 128). Mr. Rivera had been an Abrams employee for almost two years at the time of the inspection and reported to Mr. Matute. (Tr. 33, 55). Mr. Rivera had worked in the excavation industry since 1988. (Tr. 33, 35; Ex. C-4). Mr. Rivera supervised a three-person crew

[2] The factual background is based on the credible record evidence, as discussed below, and consideration of the record as a whole. Contrary evidence is not credited.

[3] During the 22 years he worked for Abrams, Mr. Zbranek held various positions in the company including project manager and project engineer. (Tr. 119-20). Steven Zbranek is familiar with Abrams' safety policies and testified regarding the company's approach to safety, including its safety manual. (Tr. 119-23).

[4] Ramon Louis Reyes Rivera was referred to as both Mr. Reyes and Mr. Rivera throughout the record. He will be referred to as Mr. Rivera in this Decision.

at the Worksite—Orlando Garcia, Pedro Ortega, and Mr. Cruz. (Tr. 24-25). Mr. Cruz operated the excavator, Mr. Garcia worked inside the trench, and Mr. Ortega worked from outside the trench.[5] (Tr. 25).

On December 2, 2019, the day before OSHA's inspection, Mr. Rivera's crew worked on a section of trench that had been flooded after a trench box crushed a section of pipe. (Tr. 42, 69-71). Fortunately, no one was working inside the trench at the time. (Tr. 69). The trench box had accidentally crushed the pipe as it was moved down the trench. (Tr. 42, 71). A subcontractor for Abrams repaired the pipe and work continued. (Tr. 42). Mr. Matute and Mr. Clementino knew about the crushed pipe, but neither went to the trench to evaluate the incident on December 2 or the following morning. (Tr. 71-72, 74).

The next day, December 3, 2019, Mr. Rivera told the crew that because of the crushed pipe the day before, they would not use a trench box that day.[6] (Tr. 43, 73-74). Mr. Rivera instructed the backhoe operator, Mr. Cruz, to open the trench around seven or eight that morning. (Tr. 24). The trench ran parallel between a frontage road to one side and a sidewalk on the other side. (Tr. 24, 45, 67; Ex. C-6, pp. 2-3, Ex. C-8). About 18 inches of rock was excavated from the lowest layer of the trench. (Tr. 44). Mr. Rivera determined the middle layer was comprised of type B soil.[7] (Tr. 44, 46-47). The top layer of the trench consisted of about a foot of asphalt on the wall closest to the highway and six inches of sidewalk material (concrete and wire mesh) for the wall next to the sidewalk. (Tr. 45-46; Ex. R-13, #000005).

After the trench was excavated, a ladder was placed in the trench. (Tr. 26, 63-64). Mr. Garcia used the ladder to enter the trench and prepare the base of the trench for a section of

[5] Orlando Garcia is also referred to as Orlando Grazia in the record. (Ex. C-4)

[6] During his testimony, Mr. Rivera stated that not using a trench box was a bad decision. (Tr. 33).

[7] OSHA's testing of the soil also determined the classification as Type B. (Ex. R-8).

pipe. (Tr. 26, 63-64). Mr. Garcia used the ladder to exit the trench and the excavator placed a section of pipe into the trench. (Tr. 26-27). The ladder was then moved further down the trench and the process was repeated. (Tr. 56, 63-64). Mr. Rivera's crew had begun working on this Project about four or five days before OSHA's inspection. (Tr. 41).

B. OSHA Inspection

As he drove to the office[8] on December 3, 2019, OSHA Area Director (AD) Casey Perkins saw what appeared to be an employee working in an unprotected trench over 5 feet deep.[9] (Tr. 78-79). AD Perkins assigned Compliance Safety and Health Officer (CO) Robert Ray and CO Darren Beck[10] to immediately open an investigation. (Tr. 78-79). When CO Ray arrived at the Worksite, he observed a worker inside the open trench, a worker standing on the surface next to the trench, a worker in the excavator, and CO Beck talking to the foreman, Mr. Rivera.[11] (Tr. 79, 81; Ex. C-8). Kevin Vannier, Abrams' safety coordinator for the Austin area, arrived at the Worksite about fifteen minutes after the inspection began. (Ex. C-6, p. 4). Matute and Clementino arrived sometime later during the inspection. (Tr. 72).

CO Ray and CO Beck took employee statements, photographed the Worksite, and took measurements.[12] (Tr. 80-84). The trench was six feet wide and between 60-86 feet long.[13] (Tr. 62--3, 91; Ex. C-6, pp. 2-3). The trench depth was measured in three areas, each over five

[8] The Worksite was less than 3 miles from the Austin area office. (Tr. 79).

[9] According to CO Ray, Perkins could barely see, in the trench, the top of a worker's hardhat. (Tr. 114).

[10] CO Beck no longer works for OSHA. (Tr. 78).

[11] OSHA arrived at the Worksite at about 1:00 p.m. (Tr. 27).

[12] For the employee statements, CO Ray transcribed an employee's response to CO Beck's interview questions. (Tr. 81-82, 84). The transcribed, signed interview statements of Mr. Matute and Mr. Rivera were admitted into the hearing record. (Tr. 81-82, 84; Exs. C-9, C-10)

[13] A diagram in CO Beck's contemporaneous site notes shows a measurement of 86 feet for the trench length. (Ex. C-6, pp.2-3). Mr. Rivera recalled the trench length as sixty feet. (Tr. 62-63). Whether the length was 60 feet or 86 feet is not dispositive to the issues in dispute here. Nonetheless, the undersigned finds the contemporaneous notes of the CO are more credible than Mr. Rivera's memory about a particular trench from two years before.

feet: five feet eight inches, six feet, and six feet seven inches.[14] (Tr. 91; Ex. C-6, p.2, Ex. C-8, p.3). The top of the ladder used to enter and exit the bottom of the trench measured as two feet eight inches above the landing surface. (Tr. 29, 92-93; Ex. C-5, C-8, C-11, p. 2).

Mr. Rivera confirmed that Mr. Garcia had worked in all trench areas that the CO had measured as over five feet deep. (Tr. 64-65). Mr. Rivera knew that a trench over five feet in depth had to be sloped back or protected with a trench box.[15] (Tr. 67). He also knew a ladder should extend three feet above the landing surface. (Tr. 55). Because Mr. Rivera knew the distance between rungs was 12 inches, he estimated the distance by counting the rungs. (Tr. 55-56). When the ladder was initially placed in the trench that morning, Mr. Rivera verified that it extended at least three feet above the ground; however, he did not check the ladder again as the work progressed. (Tr. 55-56, 63-64).

C. Safety Manual

The Abrams safety program included a safety manual, training, area safety coordinators, site audits, and discipline for work rule violations. (Tr. 120-23; Exs. R-1, R-2). Abrams set forth its work rules in a 72-page employee safety manual (Safety Manual or Manual), available in English and Spanish.[16] (Tr. 120; Exs. R-1, R-2). Each employee was provided a copy of the Manual to review during his company orientation, as confirmed by Mr. Rivera. (Tr. 36, 120; Ex. R-1). The Manual is organized into twenty-five safety topics, such as stairways and ladders, excavations, and fall protection. The Manual includes an appendix entitled "Life Saving

[14] Mr. Rivera recalled the trench depth as five feet six inches. (Tr. 25). However, Mr. Rivera did not dispute the accuracy of the measurements taken by the OSHA compliance officers. (Tr. 28-30; Ex. C-8, p.2, Ex. C-11, pp. 1-2).

[15] Mr. Rivera also stated that if he deducted the foot of asphalt, the trench was four feet seven inches deep. (Tr. 43). However, he admitted there was nothing in the Safety Manual that allowed a layer of asphalt to be omitted when measuring the depth of a trench. (Tr. 68-69).

[16] The Safety Manual does not address a disciplinary program or consequences for an employee that does not follow Abrams' safety rules. (Ex. R-1).

Commitments" (LSCs or Commitments), which sets out fourteen safety principles for employees to abide by. (Ex. R-1, ##00108-116). Mr. Zbranek explained the LSCs provide guidance to employees for daily meetings, for job hazard evaluations, to eliminate exposure in the workplace, and to orient new employees. (Tr. 36-38, 122-23).

On the excavation safety page, the Manual specifies that no one "will be allowed to enter an unprotected trench with a depth greater than 5 feet." (Ex. R-1, #00061). Under the stairways and ladders topic, the Manual specifies that "Ladders will be setup with side rails extending a minimum of 36" above the landing." (Ex. R-1, #00057). LSC #10 instructs employees not to "enter a trench or excavation greater than five feet deep that is not shored with a trench box or the side of the trench or excavation are sloped back." (Ex. R-1, #00114). Additionally, LSC #10 also instructs each employee to, *inter alia,* "[r]efuse to enter a trench or excavation that is not protected or has standing or running water in it," "[o]nly use ladders or ramps for entering and exiting trenches," and "[a]lways stay inside the trench protection system." (Ex. R-1, #00114). LSC #14 requires an employee to "[t]ie ladders off and extend them at least 3 feet above the work surface." (Ex. R-1, #00116).

D. Safety Coordinators

Abrams had four safety coordinators, each responsible for a particular geographic area. (Tr. 123-24, 131). Kevin Vannier was Abrams' safety coordinator in the Worksite's area. (Tr. 124, 130-31). As Mr. Zbranek explained, a safety coordinator's duties were dedicated to safety training, auditing worksites for safety compliance, and investigating incidents at worksites. (Tr. 121, 123, 130-32).

E. Safety Training and Meetings

Training was provided by the safety coordinators, including the training for new employees. (Tr. 34, 131-32). Mr. Rivera had received excavation training four or five times in the three years he worked for Abrams. (Tr. 34). This included interactive training where scenarios were discussed with the trainer and the rules were displayed on a screen in English and Spanish. (Tr. 34).

Every Monday a 30-minute safety meeting was held for the staff at each active project. (Tr. 34-35, 73, 120; Ex. R-3). A variety of topics were discussed at this meeting, such as, pipes, trenching, traffic control, bridges, etc. (Tr. 34-35). Attendance at this weekly meeting was documented by signing the Supervisor's Safety Training Report attendance sheet. (Tr. 38-41; Ex. R-3). Each day a foreman had a five-to-ten-minute meeting with the crew to go over the work plan and safety measures needed for the day. (Tr. 35, 120-21). A pre-activity meeting was held at the beginning of a project or when the nature of the project changed. (Tr. 121-22).

F. Site Audits

According to Mr. Zbranek, the safety coordinator was required to audit each project at least once per month.[17] (Tr. 133). The audit was either unannounced or requested by the onsite foreman. (Tr. 134). Depending on the size of the site, the audit could take a few hours or an entire day. (Tr. 133). If safety violations were found, the project's superintendent was notified so the violations could be immediately corrected. (Tr. 133). Each month, the safety coordinator reported the results of all audits to the management team. (Tr. 121, 123, 132-33). The monthly report included the safety issues discovered and how each was corrected. (Tr. 133). No documentation of the audits or reports was submitted into evidence. (Tr. 148).

[17] According to the Safety Manual, a safety coordinator is to inspect each worksite at least once a week and document the inspection. (Ex. R-1, #00050).

G. Disciplinary Measures

According to Mr. Zbranek, an employee who did not follow Abrams' work rules was disciplined with either a verbal warning, suspension, or termination depending on the nature and severity of the violations.[18] (Tr. 127). After the December 3, 2019, OSHA inspection, both Mr. Rivera and Mr. Garcia were suspended without pay for a time. (Tr. 128; Ex. R-12).

Mr. Rivera admitted that he was disciplined because he had made a mistake, but his decision to not use the trench box had been based on his desire to avoid the same accident that had occurred the day before when the trench box crushed a pipe. (Tr. 33, 54; Ex. R-12). Mr. Rivera was suspended for a week without pay because he allowed Mr. Garcia to work in an unprotected trench over five feet deep and use a ladder that did not extend at least three feet above the ground. (Tr. 31, 128; Ex. R-12). Orlando Garcia received the same discipline as Mr. Rivera; however, Mr. Garcia did not return to work for Abrams after his suspension. (Tr. 31-32, 54-55; Ex. R-12). Mr. Rivera stated this was the first time he or any member of his crew had been disciplined by Abrams. (Tr. 31-32, 61-62). Mr. Zbranek did not know of another time Rivera or Garcia had been disciplined. (Tr. 135).

IV. Analysis

To establish a violation of an OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). The Secretary has the burden of

[18] The Manual does not include a disciplinary program or other consequences for an employee that does not follow Abrams' safety rules. (Ex. R-1).

establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361, 1365 (No. 92-3855, 1995).

A. Citation 1, Item 1

1. *The Standard Applies*.

The Secretary alleged a serious violation of 29 C.F.R. § 1926.652(a)(1), which requires:

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

29 C.F.R. § 1926.652(a)(1).

The Secretary alleges that "an employee was working in a trench . . . approximately 6 feet 7 inches in depth and had no form of shoring, trench box, or other adequate protective system, exposing the employee to the hazard of being crushed from a cave-in." Complaint, Ex. A. Respondent asserts that the Secretary has not proved a protective system was required or that Respondent had actual or constructive knowledge of the trench conditions. (R. Br. 7). Respondent also asserts the affirmative defense of unpreventable employee misconduct. (R. Br. 10)

An "excavation" is defined as "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." 29 C.F.R. § 1926.650(b). It is undisputed Rivera's crew created an excavation through earth removal. The cited standard requires that employees working in an excavation be protected from cave-ins, unless one of two exceptions apply.

A protective system is not required if the excavation is either made entirely in stable rock or less than 5 feet in depth. 29 C.F.R. § 1926.652(a)(1). Respondent carries the burden of proof when claiming an exception to the standard's requirement. *See Ford Dev. Corp*., 15 BNA OSHC 2003, 2010 (No. 90-1505, 1992) ("party claiming the benefit of an exception bears the burden of proving that its case falls within that exception"). The Secretary asserts the trench excavation was over five feet deep and not comprised of stable rock, so an adequate protective system was required. (S. Br. 10).

Respondent does not assert the excavation was made entirely in stable rock. (R. Br. 8-9). Respondent does assert the trench was less than five feet deep. (R. Br. 8-9). Respondent claims that if the layer of solid rock at the bottom of the trench and the concrete or asphalt layer at the top of the trench are excluded from the measurement, the depth of the trench is less than five feet. (R. Br. 8-9; Tr. 47-48).

This assertion is inapt. Commission case law is clear on this point—the depth of the trench is measured from the base of the trench to the top regardless of the various types of soil or other materials it may consist of. *See Andrew Catapano Enterprises, Inc.,* 16 BNA OSHC 1949, 1951-52 (No. 89-1981, 1994) ("the depth requirement relates to the depth of the trench itself and not the depth of the unstable or soft soil portion, unless the soft or unstable portion is insignificant"). Respondent cannot simply ignore a layer of what it believes is stable material when measuring the trench's depth. Further, Mr. Rivera admitted that Abrams' work rules did not provide for a deduction of the rock layer at the bottom or asphalt layer at the top when determining trench depth. (Tr. 68-69). Finally, the stability of an excavation is evaluated by the weakest material in its structure. *See Woolston Constr. Co*., 15 BNA OSHC 1114, 1117 (No. 88-1877, 1991) *aff'd without published opinion*, 1992 WL 117669 (D.C. Cir. 1992) (citations

omitted) ("trench wall composed of materials of differing strengths is only as stable as its weakest component"). Respondent has not established the trench was less than five feet in depth.

The Worksite was an excavation and does not qualify for either exception. Thus, the cited standard applies.

2. *The Standard was Violated and Employees were Exposed to the Hazard.*

To comply with the standard, an adequate protective system must be used and designed in accordance with either 29 C.F.R. § 1926.652(b), which sets forth the requirements for "design of sloping and benching systems" or 29 C.F.R. § 1926.652 (c), which sets forth the requirement for "design of support systems, shield systems, and other protective systems." 29 C.F.R. § 1926.652.

Respondent does not dispute there was no support system, such as a trench box, in use and admits the walls of the trench were not sloped or benched. (Tr. 43, 67, 73-74). Therefore, Respondent violated the standard's requirement to use an adequate protective system.

With respect to exposure, there is no dispute that Mr. Garcia was working in the unprotected trench. CO Ray observed an employee in the trench when he arrived at the worksite and Mr. Rivera admitted that Mr. Garcia worked inside the trench. (Tr. 26, 85-86; Ex. C-8, p.3). Exposure to the hazard is proved.

3. *Knowledge*

To establish knowledge, the Secretary must prove that Respondent "knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (*AEDC*). Actual or constructive knowledge may be imputed to the employer through its supervisory employee. *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015)

(citations omitted); *see also, Access Equip. Sys., Inc.,* 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) ("an employee who has been delegated authority over other employees . . . is considered to be a supervisor for the purposes of imputing knowledge to an employer). "The employer's knowledge is directed to the physical condition that constitutes a violation." *Phoenix Roofing, Inc.,* 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) (*Phoenix*) (citations omitted) *aff'd*, 79 F.3d 1146 (5th Cir. 1996).

Mr. Zbranek acknowledged that Mr. Rivera was the crew foreman and responsible for the crew on December 3, 2019. (Tr. 128). Mr. Rivera admitted that he directed the backhoe operator to open the trench that morning and that he directed Mr. Garcia to work in the trench. (Tr. 24-25). Mr. Rivera also admitted that he had measured the trench depth as five feet six inches prior to Mr. Garcia's work in the trench. (Tr. 25). Mr. Rivera knew Mr. Garcia would be working in the trench with no trench box or other protective measure. (Tr. 43). Mr. Garcia entered and exited the trench repeatedly that day and Mr. Rivera supervised the work the entire time. (Tr. 27). Thus, Mr. Rivera had actual knowledge Mr. Garcia worked in a trench over five feet in depth without cave-in protection. As foreman, Mr. Rivera's knowledge is imputed to Abrams.

However, Respondent asserts that because Mr. Rivera violated Abrams' work rules by not requiring the use of a trench box, his knowledge can only be imputed if it was foreseeable. (R. Br. 9-10). Respondent relies on *Angel Brothers* to support this position. (R. Br. 9-10, citing *Angel Brothers Enterprises, Ltd. v. Walsh*, 18 F.4th 827, 830-31 (5th Cir. 2021) (*Angel Brothers*)).

Respondent's reliance on *Angel Brothers* to support its position is misplaced. As the Fifth Circuit reiterated in *Angel Brothers,* foreseeability relates only to imputation of the supervisor's knowledge of his own misconduct. *Angel Brothers*, 18 F.4th at 830-31 (citation omitted) ("When

a supervisor's own conduct is the OSHA violation, the supervisor's knowledge should be imputed to the employer only if the supervisor's misconduct was foreseeable."); *see Calpine Corp. v. Sec'y,* 774 Fed. Appx. 879, 883-84 (5th Cir. 2019) (clarifying that *Yates* "addresses only when a supervisor's knowledge of his own misconduct violates an employer's policy or instructions"); *W.G. Yates & Sons Constr. Co. v. Sec'y*, 459 F.3d 604, 609 n.8 (5th Cir. 2006), (addressing only situations where the supervisor himself engages in conduct contrary to employer policy).

Here, it was a member of the crew who worked in the trench that was not adequately protected. When a crew member is engaged in the violative conduct, the supervisor's knowledge is imputed to the employer. *See Angel Brothers,* 18 F.4th at 832 (Whether a supervisor engages in misconduct alongside a subordinate or authorizes a subordinate to engage in misconduct, "both of those scenarios involve a subordinate's violation of safety rules so it is reasonable to charge the employer with the supervisor's knowledge of the subordinate's misconduct."). Therefore, Mr. Rivera's knowledge of Mr. Garcia's work in the unprotected trench can be imputed to Respondent. Knowledge is established.

The Secretary has proved his prima facie case for Citation 1, Item 1. Respondent's affirmative defense of unpreventable employee misconduct is discussed below.

B. Citation 1, Item 2

1. *The Standard Applies.*

The Secretary alleged a serious violation of 29 C.F.R. § 1926.1053(b)(1), which requires:

> (b) Use. The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:
>
> > (1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension

> is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

29 C.F.R. § 1926.1053(b)(1).

The Citation alleges the "ladder that employees were utilizing to enter and exit the trench only extended above the top of the trench by 2 feet, exposing employees to the hazard of falling from height." Complaint, Ex. A. Respondent asserts the Secretary has not proved the ladder extended less than the required three feet above the landing surface, an employee was exposed to the hazard, or Respondent had actual or constructive knowledge of the condition. (R. Br. 18). Respondent also asserts the affirmative defense of unpreventable employee misconduct. (R. Br. 20).

The cited standard requires a portable ladder to extend at least three feet above the upper landing surface. A portable ladder was used by Mr. Garcia to enter and exit the trench. (Tr. 26, 63-64). Thus, the standard applies.

2. *The Standard was Violated.*

Respondent asserts Secretary did not provide an actual measurement to document the distance the ladder extended above the side of the trench. (R. Br. 18). To the contrary, the evidence provided at the hearing includes documentation of the ladder's height above the landing surface. CO Ray testified that he measured the ladder. (Tr. 92-93). A photograph, Exhibit C-11, shows the measurement, with a tape measure, of the distance from the ground to the top of the ladder as two feet eight inches.[19] (Ex. C-11, p.2). Mr. Rivera did not dispute the accuracy of the

[19] Both parties stipulated to the admissibility of all hearing exhibits. (Tr. 10-11).

measurement shown in the photograph. (Tr. 29; Ex. C-11, p.2). Finally, in its response to "Request for Admission No. 7" in *Respondent's Objections, Answers, and Response to Complainant's First Set of Written Discovery*, Respondent stated: "[a]dmit that the ladders extended two feet, eight inches above the upper landing surface." (Ex. C-16, p.12). Respondent's claim there is no proof the ladder extended less than three feet above the surface is rejected. Therefore, the ladder did not comply with the requirements of the cited standard and the standard was violated.

3. *Employees were Exposed to a Hazardous Condition.*

The Secretary must show that an employee was either actually exposed to the hazard or that exposure was reasonably predictable. *Phoenix*, 17 BNA OSHC at 1079, n.6. The predictability of exposure can be determined through "evidence that employees while in the course of assigned work duties, personal comfort activities and normal means of ingress/egress would have access to the zone of danger." *Phoenix*, 17 BNA OSHC at 1079 n.6.; *see also, S. Hens, Inc. v. Sec'y*, 930 F.3d 667, 681 (5th Cir. 2019) (Fifth Circuit adopting "reasonably predictable" exposure test).

Respondent asserts that because the ladder was moved throughout the day there was no evidence anyone used the ladder in the position where it measured at less than three feet above the surface. (R. Br. 19). The Court disagrees.

The record is clear that Mr. Garcia used the ladder throughout the day to get into and out of the trench. Mr. Rivera confirmed that Mr. Garcia used the ladder to enter and exit the trench. (Tr. 25-26). During redirect examination, Mr. Rivera clarified that Mr. Garcia had access to use the ladder, as pictured, extending less than three feet above the trench wall. (Tr. 64-65; Ex. C-8, pp. 1-3, Ex. C-11, pp.1-2). CO Ray observed the ladder in the trench and Mr. Garcia working in

the trench. (Tr. 79, 81, 93; Ex. C-8, p.3). It is reasonably predictable Mr. Garcia would use the ladder that extended less than three feet above the surface to exit the trench.

Thus, Mr. Garcia was exposed to the hazard presented by a ladder that did not extend at least three feet above the surface. Exposure is proved.

4. *Knowledge*

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli Constr. Co*., 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001); *see also, ComTran Grp., Inc. v. Sec'y*, 722 F.3d 1304, 1308 (11th Cir. 2013) (In the absence of actual knowledge, the Secretary must prove that an employer had constructive knowledge of the violative conditions by showing that the conditions were in plain view of the supervisor or that the employer failed to implement an adequate safety program).

As with Citation 1, Item 1, Respondent asserts that Mr. Rivera's knowledge cannot be imputed to Respondent. (R. Br. 20). This assertion is rejected. Here, it is Mr. Rivera's knowledge of Mr. Garcia's use of the ladder that is imputed to Respondent. As discussed above, a supervisor's knowledge of a crew member's noncompliant conduct can be imputed to the employer. *See Angel Brothers,* 18 F.4th at 832 (allowing foreman's knowledge of subordinate's conduct to be imputed to employer).

Mr. Rivera was on site supervising the work all morning—he knew that Mr. Garcia used the ladder to enter and exit the trench, and that the ladder would be moved as the work progressed. (Tr. 26-27, 56, 64-65). Mr. Rivera knew a ladder should extend three feet above the top of the trench wall. (Tr. 55-56). At the start of work, Mr. Rivera verified the ladder extended the necessary three feet above the surface yet took no further action to ensure the ladder continued to be kept at the proper extension. (Tr. 55-56).

Mr. Rivera's presence on the Worksite, the plainly observable nature of the violation, and knowledge of how the ladder was used as work progressed establish that with reasonable diligence Mr. Rivera could have known the ladder was not properly positioned. *See A.L. Baumgartner Construction, Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (constructive knowledge found where violative conditions in plain view); *Automatic Sprinkler Corp. of America,* 8 BNA OSHC 1384, 1387 (No. 76–5089, 1980) (an employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed" and give "instructions to prevent exposure to unsafe conditions"). Therefore, knowledge is established.

The Secretary has proved its prima facie case for Citation 1, Item 2. Respondent's affirmative defense of unpreventable employee misconduct is discussed below.

C. Unpreventable Employee Misconduct

Respondent asserts the unpreventable employee misconduct defense for both citation items. (R.Br. 10, 20). Respondent carries the burden of proving this affirmative defense. *See Briones Util. Co.*, 26 BNA OSHC 1218, 1220 (No. 10-1372, 2016); *see also, Calpine Corp.,* No. 11-1734, 2018 WL 1778958, at *9 (OSHRC Apr. 6, 2018) (employer carries evidentiary burden for unpreventable employee misconduct defense), *aff'd,* 744 F. App'x 879 (5th Cir. 2019) (unpublished). To prevail on this defense, Abrams must show that it "(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." *Stark Excavating, Inc.,* 24 BNA OSHC 2218, 2220 (Nos. 09-0004, 09-0005, 2014) *aff'd* 811 F.3d 922 (7th Cir. 2016); *see also, TNT Crane & Rigging, Inc. v. Sec'y*, 821 Fed. App'x 348, 355 (5th Cir. 2020) (unpublished)

(acknowledging the Commission's four elements of proof required for unpreventable employee misconduct defense).

Respondent asserts that it had effective work rules that were adequately communicated to its employees. Further, Respondent asserts that it routinely took steps to discover violations and effectively disciplined employees who violated a work rule. (R. Br. 14-16, 22).

The Secretary asserts the affirmative defense fails because Respondent failed to adequately communicate its work rules, failed to take adequate measures to discover violations, and did not adequately enforce its work rules. (S.Br. 16-17).

As set forth below, the Court finds Respondent had effective work rules that it adequately communicated to its employees; however, its measures to discover violations and enforce its work rules were inadequate. Thus, the defense fails.

1. *Work Rules*

To prevail on the defense of unpreventable employee misconduct, the employer must establish it had a work rule that effectively implemented the requirements of the cited standard. *See Capform, Inc*., 16 BNA OSHC 2040, 2043 (No. 91-1613, 1994); *see also, Superior Custom Cabinet Co., Inc. v. Sec'y,* 158 F.3d 583 (5th Cir. 1998) (unpublished) (unpreventable employee misconduct defense fails because instructions "were not adequately designed to prevent the violations"); *Mosser Constr. Co.,* 15 BNA OSHC 1408, 1415 (No. 89–1027, 1991) (work rule inadequate because it was not "clear enough or broad enough to eliminate employee exposure" to the specific violative conditions); *Archer-Western Contractors Ltd*., 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991) (work rule inadequate because "even if the employee had complied," it would not "eliminate the hazard"), *aff'd*, 978 F.3d 744 (D.C. Cir. 1992).

Respondent's Safety Manual included rules for working in a trench greater than five feet in depth and for the distance a ladder must extend above the landing surface. (Ex. R-1). The Manual directs employees to not work in an unprotected trench over five feet. (Ex. R-1, ## 00061, 00114). It also states all ladders must extend at least three feet above the landing. (Ex. R-1, ## 00057, 00116).

The Secretary does not dispute the adequacy of these work rules. Here, the work rules in Respondent's Safety Manual mirror the requirements of the two OSHA standards cited here. The Court finds Respondent's work rules were adequate to implement the requirements of the cited standards.-

2. *Communication of Rules to Employees*

When evaluating whether an employer has adequately communicated its safety rules, "the Commission considers evidence of whether and how work rules are conveyed." *Angel Bros. Enterprises, Ltd*., No. 16-09540, 2020 WL 4514841, *4 (OSHRC, July 28, 2020) (*ABE*)(citations omitted) (finding training and toolbox talks provided adequate communication of rules even though foreman allowed employee to work in unprotected trench) *aff'd* 18 F.4th 827 (5th Cir. 2021); *see United Contractors Midwest, Inc.,* 26 BNA OSHC 1049, 1052 (No. 10-2096, 2016) (finding rule adequately communicated through orientation, toolbox talks, annual training sessions, and onsite reminder).

The evidence shows Abrams effectively communicated its work rules to its employees through meetings, training, and the Safety Manual. The rules in the Manual were reviewed by an employee at orientation. (Tr. 36, 120; Ex. R-1). Mr. Rivera confirmed that he had read the Manual during orientation and knew that it included the rules for excavation work and ladder use. (Tr. 36-38; Ex. R-2). Mr. Rivera also confirmed that he had several trainings on trench safety and

knew that a trench over five feet requires cave-in protection and that a ladder must extend three feet above the landing. (Tr. 34-35, 38-41, 55, 73; Ex. R-3, pp. 16-18). Mr. Rivera attended interactive trainings where employees discussed work rules and unsafe scenarios with the instructor. (Tr. 34). Each Monday, a worksite meeting was held for all employees where the safety rules for trench work were often discussed. (Tr. 38; Ex. R-3). In addition, safety measures were discussed at a five-to-ten-minute meeting prior to work each day. (Tr. 35, 120-21).

The Secretary asserts Respondent should have provided more documentation to show its work rules were effectively communicated. (S. Br. 16-17). In particular, the Secretary notes there is no documentation of the pre-shift meetings or written verification that each employee had received the Manual. (S. Br. 16-17). The Secretary's argument is not persuasive. Communication of work rules can be adequate without being documented. *See ABE*, 2020 WL 4514841 at **4-6 (written documentation not required to show adequate communication of work rules). Here, the weekly safety meetings were documented and show that trench and excavation safety was a regular topic. (Ex. R-3). The fact the daily pre-shift meeting was not documented does not alone indicate work rules were not communicated to employees.

Mr. Rivera's testimony, when considered along with the documentation of weekly safety training sessions and the Safety Manual, demonstrates Abrams effectively communicated its work rules to its employees. *See GEM Indus., Inc*., 17 BNA OSHC 1861, 1863 n.5 (No. 93-1122, 1996) (safety rule need not be written as long as it is clearly and effectively communicated), *aff'd*, 149 F.3d 1183 (6th Cir. 1998)

Thus, the Court finds that Respondent effectively communicated the work rules to its employees.

3. *Steps to Discover Violations*

However, Respondent failed to prove that it effectively took steps to detect violations of safety rules at its worksites. "Effective implementation of a safety program requires a diligent effort to discover and discourage violations of safety rules by employee." *Propellex Corp*., 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999); *see Manganas Painting Co.,* 21 BNA OSHC 1964, 1998 (No. 94-0588, 2007) (finding monitoring inadequate where supervisors "could have seen" employees "work[ing] without respiratory protection in plain view"), *Am. Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997) ("It is not enough that an employer has developed an exemplary safety program on paper," because "the proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program.") (citation omitted).

Respondent asserts its area safety coordinators were focused solely on safety matters and routinely audited all the worksites for compliance with safety rules. (R. Br. 15, 22). Mr. Zbranek testified that worksite audits were documented, compiled, and presented monthly by the area safety coordinators to the management team. (Tr. 121, 123). Yet, no documentation of any audit was provided. (Tr. 143, 148).

Mr. Zbranek also stated the area safety coordinators investigated accidents and documented near misses at worksites. (Tr. 132, 135). Yet, no one came to the Worksite on December 2 after the crushed pipe flooded the trench. (Tr. 71-72). This lack of response suggests the safety coordinators did not consistently respond to near misses.

Despite Mr. Zbranek's testimony that worksite audits were routinely documented, Abrams provided no evidence to support this claim. (Tr. 121, 123, 143, 148). Further, there was no testimony from an Abrams' safety coordinator to describe the frequency of site visits, the process for discovering violations at a worksite, how information was communicated to the employees

during a safety audit, or the steps to remedy any compliance issues at a worksite. *See Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1968, 2003) (*Capeway*) ("when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party") *aff'd* 391 F.3d 56 (1st Cir. 2004).

Mr. Zbranek's testimony is insufficient to show that Respondent had a meaningful program to detect and to discourage safety violations. The Court finds Respondent did not prove this element of the unpreventable employee misconduct defense.

4. *Enforcement of Work Rules*

Respondent's proof that it had effective and consistent discipline for safety rule violations is also insufficient. According to Respondent, its work rules were enforced through verbal warnings, suspension, or termination depending on the nature and severity of a work rule violation. (R. Br. 16, 22). The only two examples of employee discipline supporting Respondent's position

were the discipline of Mr. Garcia and Mr. Rivera related to the December 3, 2019, inspection.[20] Mr. Garcia was disciplined for working in a trench over five feet deep without cave-in protection and using a ladder that did not extend three feet above the side of the trench wall. (Tr. 31-32; Ex. R-12). Mr. Rivera was disciplined for allowing Mr. Garcia to use the ladder and work in the trench. (Tr. 31-32; Ex. R-12). Mr. Garcia was suspended and never returned to work for Abrams. (Tr. 55). Mr. Rivera was suspended for one week without pay. (Tr. 31).

The Court finds this inspection-related discipline alone does not demonstrate Respondent effectively enforced its work rules prior to OSHA's inspection. As the Commission previously observed, "post-inspection discipline alone is not necessarily determinative of the adequacy of an employer's enforcement efforts." *AEDC*, 23 BNA OSHC at 2097; *see Precast Serv., Inc*., 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) ("Commission precedent does not rule out consideration of post-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline."), aff'd, 106 F.3d 401 (6th Cir. 1997) (unpublished); *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164-65 n.3 (No. 90-1307, 1993), *aff'd in unpublished opinion*, 19 F.3d 643 (3d Cir 1994) (finding termination of foreman following OSHA inspection did not make up for ineffective enforcement policy prior to inspection). Here, Respondent provided no evidence of any discipline or enforcement action that had been implemented as a result of its discovery of violations at a worksite.

[20] Exhibit R-12 includes the "Employee Warning Report" issued to Ramon Reyes (Rivera) on December 9, 2019, for allowing a worker to be in an unprotected trench and a ladder less than three feet above the landing area. (Ex. R-12 p.1). The form noted this was Mr. Reyes first warning and that he was immediately suspended on December 3, 2019. (Ex. R-12 p.1). An Employee Warning Report was also issued to Orlando Garcia for being in a trench over five feet without protection and for a ladder that was less than three feet above the landing area. (Ex. R-12 p.2). Mr. Garcia refused to sign the form. (Ex. R-12 p.2).

Again, Respondent was uniquely able, and had the burden, to produce evidence of an effective disciplinary program for violations of its safety rules.[21] *See ABE*, 2020 WL 4514841 at *8 (finding lack of effective enforcement program where employer provided no example of discipline that resulted from its own monitoring program)*; see also, Capeway*, 20 BNA OSHC at 1342-43 (lack of evidence peculiarly in power of one party gives rise to presumption it would be unfavorable). The Court finds Respondent did not effectively enforce its safety rules.

Because Respondent did not prove that it took steps to discover violations of its work rules or that it effectively enforced these rules when violations were discovered, the defense of unpreventable employee misconduct fails.

D. Serious Characterization

The Secretary alleged that each citation item was serious in nature. A violation is classified as serious under section 17(k) of the Act if "there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "The Secretary must show that death or serious physical harm is a probable consequence *if* an accident results from the violative condition—he is not required to show that an accident is itself likely." *Home Rubber Company, LP*, 2021 WL 3929735, at *5 (No. 17-0138, 2021)

When a trench wall caves in, serious injuries, such as contusions, fractures, suffocation, and death can result. (Tr. 86, 94-95). *See generally, Digioia Brothers Excavating, Inc.,* 17 BNA

[21] Respondent attached an exhibit to its post-hearing brief in an apparent attempt to include evidence outside the record. (R. Br. 16 n.5). Respondent explained the documents were "not introduced as exhibits at trial because they were extraneous to the specific discipline meted out to Mr. [Rivera] and Mr. Garcia as relevant here. Nonetheless, Respondent is providing a copy of these additional disciplinary actions, . . . to the extent the Court deems them relevant to its consideration of the citation here. See Exhibit A." (R. Br. 16 n.5). This attempt to shoehorn information, outside the hearing, into the record is improper. Because it was not presented during the hearing, there was no opportunity for Secretary to object or for either party to present witness testimony to explain or support the documents. The documents attached as Exhibit A to Respondent's post-hearing brief are not a part of the record of this proceeding and accordingly, are not considered here.

OSHC 1181, 1184 (No. 92-3024, 1995) ("If a cave-in occurred in an 8-foot deep trench, it is clear that there is a substantial probability that the likely result would be death or serious physical harm.") The noncompliant ladder was a fall hazard, which can result in contusions, fractures, and concussions. (Tr. 94-95). The Court finds, a trench cave-in and a fall from a ladder can each result in serious injury.

Both citation items are properly classified as serious.[22]

E. Penalty

"Once a citation is contested, the Commission has the sole authority to assess penalties." *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (citation omitted), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). The penalty amount proposed in the citation is given no deference. *See Hern Iron Works*, 16 BNA OSHC 1619, 1621 (No. 88-1962, 1994).

The maximum statutory penalty for a serious violation is $13,494.[23] Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. 29 U.S.C. 666(j). Gravity is generally the primary factor in the penalty assessment. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

With respect to Citation 1, Item 1, the Secretary proposed a penalty of $7,711. OSHA assessed the gravity as moderate based on a lesser probability and medium severity. (Tr. 86-87;

[22] Respondent asserts the violation was not serious because of Mr. Rivera's concern that a trench box could crush the pipe and flood the trench. (R. Br. 17). This argument is rejected. A serious classification is based on the nature of probable injuries that would occur if there was an accident, not the reason an employer violated the standard.

[23] For a serious penalty assessed after January 15, 2020, but on or before January 15, 2021, the statutory maximum of $13,494 applies. 85 Fed. Reg. 2292, 2298-99 (Jan 15, 2020).

Ex. C-4). With respect to Citation 1, Item 2, the Secretary proposed a penalty of $5,783. OSHA assessed the gravity as low based on a lesser probability and low severity. (Tr. 94-96; Ex. C-5).

The company had approximately 500 employees, so no there was no penalty adjustment for size. (Tr. 87, 123). The proposed penalty included no discount for good faith because the onsite supervisor directed the employee to use the ladder and work in the unprotected trench. (Tr. 90). There was no penalty adjustment for history.[24] (Tr. 87-90).

Respondent argues it should get a reduction for good faith because it has a safety policy. (R. Br. 17-18). This argument is rejected. As discussed above, Respondent's safety policy was incomplete. *See generally, Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001) (even though safety and enforcement program, were written, a reduction for good faith inappropriate where safety program did not fully address the hazard) *aff'd*, 34 F. App'x. 152 (5th Cir. 2002).

The Court finds the penalties as proposed are supported and assesses penalties of $7,711 for Citation 1, Item 1 and $5,783 for Citation 1, Item 2.

V. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.652(a)(1) is AFFIRMED, and a penalty of $7,711 is assessed.
2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1) is AFFIRMED, and a penalty of $5,783 is assessed.

[24] The proposed penalty included no adjustment, increase or decrease, to the penalty calculation related to citation history. (Tr. 87-90). There was some discussion during the hearing as to whether Abrams had been cited by OSHA previously. The Secretary conceded there was no documentation in the hearing record that Abrams had any prior citations. (Tr. 127). The lack of penalty adjustment reflects this lack of inspection history.

SO ORDERED.

/s/ Christopher D. Helms

Dated: August 29, 2022
Denver, Colorado

Christopher D. Helms
Administrative Law Judge, OSHRC