COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 5166-14

SECRETARY OF LABOR
KENTUCKY LABOR CABINET — COMPLAINANT

v.

LOUISVILLE WATER COMPANY — RESPONDENT

****

Hon. Steven Fields, Frankfort, for the Secretary. Hon. Todd B. Logsdon, Louisville, Attorney for the Respondent Louisville Water Company.

DECISION AND ORDER
OF THIS REVIEW
COMMISSION

Louisville Water Company ("LWC") filed a timely petition for discretionary review of our hearing officer's recommended order in which he affirmed a citation alleging that LWC willfully violated an excavation safety standard, 29 CFR §1926.652(a)(1), and another serious citation implicating two standards applicable to work ladders, 29 CFR §1926.1053(b)(1) and 29 CFR §1926.1053(b)(16). We granted review and asked for briefs. *See* 803 KAR 50:010, Section 48. For the reasons discussed herein, we amend the willful citation to serious, affirm the work ladder citation, and reduce the penalties for each citation.

Standard of Review

KRS §336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky Occupational Safety and Health Act, KRS chapter 338. When a compliance

officer conducts an inspection of an employer and discovers violations, the Department of Workplace Standards of the Labor Cabinet issues citations. KRS §338.141 (1). If the cited employer notifies the Commissioner of its intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission ("Review Commission") "shall afford an opportunity for a hearing." KRS §338. 141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS §338.07 1 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review with the Review Commission; the Review Commission may grant the petition, deny the petition or elect to call the case for review on its own motion. 803 KAR 50:010, Section 47 (3). When the Review Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Brennan v. O.S.H.R.C.*, 487 F.2d 438, 441 (8th Circ. 1973), the Eighth Circuit said when the commission hears a case it does so "de novo." *See also Accu-Namics, Inc. v O.S.H.R.C.*, 515 F.2d 828, 834 (5th Circ. 1975) ("the Commission is the fact-finder, and the judge is an arm of the Commission....[1]").

As stated by our Supreme Court in *Sec'y of Labor v. Boston Gear, Inc.*, 25 S.W.3d 130, 133 (Ky. 2000), "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer". "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and

[1] *See* federal commission rule 92(a), 29 CFR §2200.

accord more weight to one piece of evidence than another." *Terminix International, Inc. v Secretary of Labor*, 92 S.W.3d 743, 750 (Ky. Ct. App. 2002).

Facts[2] and Summary of Proceedings

Louisville Water Company (LWC) is a municipal water company servicing residents in Jefferson County, Kentucky. LWC performs numerous excavations to maintain its water distribution system, which implicates 29 CFR §1926.652(a)(1):

> (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 (1.52 m) in depth and examination on the ground by a competent person provides no indication of potential cave-in.

Adequate cave-in protection involves either benching or sloping of the walls of an excavation or shoring the walls with a protective shielding system.

On January 16, 2014, LWC dispatched three employees to replace a fire hydrant on Leman Drive in Louisville, Kentucky. Jay Covert led a work crew consisting of himself, Tom Petrowski, a plumber lead and assistant, and Ed Moore, a backhoe operator. Covert was training Petrowski, who had not performed a hydrant replacement before.

The fire hydrant connected to a water main T-connection in the ground through a pipe (lead) and gate valve. The fire hydrant connects to a flange on the gate valve with bolts. *See* Trial Exhibit 12. When the hydrant valve shuts, a drain valve opens

---

[2] Additional findings are stated below in the discussion of whether LWC established the unpreventable employee misconduct defense.

and the hydrant will empty the residual water into the surrounding soil via a gravel sump pit located just below where the hydrant connects to the lead. *See id.*

Moore excavated a hole to uncover the lead and gate valve connecting the hydrant to the water main. At first, he only uncovered the top of the lead and hydrant gate valve, leaving the surrounding soil and concrete thrust blocks in place so that the hydrant gate valve remained firmly affixed to the water main T-connection. The hole was about four feet, three inches deep at this time. Petrowski and Covert entered the excavation and placed a steel rod between the gate valve and water main T-connection to secure the gate valve and prevent it from blowing off and injuring them after the excavation was complete. Petrowski cut the pipe running from the gate valve to the hydrant and removed the top four of the six bolts in the gate valve flange. Dirt still covered the other two bolts.

The men exited the hole and Moore removed the hydrant using the backhoe, leaving a portion of pipe still connected to the gate valve. He then removed more dirt to create the sump pit, which made the hole approximately six feet, four inches deep. Covert planned to add rock to the sump pit up to the depth of the gate valve before anyone re-entered the hole to remove the other two bolts and install the new hydrant. *See* Transcript Day 1, p. 262. Adding the rock would have made the hole less than five feet deep again, which meant that the crew would not have had to employ cave-in protection.[3]

---

[3] Compliance Officer Seth Bendorf stated that the regulation would not require cave-in protection if LWC back-filled a 6-foot hole with rock to a depth of four feet unless that technique somehow made the walls less stable and made cave-in more likely. *See* Transcript Day 3, p. 121 - 22. He conceded, however, that he had no expert opinion about whether a six-foot excavation with two feet

Covert evaluated the excavation and determined that the crew would not need cave-in protection for the hydrant replacement. He classified the soil type as Class B[4] and determined that there was no potential for cave-in. He documented his evaluation on an excavation checklist, which LWC had implemented to guide its employees and provide documentation of evaluations. *See* Trial Exhibit 42.[5] Covert wrote on this checklist that the excavation was six feet deep, but testified at the hearing that the recorded depth was incorrect. LWC's post-inspection investigation found that the top of the pipe was only about four feet from the surface, and Covert stated that he never planned for anyone to enter into the excavation while it was greater than five feet deep. *See* Transcript Day 1, p. 8.

The work crew decided to take lunch after removing the hydrant. Moore left in a work truck to transport the removed dirt to LWC's facility with plans to return with a new hydrant and the rock needed to fill the hole. Covert picked up various tools to take them to an LWC work truck parked on the street near the hole. While Covert was walking toward the truck, Petrowski told Covert that he was going to remove the two remaining bolts on the gate valve flange in the hole. Covert said

---

of rock added to it would present more of a cave-in hazard than just a four-foot excavation without any rock. *See id.* A geotechnical/civil engineer, Peggy Duffy testified that adding rock stabilizes the walls of the excavation. *See* Transcript Day 3, p. 167 - 68.

[4] Class B soil is relatively cohesive clay soil, which is not as prone to cave-in as sandy or loamy soil. Ms. Duffy testified that she did not believe that the conditions of the excavation made it particularly susceptible to cave-ins even though it was more than five feet deep. *See* Transcript Day 3, p. 138 – 165, 168. We find that Ms. Duffy's testimony carries more weight than Bendorf's testimony that the excavation had characteristics making it susceptible to cave-ins, such as fissures, cracks and frozen soil.

[5] After the Secretary cited LWC for an alleged violation occurring in February of 2013, LWC revised its policies to require crew leaders to complete a checklist prior to entry into any excavation that was three feet in depth or more.

something to the effect of, "sure go ahead" or "OK," and continued packing up tools. Petrowski's entry violated 29 CFR §1926.652(a)(1) because he entered an excavation greater than five feet in depth without cave-in protection.

Based on the evidence, we find that Covert suffered an unfortunate mental lapse when he allowed Petrowski into the hole before Moore added the rock. His testimony refutes the notion that he intentionally disregarded the excavation regulation:

> Q. Okay. And did you know -- looking at it now, knowing now the hole was six foot, four inches, you know that that was not something that you should have –
> A. Yes.
> Q. -- allowed him to do?
> A. Yes.
> Q. Okay. What was your mental state or pro -- mental processing at the time?
> A. You know, I -- I just wasn't even thinking. I mean, it was -- you know, I knew better, I just wasn't -- it was -- I wasn't thinking about it.
> Q. Did you intend for Mr. Petrowski to get into the hole knowing that it was six foot, four inches deep?
> A. No.
> Q. Uh, did you intend to disregard the OSHA regulations on excavation when you said okay and let him get in the – the hole?
> A. Did I intend to?
> Q. Right.
> A. No. That was just -- that was a mistake that I made.
> Q. Okay. Do you regret that?
> A. Oh, yes. Yes.

Transcript Day 2, p. 15 -17. He had already made sure the excavation was less than five feet prior to entering it the first time, and had formulated a plan that nobody was going to enter the hole until Moore had returned. *See* Transcript Day 2, p. 8.[6]

---

[6] Covert stated that his work crews often add rock immediately after removing a hydrant, but that the crew did not bring rock with them to the site that morning. Covert and Moore stated that they did not bring rock initially because they wanted to slow down their work so that Petrowski could

Moore corroborated Covert's original intent was to add rock before allowing anyone to enter:

> Q. This excavation on January 16th --
> A. Mm-hmm.
> Q. over five feet, why wasn't there benching or shoring?
> A. Uh, my crew leader had a brain fart that day, 'cause he told me to go get rock to put in the excavation to make it safe and when I got the phone call and told me not to bring rock because there's a whole lot of people out here, then I asked him immediately, "What's going on? I thought you all were going to lunch?" And he said that "I messed up." And that's what he said. So, he told me to take the rock back, dump it and come back to the job as quick as possible. I said okay. But I said -- and the whole time I was like "I thought you" -- I thought he was going to lunch. I thought he was going to lunch. So...

Transcript Day 2, p. 104 to 105.

Petrowski's testimony also supports the conclusion that he and Covert both made an absent-minded mistake:

> Q. Okay. Now, there's -- there's been some discussion about, um, the hydrant had been removed, the drain pit had been dug, uh, that Ed Moore was going to go get the rock and you guys were going to go to lunch. And then, at some point, you re-entered the excavation; is that correct?
> A. Yes, it is.
> Q. Okay. Can you tell me how that transpired?
> A. Um, we were getting ready for lunch and Jay was kind of picking up a couple of things. Um, and I -- I believe I – I can't remember, I'm pretty sure I just said "Hey, I'll jump down there and get them bolts real quick," you know, not thinking and, you know, just hop down there and just, uh, started taking them off, wasn't -- didn't really honestly think about how deep it was at the time, you know, just hop down there and started doing it.
> Q. And -- and when you said that to Jay, what did he say to you?
> A. I don't -- I really don't remember what he said. I just, you know, me being a new person, I -- I only been there for a short amount of time to -- you know, I just wanted to get down there and take them two bolts off. I don't-- if we knew what he was going to do today, we wouldn't have

---

better learn the process for replacing a hydrant. The Secretary finds this incredulous. The reason for rock not being there initially, however, is immaterial.

done it, so -- but, I just didn't logically, uh -- just wasn't thinking, you know, it's just two bolts.
Q. Okay. Was, uh -- was Jay walking away from you or walking toward you when you made that statement to him?
A. Uh, he was putting some things on the truck, so he would have been walking away from me.
Q. Okay. And you realize getting back in the excavation at -- at that point when it was six foot, four inches, that was -- that was wrong; is that correct?
A. Yes, it -- yeah, it was -- yeah, it was wrong for me to do that.
Q. Okay. How long did it take you to -- to remove those last two bolts?
A. Took me a couple of minutes, I can't recall, just two bolts, so, it wouldn't have took long, cause they were actually, uh, slotted bolts. So once I had loosened them up, they would have come right out.
Q. Okay. So, you didn't have to back them all the way out?
A. No, I didn't have to back them all the way out.
Q. Did you just loosen them up and then you what happened --
A. They -- there was little slots in the gate, they just --you just slide them out.
Q. Okay. Um, so, it wasn't -- you didn't have to have a lot of leverage to
A. No, I didn't --
Q. -- loosen them up?
A. No, I don't believe so.
Q. Okay. Do you recall Jay Covert standing on the -- the --
the side of the excavation looking down watching you do that work or -- and -- and talking to you when you were removing those last two bolts?
A. No. No, I don't.

Transcript Day 2, p.64 – 66.

As it so happens, Compliance Officer, Seth Bendorf, lived near the worksite and observed a person in the excavation while driving home. *See* Transcript Day 3, p.56 -57. Once home, he retrieved various items, including a measuring rod, and then parked somewhere near the worksite to observe. *See id.*; Exhibits 44, 45, 46.

Bendorf testified that he observed Covert standing over the hole for five to ten minutes while Petrowski was in it. If this were true, it would suggest that Covet had more of an opportunity to realize that Petrowski had entered into an excavation that was too deep. Covert and Petrowski, however, both controverted this testimony.

Covert and Petrowski testified that they did not recall that Covert watched Petrowski while he removed the last two bolts, and Petrowski stated that he was only in the hole for a couple of minutes. Moreover, Bendorf took pictures allegedly depicting his version of events, but none of those pictures show Covert standing over the hole. Only one picture depicts Covert standing near the hole after Petrowski had already exited. Bendorf's testimony also poorly delineates his first observation while driving home versus his observation of the worksite after he returned. It is possible that Bendorf's initial drive-by observation occurred when the hole was only four feet deep or that his sense of time was distorted. We find that the weight of the evidence supports that Covert was putting tools in his work truck to prepare to leave for lunch while Petrowski was in the hole for a short period.

After he observed Petrowski exit the excavation, Bendorf approached the men. He measured the excavation and photographed the work site, including the ladder used in the excavation. Based on Bendorf's investigation, the Secretary cited LWC for willfully violating 29 CFR § 1926.652(a)(1) and proposed a penalty of $70,000. *See* Citation 1 Item 1. LWC was also issued a citation for violating 29 CFR § 1926.1053(b)(1)[7] because they used a ladder for access and egress that did not extend to at least three feet above grade level. *See* Citation 2, Item 1. In addition, the same

[7] The regulation states, "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 grab rail, 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."

ladder used for the excavation had damaged rungs on the top and bottom of the ladder and a damaged side rail which is in violation of 29 CFR §1926.1053(b)(16).[8] *See* Citation 2, Item 2.

Our hearing officer conducted a hearing in April of 2015 and affirmed both citations and the proposed penalties. On discretionary review, LWC seeks dismissal of the excavation standard violation based on the unpreventable employee misconduct defense or lack of employer knowledge. If not dismissed, LWC requests that the Review Commission re-classify the violation from willful to serious and lower the penalty accordingly. LWC does not dispute that it violated the regulations set forth in Citation 2,[9] but believes the penalties are too high.

Excavation Violation, Citation 1

A. The Secretary Proved that LWC Violated the Excavation Standard

The Secretary must prove the following elements to sustain the standard-based excavation violation:

(1) the applicability of the standard;

(2) the employer's noncompliance with the terms of the standard;

---

[8] The regulation provides, "Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired."

[9] *See* Reply Brief to Commission, p. 5, fn. 1.

(3) employee access to the violative condition; and

(4) the employer's actual or constructive knowledge of the violation.

Bowlin Group, LLC v. Secretary of Labor, 437 S.W.3d 738, 744 (Ky. Ct. App. 2014) (quoting *David Gaines Roofing, LLC v. KOSHRC*, 344 S.W.3d 145, 148 (Ky. Ct. App. 2011)).

Of these four elements, LWC only disputes that it had knowledge of the violation. An employer must have actually known of or with the exercise of reasonable diligence should have known of the violation. Failure to exercise reasonable diligence to discover a violation amounts to constructive knowledge. The Secretary may generally prove employer knowledge in one of two ways.

First, the Secretary may prove that a supervisor knew or should have known of the violation. *See* Rothstein, Occupational Safety and Health Law, §5:16 (2017 ed.). In that case, "the actual or constructive knowledge of the employer's supervisor or foreman may be imputed to the employer." *Bowlin Group*, 437 S.W.3d at 746 (citing *New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Circ. 1996) and *Kokosing Construction Co. v. O.S.H.R.C.*, 232 Fed. Appx. 510, 512 (6th Circ. 2007)); *Morel Construction Co. v. Commissioner*, KOSHRC Case Nos. 4147-04, 4151-04 & 4149-04 (consolidated) (Oct. 7, 2008), slip opinion at *33 (foreman's actual knowledge imputed to company when he was engaged in violative conduct and observed his subordinates doing the same); *Sec'y of Labor v. Bowlin Energy, LLC*, KOSHRC 4444-07 (Feb. 1, 2011), slip opinion at * 18 (foreman's actual knowledge of violation imputed to employer). An employer obtains actual knowledge when a supervisor directly sees a subordinate's misconduct. *See ComTran Group Inc. v. U.S.*

Dept. of Labor, 722 F.3d 1304, 1308 (11th Circ. 2013); *Sec'y of Labor v. Rawson Contractors, Inc.*, 20 O.S.H. Cas. (BNA) 1078 (O.S.H.R.C. Apr. 4, 2003), 2003 WL 1889143 at * 2. An example of a supervisor having constructive knowledge occurs where "the supervisor "may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have." *ComTran Group, supra* at 1208; *see also, Morel Construction Co.*, *supra* at *18 (supervisor had constructive knowledge because all he had to do was "glance" in subordinate employee's direction).

One caveat applies when a supervisor personally engages in misconduct constituting a violation. Some jurisdictions hold that the Secretary offers sufficient proof of knowledge because supervisors know of their own misconduct and that their knowledge of the same imputes to the employer. *See* Rothstein, *supra* at §5:16 (stating that the Sixth Circuit and the Federal Commission hold to this view). Other jurisdictions hold that the Secretary must prove knowledge of the supervisor's violation in a different manner:

> [T]he Secretary does not carry her burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct. A supervisor's "rogue conduct" cannot be imputed to the employer in that situation. Rather, "employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards]."

ComTran Group, Inc., *supra* at 1316 (quoting *W.G. Yates & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604, 609, n. 8 (5th Circ. 2006) after discussing similar holdings in the Third, Fourth, Fifth and Tenth Circuits). The Review Commission has not addressed a case where only a supervisor commits a violation, and, therefore, has not

had a reason to address the burden of proof issue raised by *Comtran*. In any event, we do not believe that this case warrants such a discussion because Covert, a supervisor, did not re-enter the hole with his subordinate, Petrowski. Nor was it Covert's plan for Petrowski to enter the hole before Moore returned and added rock.

Adding yet another nuance is the situation where the supervisor not only sees and fails to stop subordinates from engaging in violative conduct, but joins in that conduct with them. The Eleventh Circuit addressed this situation in *Quinlan v. Secretary*, 812 F.3d 832 (11th Circ. 2016), and held that the supervisor's knowledge of a subordinate violating a safety rule was imputed to the employer notwithstanding that the supervisor "pitches in and works beside the subordinate to expedite the job." *Id.* at 841. In doing so, it distinguished *Comtran*:

> The instant case is unlike the situation in *ComTran* involving a supervisor's knowledge of his own misconduct. In that circumstance, imputation was improper and unfair because it had the effect of relieving the Secretary of her burden of proving employer knowledge. "[I]f the Secretary is permitted to establish employer knowledge solely with proof of the supervisor's misconduct—notwithstanding that the employer did not know, and could not have known, of that misconduct—then the Secretary would not really have to establish knowledge at all. The mere fact of the violation itself (element 2) would satisfy the knowledge prong (element 4)." *ComTran*, 722 F.3d at 1317. In contrast, the situation here involving a supervisor and a subordinate employee who are simultaneously involved in violative misconduct does not present the same problem. Proof of the subordinate employee's misconduct does not by itself prove employer knowledge of such. The Secretary still bears the burden of proving employer knowledge, whether through a supervisor's actual or constructive knowledge of the subordinate employee's misconduct or through the employer's actual or constructive knowledge of the subordinate employee's misconduct, for example, by failure to implement an adequate safety program. Here, the Secretary carried that burden by proving that supervisor Pacheco had actual knowledge of subordinate employee Vargas' violative misconduct.

> Thus, the "fairness" concern which was at issue in the *ComTran* case is not present in the instant situation.

Id. at 841 – 42. We find *Quinlan* is persuasive and consistent with our precedent.

In *Morel Construction*, the Review Commission imputed the actual knowledge of a foreman to the employer under similar facts as *Quinlan*. *Morel Constr., supra* at *33. Like *Quinlan*, a foreman and his subordinates were both engaged in violative conduct (not using fall protection). Under those facts, the Review Commission relied on *Sec'y. of Labor v. Daniel Constr. Co.*, 10 OSH Cas. (BNA) 1549 (O.S.H.R.C. Apr. 20, 1982), 1982 WL 22608, which involved a supervisor who failed to employ fall protection for himself and permitted his employees to do likewise. The Review Commission applied the following rule from that case:

> . . . Daniel's area superintendent engaged in violative conduct and was present on the roof while other violations occurred in plain sight. Accordingly, the supervisor's knowledge of the violations, both actual and constructive, is imputable to Daniel for the purpose of proving employer knowledge of the violations unless Daniel establishes that it took all necessary precautions to prevent the violations, including adequate training and supervision of its supervisor.

Id. at *3.

We note that whether an employer "took all necessary precautions to prevent the violations" has no bearing on whether the Secretary met his burden of proof for employer knowledge. That part of the quoted rule from *Daniel Construction* simply acknowledges the affirmative defense of unpreventable employee misconduct. The Federal Commission in that case specifically stated this rule when analyzing whether the employer proved that defense and put the evidentiary burden on the employer – not the Secretary - to prove that it took the necessary precautions to prevent the

violations. *See* Rothstein, § 5:16 (stating that such a rule, "in effect extend[s] the unpreventable employee misconduct defense to supervisory personnel.").

The second way that the Secretary may prove knowledge is by offering evidence that the employer failed, as an organization, to exercise reasonable diligence to discover the violation through an adequate safety program. *See ComTran, supra* at 1308. The Secretary must prove this type of constructive knowledge when supervisory personnel are not present when a rank-and-file employee commits a violation. Whether an employer exercises reasonable diligence depends on a variety of factors, including "the duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules." *See Bowlin Group, LLC v. Sec. of Labor*, 437 S.W.3d 738, 746 (Ky. App. 2014) (quoting *David Gaines Roofing*, 344 S.W.3d at 148)).

LWC claims that the hearing officer found employer knowledge based on this type of organizational constructive knowledge when he stated that:

> The crew leader, Jay Covert, observed Tom Petrowski working in an excavation six feet four inches in depth without cave-in protection for about five minutes. Jay Covert's knowledge of the safety violations could be imputed to Louisville Water Company because of its ineffective implementation of its safety program and prior incidences of employee misconduct. Finding of Fact, No. 10.
>
> Mr. Covert's knowledge of Mr. Petrowski was working in the excavation six foot four inches deep without cave-in protection . . . can be imputed to Louisville Water Company because the evidence in the record establishes that Louisville Water Company did not have an adequate safety program. Conclusion of Law, No. 9.

The finding of an inadequate safety program appears to rely on other findings addressing LWC's disciplinary system for safety rule infractions; the scarcity of LWC

audits of Covert's work, the failure to admonish Covert and others for not utilizing LWC's excavation checklists, and a settled citation arising from an inspection of an excavation on February 7, 2013. LWC also correctly points out that the hearing officer failed to include a finding that Covert filled a supervisory role. These findings, however, do not bind the Review Commission.

We instead hold that the Secretary met his burden of proof by showing that LWC had actual knowledge of Petrowski's violation of the excavation standard through its supervisor, Covert. The hearing officer erred by implying that the Secretary had to prove that LWC had an inadequate safety program to establish employer knowledge. We acknowledge that the sufficiency of LWC's safety program is an important issue, but the hearing officer should have discussed it in the context of the employee misconduct defense, which he failed to mention by name in his recommended order. Even if the hearing officer did not make an explicit finding as such, Covert was the only supervisor that LWC put on site to enforce the subject excavation regulation and LWC company policies concerning the same.[10] "It is well settled that an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purpose of imputing knowledge to an employer." *M.C. Dean, Inc. v. Sec'y. of Labor*, 505 Fed. Appx. 929 (11th Circ. 2013). Because Covert was a supervisor, his knowledge of Petrowski's

---

[10] Covert was the "competent person" on site, had evaluated the excavation that day, and his duties as a crew leader specifically included directing the work of Mr. Petrowski and ensuring his work crew worked safely. *See* Exhibit 2, Crew Leader Responsibilities, Exhibit 19, LWC Excavation Policy, Section 4.3 (stating crew leader's role) and Section 5.2-Worksite Safety and Security, which states in part, "The Crew Leader is in charge of worksite safety and security and is the Competent Person."); *see also, Rawson Contractors, Inc., supra* at * 2.

violative conduct imputes to LWC, even if Covert was complicit in the violation by absent-mindedly acquiescing to Petrowski's request to enter into the excavation. *See Morel Construction, supra*; *Daniel Construction, supra.*

B. Employee Misconduct Defense.

To prevail on the affirmative defense of employee misconduct, LWC must prove that it:

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. has effectively enforced the rules when the violations have been discovered.

Commissioner v. Morel Construction Co., (KOSHRC Nos. 4147-04, 4151-04, 4149-04 (consolidated) Oct. 7, 2008), slip opinion at * 37 (quoting *Jensen Construction Co.*, 7 OSH Cas. (BNA) 1477, 1479 (O.S.H.R.C. 1979)).

As a preliminary matter, the Secretary argues that Covert's actual knowledge of Petrowski's entry makes the employee misconduct defense unavailable. In support of his argument, he quotes Rothstein who states with respect to the third element of that defense, "In essence, the employer is presenting evidence that it lacked even constructive knowledge of the noncomplying conditions." Rothstein, *supra* at § 5:27. The Secretary notes that it established actual knowledge through a supervisor, which obviates the claim that LWC lacked even constructive knowledge of the violation. LWC argued that Covert's acquiescence in itself was also misconduct and, but for him giving Petrowski permission to go into the excavation, there would have been no

violation. LWC claims that Petrowski's entry and Covert's acquiescence were both unforeseeable employee misconduct.

We reject the Secretary's contention that we should completely foreclose LWC's employee misconduct defense as a matter of law. Instead, we shall address the merits of that defense, including an analysis of LWC's efforts to communicate its excavation safety rules to its crew leaders, and its measures to detect whether its crew leaders were effectively employing and enforcing those rules on the worksite. We applied this same approach in *Morel Construction*, in which a supervisor observed and was a participant in the violative conduct. Federal cases have also employed this approach where the supervisor was present when the misconduct occurred and had actual knowledge of the violation. *See e.g., Rawson, supra* (focusing on foreman's conduct in directing employees to commit violation); *Complete General Construction Co. v. OSHRC*, 21 O.S.H. Cas. (BNA) 1007 (6th Circ. 2005), 2005 WL 712491 (focused on a foreman who the employer blamed for allowing a subordinate to enter into an un-shored trench); *Sec'y of Labor v. Revoli Construction Co.*, 19 O.S.H. Cas. (BNA) 1682, 2001 WL 1568807 (O.S.H.R.C. Dec. 7, 2001) (considering misconduct defense even after finding that a foreman had actual knowledge of excavation violation); *Daniel Construction, supra* (analyzing defense when a supervisor committed the violation and was present when two others did the same, and noting that the employer "has not established that the supervisor was himself adequately trained or supervised with regard to safety matters"). We find that LWC nonetheless failed to prove all four elements of this defense.

(1) LWC established a work rule designed to prevent the violation.

We find that LWC proved the first element because it implemented a work rule designed to prevent the violation at issue here. LWC's excavation safety policy directs the "competent person," who is typically the crew leader, to inspect an excavation exceeding three feet prior to entry by any employee. *See* Exhibit 18, Section 5.3. Soil classification procedures and requirements for sloping and shoring stated therein also mirror the requirements contained in the excavation regulation and the appendix thereto. As part of this pre-entry inspection, the policy provides that the crew leader must complete an excavation daily inspection checklist, which walks through the procedure for classifying the type of soil at the excavation and qualifying the potential for cave-ins, and reminding the competent person that excavations greater than five (5) feet require some type of cave-in protection. *See e.g.*, Exhibit 9. Had Covert taken the time to complete a checklist and properly inspect the excavation after Moore removed additional dirt for the sump pit, he most likely would have prohibited Petrowski's re-entry into the excavation.

(2) LWC adequately communicated this rule to its employees.

LWC proffered significant evidence that it communicated its work rule regarding excavation safety to its employees, including Covert and Petrowski. We find therefore that LWC met this element of the defense.

LWC conducted employee training on its excavation safety rules, which included a video and power point presentation. *See* Transcript Day 1, p. 119, 123 - 25; Trial Exhibits 22 – 25. LWC provided this training to Covert and Petrowski in February 2013 and August 2013, respectively. *See* Exhibit 25. It also hired a consultant, Kentuckian Trench Shoring, to provide additional on-site excavation consultations. *See* Transcript, Day 1, p. 127 - 28. Last, supervisors reminded employees of these rules during periodic site safety visits and during weekly safety "tailgate" meetings. *See* Exhibit 30; Transcript Day 1, pp. 110, 185 – 86.

The Secretary contended that this training was ineffective because Petrowski could not recall this training when Bendorf interviewed him during the inspection, and instead told Bendorf that he just did as he was told. Petrowski's poor interview performance, however, does not nullify our finding that LWC adequately communicated its excavation safety rules. Petrowski was nervous when interviewed, and his forgetfulness does not mean that LWC had not communicated its work rules to him. In fact, both Covert and Petrowski testified that they were trained on and understood LWC's prohibitions on entering excavations five feet or greater in depth without cave-in protection. *See* Transcript Day 1, pp. 262- 63; Day 2, pp. 60 – 62.

Covert's status as a supervisor could also be relevant to this element of the defense:

> Highly relevant in evaluating claims of unpreventable employee misconduct is the performance of supervisors and foremen. As this court has stated on more than one occasion, "negligent behavior by a supervisor or foreman[,] which results in dangerous risks to employees under his or her supervision, ... raises an inference of lax enforcement and/or communication of the employer's safety policy." Id. at 811

> (quoting *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir.), cert. denied, 484 U.S. 989, 108 S.Ct. 479, 98 L.Ed.2d 509 (1987)).

Complete General Construction Co. v. OSHRC, 21 OSH Cas. (BNA) 1007, 2005 WL 712491 at *2 (emphasis added). LWC offered sufficient evidence that Covert was well acquainted with the excavation policy and, therefore, sufficiently rebutted this general inference.

(3) LWC did not take steps to detect violations at its excavation worksite or to ensure that its crew leaders were enforcing and following its rules.

This is the most difficult element for an employer to prove. *See Bowlin Energy*, 4444-07, p. 25. The key inquiry for this element is whether the employer exercised reasonable diligence to discover the type of violation at issue. We find that LWC failed to prove this element.

LWC delegated to its crew leader, Covert, the specific duty of discovering and preventing violations of the excavation standard. As explained by the Federal Commission:

> The Commission has stated that where a supervisory employee is involved in the violation the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision.

Daniel Construction, supra (cited by *Bowlin Energy, supra* at *26). "[A] supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax." *Bowlin Energy*, at *26 (quoting *Reynolds, Inc.*, 19 OSH Cas. (BNA) 1653, 1656 (O.S.H.A.L.J. 2001)).

In *Bowlin Energy*, we held that the employer failed to prove element three when a foreman, who was the most senior person on site and responsible for enforcing the company's work rule regarding electrical safety, failed to do so. In that case, the supervisor stood by and watched a subordinate ascend in a bucket towards 7,200-volt electrical wires without PPE required by company policy. Key to our holding was the finding that quarterly or bi-monthly inspections of the worksite by the company's safety coordinator was not enough to show reasonable diligence by the company. We therefore focused on the conduct of the foreman on the day of the violation to determine whether the company exercised reasonable diligence. Because the employer's "representative on site was not enforcing the rules, requiring his workers to use the proper PPE, . . . it [could not] prove element three of the defense." *Bowlin Energy, supra* at 26; *see also, Commissioner v. American Roofing and Metal Co.*, KOSHRC No. 4219-05, slip opinion at * 16 - 19 (Oct. 2, 2007) (discussing lack of supervision by foreman in finding that third element of employee misconduct defense was not met).

Applying the approach in *Bowlin Energy*, we must determine whether LWC proved that it adequately supervised its crew leaders to make sure that they consistently followed and enforced excavation safety rules. *See id.* at *26 (quoting *Daniel Construction, supra* (employer "may establish that it took all necessary precaution to prevent the violations, including adequate supervision of its supervisor")). If not, then Covert's obvious failure to exercise reasonable diligence when allowing Petrowski to enter into the excavation precludes LWC from proving

this element of the defense. *See Bowlin Group, LLC v. Sec'y. of Labor*, 437 S.W.3d 738, 748 (Ky. Ct. App. 2014) (element three was not met because (1) occasional on site visits by upper management were insufficient and (2) foreman tasked with primary responsibility for enforcing safety rules had not adequately engaged in detection of the safety violation on day of incident); *Morel Construction, supra* at * 32-33, 39 – 42 (element three not proven because foreman who violated fall protection standard and watched others do the same was not adequately supervised by upper management).

LWC's method for supervising its crew leaders during excavation work is set forth in its excavation policy:

> Management and Safety Department personnel will periodically evaluate the effectiveness of this procedure [the excavation policy] by performing field audits and reviewing Daily Inspection Checklists.

Exhibit 18, Section 5.9. Whoever conducts the audits must document findings on worksite audit forms. *See id.* LWC's Risk Control Manager, David Simmons, set out expectations for these work site safety audits. LWC did not have a designated safety department, nor was Simmons given a title with the word "safety" in it. Simmons, however, testified that everyone took responsibility for safety and that his job duties included overseeing the company's safety program. *See* Transcript Day 1, p.13-14. Simmons, however, did not have any designated safety personnel reporting to him, and had to rely on supervisors and management to implement these safety audits. Simmons expected supervisors to conduct safety audits twice per week, managers once per week, and upper level managers once per month. *See* Exhibit 35. Thirty to

fifty percent of these audits were supposed to occur during an active excavation. *See id.* LWC produced to the Secretary 450 audit forms that related to audits performed in 2013 and January 2014. The parties only entered a relatively small percentage of those forms into evidence and it is therefore unclear whether LWC met Simmons' expectations. *See* Exhibit 14, 15, 16, 17, 47, 48, 49, 87. LWC only offered evidence of one formal audit of Covert during this period. *See* Exhibit 87.

We hold that LWC failed to prove that it exercised reasonable diligence to monitor compliance of excavation standards by crew leaders through its auditing program. LWC had formerly audited Covert only once in a year's time. Each crew leader acts as the sole company representative on a work site to ensure that employees follow the excavation policy. Because of their vital importance to excavation safety, LWC should have supervised and formally audited all of them on more than an annual basis. Moreover, many of the relatively small number of audits entered into the record do not indicate that the auditor observed entries into excavations or the precautions used to adequately protect those employees from cave-ins. Some audit forms instead show auditors arriving before or after an excavation was complete. In others, the auditors indicated that crew leaders had not allowed anyone to enter the hole "yet." In our view, an effective auditing program would have involved an inspection much like the one conducted by Bendorf, where the auditor announces his presence after observing someone entering or about to enter an excavation. As it was, the auditors would have to take the crew leaders word for it that they would implement or had implemented the required cave-in protection.

LWC's written program also required management to review daily inspection checklists during audits. The Secretary offered several checklists produced by LWC as evidence that LWC's crew leaders were not filling out these checklists properly. *See* Exhibits 9, 42, 80. In response, LWC's representatives testified that it had put less emphasis on the crew leaders completing checklists and that those checklists became more of a guide for the excavation inspections. This position is conflicted by the record. Mr. Covert himself filled out a checklist on the date of the violation as well as in the months leading up thereto. *See* Exhibit 9, 42. This indicates that filling out the checklist was still required. LWC also had revised its policy in February of 2013, but that revised policy still made completion of the checklist mandatory for any entry by employees. Additionally, the worksite audit forms specifically mention completing checklists and some of the comments specifically criticize the crew leaders about checklist related issues. *See* Exhibit 14 (LWC_221); Exhibit 15 (LWC_288); Exhibit 17 (LWC_85).

Even if true, LWC's position that it no longer required the checklist to be completed undercuts its argument that it adequately supervised its crew leaders in their role as competent persons for excavations. Absent accurate and complete checklists for auditors to review, it would be difficult for LWC to determine if crew leaders properly evaluate excavations and implement correct cave-in protection when required. To gauge a crew leader's compliance, an auditor must be present before the crew leader plans to have his crew enter the excavation to perform work. As stated above, LWC offered no evidence that it performed audits in this way. Moreover, some

checklists in the record do not provide enough information to know for sure whether Covert consistently complied with the excavation regulation, and LWC did not offer testimony as to whether it followed up with Covert concerning these checklists.

The evidence shows that the auditing program was inadequate to monitor whether crew leaders were sufficiently following excavation policies and regulations. Moreover, it is clear that Covert himself failed to exercise reasonable diligence on the day in question. LWC therefore failed to meet this element of the defense.

(4) Did LWC effectively enforce it excavation rules?

LWC had "Guidelines for Code of Conduct Violations" and argued that those guidelines allowed for progressive discipline for failure to follow safety policies. *See* Exhibit 29. The steps included step 1 and 2 written counseling, suspension, and termination. *See id.* LWC also has coaching and counseling procedures setting forth guidelines for coaching and the four steps of discipline, including a warning that LWC has the right to initiate more or less severe action as warranted at any time during the discipline process. *See* Exhibit 40.

The Secretary questioned whether LWC's disciplinary system allowed for severe discipline when an employee violated safety policies. In particular, he referred to a table in the code of conduct implying that employees who did so would at most be subject to written counseling. *See* Exhibit 29. An employee who reads the code of conduct could have a false impression that LWC does not take safety rule infractions seriously, which lessens the deterrent effect of the discipline. LWC, however, offered testimony and procedures for employee counseling and coaching to support its

position that safety violations subject employees to all forms of discipline, including immediate termination or suspension. In fact, LWC suspended Covert and Petrowski without pay immediately after the subject incident without objection by their union. We find that sufficient record evidence supports that LWC's employees are subject to all levels of progressive discipline for safety violations.

LWC offered some proof that it actually meted out discipline for safety related issues, which included five disciplinary memorandums to employees for safety violations during the year leading up to the subject citation. *See* Exhibit 28, 30, 31, 32, 33. LWC was cited for an excavation violation in 2010, but LWC did not offer documentary evidence that it disciplined employees who were involved. In fact, LWC chose not to offer any documentary evidence of discipline prior to 2013. Herman Reed, a LWC manager, testified that LWC immediately terminated one person for riding in the bucket of a backhoe. *See* Transcript Day 1, p. 177.

Two of the documented disciplinary actions entered as evidence related to the subject citation. Both Petrowski and Covert received suspensions without pay immediately after the January 16, 2014 inspection. As we have noted before, these disciplinary actions do not carry much weight because the discipline may have been "administered to protect an employer in the event he received a citation," especially if such disciplinary action is the only discipline that the employer has handed out. *Bowlin Energy, supra* *22.

LWC also disciplined a crew leader named Ron Osborne after an inspection in February of 2013. On the day of the inspection, Osborne's crew was fixing a water

main break. During part of the excavation, an employee named Mo Brown entered the hole and stood on a ladder while removing dirt around fiber optic cables. LWC's fact-finding showed that the excavation was only four feet deep at that time, but water from the water main break saturated the soil making the excavation more susceptible to cave-in. Brown, however, did not ensure that Osborne had inspected the hole prior to entering the excavation in violation of LWC's excavation policy. Osborne claimed that he was not even aware that somebody had entered the hole. Brown also erroneously believed that standing on a ladder in the excavation did not constitute entry into it.

After Brown exited the excavation, Osborne excavated more dirt from the hole making it over five feet deep. Bendorf arrived on site around this time and claimed that he saw an employee enter the excavation at that depth in violation of the excavation regulation. *See* Transcript Day 2, pp. 206 – 12. Osborne was rude and less than forthcoming in answering Bendorf's questions. LWC was cited on March 7, 2013 for failing to comply with the excavation regulation.

LWC issued Osborne written discipline on March 8, 2013, a day after the issuance of a citation. The written disciplinary report stated the reasons for the discipline, including Osborne being rude and disrespectful to Bendorf, failing to complete an inspection checklist before Brown entered the hole, and not controlling the worksite because Brown entered the hole without Osborne knowing about it. Brown, who LWC claims received the same excavation training as Osborne and all other persons designated as competent persons, received no discipline at all for his

violation of the excavation policy. Although it might just be a coincidence, one could also infer from the timing of the discipline that LWC issued discipline to Osborne as a defensive measure to the citation.

The other two documented disciplinary actions entered as evidence involved a supervisor who did not contemporaneously fill out audit forms for the safety audits that he claimed to have performed and then later tried to create those forms after the fact. He received step 2 written discipline and LWC put him on a performance improvement plan. The other action involved Osborne and a subordinate employee for their failure to wear a hardhats and hi-vis vests. Both employees received step one discipline, which is essentially a written memorandum to the employee.

LWC offered no evidence that crew leaders, who had primary responsibility for enforcing safety rules at worksites, initiated disciplinary action or had the authority to do so. In fact, in four out of the five examples of documented discipline offered by LWC, the crew leader was not enforcing a safety rule and/or was violating the rule himself. Again, this indicates not only failure of LWC to detect violations through its crew leaders, but also lax enforcement of the safety rules. *See Complete General Construction Co., supra* at *2.

We find that LWC failed to meet its burden of proof on this element of the employee misconduct defense. The evidence of consistent enforcement of LWC safety rules is sparse. LWC chose not to offer any evidence of its discipline prior to 2013. It also did not offer convincing evidence of the discipline issued to the employees that violated the excavation standard in 2010, which resulted in a citation. Even the

evidence offered concerning discipline showed that LWC failed to discipline Brown for entering into an excavation in February of 2013 without notifying the crew leader or making sure that he had evaluated it according to the company's excavation policy. LWC's evidence of discipline also shows that crew leaders were often complicit in the violations or failed to enforce the rules at the worksite.

C. Whether Excavation Violation is Properly Characterized as Willful.

The Review Commission most recently addressed the issue of willfulness in *Sec'y. of Labor v. D.W. Wilburn, Inc.*, KOSHRC No. 4669-09 (Dec. 6, 2011). In *D.W. Wilburn*, a supervisor realized that workers in one area of a worksite needed fall protection, but did not believe that a lanyard could be used because of the wet concrete in the area, nor did he believe that vertical steel rods and newly poured masonry walls could be used to build a standard railing system. A compliance officer inspected the site and also testified that lanyards could not be used in the presence of newly poured concrete and did not offer suggestions on how the employer could have met the fall protection regulation in that area. It was also evident that D.W. Wilburn had a good safety program addressing fall hazards and had implemented fall protection standards elsewhere on the same worksite. Under these facts, the Review Commission held that the Secretary failed to prove that the employer committed a willful violation of the fall protection standard. Even though the facts are slightly different here, D.W. Wilburn provides the rules by which we should analyze this case.

We held that an employer must have actual knowledge, rather than just constructive knowledge, of the violation in order to show that it acted willfully. *See id.* at *16. This prerequisite to finding willfulness is met here because Covert's actual

knowledge is imputed to LWC. As we pointed out in D.W. Wilburn, however, the Secretary must show more than just actual knowledge. *See id.* at *24.

A willful violation differentiates itself from other violations because of the employer's "heightened awareness of the illegality of the conduct or conditions by a state of conscious disregard." *Id.* at 14 (quoting *Fiore Construction, Inc.*, 19 OSH Cas. (BNA) 1408, 1409 (OSHRC 2001)). *Intercounty Construction Co., v. OSHRC*, 522 F.2d 777 (4th Circ. 1975), provides the majority rule[11] for determining whether a violation is willful:

> "Willful" means action taken knowledgably by one subject to the statutory provision in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, 'regardless of venial motive.'

Id. at 779 – 80 (citations omitted). Applying this standard, the Secretary may employ two general methods to show willfulness that parallel the type of proof that he would otherwise use to show employer knowledge.

First, the Secretary may focus on the supervisor who is present when a violation occurred and determine whether the supervisor intentionally disregarded a known safety regulation. *See e.g., D.W. Wilburn, supra* at * 14. As stated by the federal administrative law judge in *Sec'y. of Labor v. Fields Excavating, Inc.*, 20 O.S.H. Cas. (BNA) 1203 (O.S.H.R.C.A.L.J. Mar. 28, 2003), 2003 WL 1701512:

> A supervisor's willful actions may be imputed to the employer, as would a supervisor's knowledge of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541 (No. 86-360, 1992). "The key to whether a supervisor's actions are willful is the supervisor's state of mind."

---

[11] The federal commission and ten federal circuit courts of appeal have adopted this rule. *See D.W. Wilburn, supra* at 12.

> *George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1934 (No. 94-3121, 1999).

Id. at * 9; *see also, Globe Contractors Inc. v. Herman*, 132 F.3d 367, 373 (7th Circ. 1997) (imputing supervisor's willful disregard of excavation regulations); *Donovan v. Capital City Excavating Company, Inc.*, 712 F.2d 1008, 1010 (6th Circ. 1983) (imputing actions of supervisor to company to find willful violation of excavation standard).

Second, an employer, as an organization, may be plainly indifferent to a particular safety standard, or safety in general, such as to support a finding of willfulness. *See e.g., D.W. Wilburn, supra* at 21 – 22; *Fields Excavating*, at * 9 ("[R]elevant is the company's actions and policies regarding safety"); *Dakota Underground, Inc. v. Sec. of Labor*, 200 F.3d 564, 567 (8th Circ. 2000) (finding willfulness in part because employer "generally fostered a working environment in which safety regulations were frequently ignored or even mocked."); *Georgia Electric Company v. Marshall*, 595 F.2d 309 (5th Circ. 1979) (no effort whatsoever was made to make supervisory personnel aware of subject OSHA regulations concerning live wires). As stated by Rothstein,

> A citation for [a] willful violation will be vacated if there is a failure to show 'plain indifference" on the part of the employer. One of the best indications of lack of plain indifference is if the employer made any attempt at compliance. Accordingly, willful violations have not been found where employers have made good faith efforts to protect employee safety and health.

Rothstein, supra at §14.5.

Although not determinative of the issue of willfulness, repeat violations of a particular standard may indicate that the employer has not taken good faith efforts

to address a known safety issue. *See D.W. Wilburn*, 17 - 19; *Globe Contractors, supra* at 373; *Sec. of Labor v. E.L Davis Contracting Co.*, 16 O.S.H. Cas. (BNA) 2046, 1994 WL 541796 at * 6 (O.S.H.R.C. Sept. 29, 1994). At the very least, previous citations regarding certain work practices may create a heightened awareness of the illegality of those practices. *See D.W. Wilburn*, 17 – 19; *E.L Davis Contracting Co., supra* at *6; *Dakota Underground Inc., supra* at 567.

In this case, the hearing officer made the following conclusory statements to support his finding that LWC willfully violated the standard:

> A prior incidence of employee misconduct of failure to provide cave-in protection occurred February 7, 2013 in a case in which Louisville Water Company blamed a crew leader, Ron Osborne, and which resulted in a settlement with Labor, so Louisville Water Company had heightened awareness of the issue. Factual Finding No.10.
>
> Citation 1, Item 1 was a willful violation because the evidence in the record demonstrates a heightened awareness of the illegality of the conduct and a state of conscious disregard or plain indifference. Conclusion of Law, No.11.

Although it is not clear what evidence in the record our hearing officer believed demonstrated a state of conscious disregard or plain indifference, he seemed to put significant weight on the excavation checklists and safety audits and his belief that they showed "numerous safety rule violations." *See* Fact Finding No. 14. We find that our hearing officer's conclusions to be in error and hereby amend this violation from willful to serious.

First, we have found that Covert absent-mindedly allowed Petrowski to enter the hole rather than him making an intentional and deliberate decision to violate the excavation standard. Covert had a plan to add rock to the hole before allowing

someone to get into it again, which indicates that Covert intended to follow the regulation. Petrowski, who had not performed a hydrant replacement before, perhaps was trying to be helpful and remove the last two bolts from the flange. He told Covert that he was re-entering the hole when Covert was preparing to go to lunch and packing up tools on the truck. Covert said "ok" and continued to pack up the truck. Petrowski was only in the hole for a couple of minutes. This scenario suggests that Covert was distracted and did not have much time after Petrowski entered the hole to realize his mistake and correct it.[12]

Second, we also find that the Secretary failed to prove willfulness by demonstrating that LWC, as an organization, was plainly indifferent to its safety obligations or the excavation standard in particular. LWC had written policies instructing its employees about the excavation standards, and offered proof that it provided training to all of its employees who did excavation work. It also had purchased and/or leased numerous trenching boxes so that every crew would have access to one if necessary.

Last, it discussed work place safety and excavation rules at tailgate meetings and during safety blitzes to try to instill the importance of excavation training to its employees. Although not well tailored to detect violations of the excavation standards in practice, LWC performed over 450 worksite audits in 2013 to determine if work

---

12 In post-hearing briefs, the parties discussed several federal cases relating to willful violations of the excavation standard, and instances where a supervisor or foreman's willful conduct was properly imputed to the employer. The facts of those cases are easily distinguished. In all of those cases, the foremen/supervisors were acutely aware that entering an excavation was in violation of excavation regulations, but ordered or allowed work to continue therein for a much longer period than in this case.

crews were following safety rules. LWC also offered evidence that meted out some discipline to workers for violation of safety rules. This record evidence shows that LWC was making good faith efforts to comply with the excavation regulation and other safety rules at the time of the violation, which negates a finding of willfulness.

This finding is consistent with our above holding that LWC's safety program fell short on providing adequate supervision of its crew leaders for safety compliance or that its enforcement of safety rules could be better. "[W]here the record establishes that the employer has made a good faith effort to comply with a standard or to eliminate a hazard to its employees, a willful charge is not justified even though the employer's efforts are not entirely effective or complete." *Secretary of Labor v. General Dynamics Land Systems, Inc.*, 985 F.2d 560, 15 O.S.H. Cas. (BNA) 2118, 1993 WL 15067, *5 (6th Circ. 1993) (quoting *Marmon Group, Inc.*, 11 OSH Cas. (BNA) 2090 (July 19, 1984)). The Federal Commission in *Cranesville Block Company*, 23 OSH Cas. (BNA) 1977, 2012 WL 2365498 (O.S.H.R.C. 2012), also refused to find willfulness when an employer failed to provide an appropriate respirator to an employee and did not adequately monitor safety practices at the plant. The Federal Commission in that case noted that the employer had a written respirator program and made sure its employees were trained and fit tested to use respirators. Just like the employer in *Cranesville*, LWC clearly took good faith steps at compliance with the excavation standard and it would be incorrect to conclude that LWC was plainly indifferent to that standard.

Our hearing officer also incorrectly found that safety records showed numerous violations, a finding which he presumably used to support the conclusion that LWC demonstrated a conscious disregard for the excavation standard. The excavation inspection sheets and audit forms support what LWC representatives stated during the hearing, which is that LWC put less emphasis on filling out the checklist and used them more as a guideline. Even if this shift away from written policy occurred, these documents by themselves are not sufficient evidence of pervasive violations supporting a finding of plain indifference to the excavation standard.

The parties entered twelve excavation checklists into the record completed by Covert, including the checklist that he completed on the day of the subject inspection.[13] *See* Exhibits 9 and 42. Nine of the checklists are not complete, and Covert could not recall the details of the excavations to which they relate. Covert checked that no cave-in protection was required for holes stated as being five feet deep on the three other checklists. If someone entered into those holes that were in fact that depth, then it would have been a violation according to the regulation providing that cave-in protection is required at holes with depth of 5 feet or greater. The checklists, however, incorporate an OSHA appendix with a decision tree stating that cave-in protection is not required until the depth is "greater" than five feet. Although the words of the regulation should arguably govern in the case of this conflict, we find that the appendix guidance at the very least caused confusion, and eliminates a finding of willfulness by Covert or LWC. Not only that, Covert stated

[13] Exhibit 80 shows a checklist filled out by Mr. Osborne on February 7, 2013, which had not been completed.

that he simply never placed a priority on filling out the checklists correctly so the holes may not have been exactly five feet by the time someone entered them. Case in point is the excavation at issue in the citation. Covert stated that he transposed the depth (stated as 5ft) with the width (stated as 6ft) on a checklist for that excavation, and that he incorrectly wrote 5 feet as the depth because the plan was only to enter the hole when it was less than 5 feet deep. *See* Transcript Day 1, p. 254 – 55.

The safety audits that the Secretary entered into the record also do not indicate excavation regulation violations or an attitude of plain indifference by the auditors of any noted deficiencies. In his post-hearing brief, the Secretary stated that five audit forms dated March 10th, March 14th, March 22nd, April 29th and June 12th show "several instances where a crew leader has failed to provide cave-in protection." The Secretary's Post-Hearing Brief, p. 7 (referring to Exhibit 14). He also mentioned that six other forms dated February 12th, May 7th, May 14th, May 29th, June 3rd and June 20th indicate "probable" violations of the excavation standard. *Id.*, p. 7 – 8 (referring to Exhibit 15 – 17). Presumably, these documents formed the basis for our hearing officer's finding that LWC consciously disregarded the excavation standard.

The March 10 audit form (Exhibit 14) stated that crew was back filling at the time of the audit, a checklist has been completed, and that a box was needed. To us, this simply means that the auditor noted that the crew in fact used a shoring box to perform the work.

The March 14 audit form (Exhibit 14) contained a written criticism of a crew leader who had not completed a checklist for a 5' 4" deep excavation that was dug the

day before. LWC's policy required that the crew should have completed another checklist. The auditor, however, did not criticize the crew for not using cave-in protection, which arguably means that the hole had been sloped, shored, or benched in compliance with the regulation.

The March 22 audit form (Exhibit 14) stated, "Excavation 5.5 feet deep, crew to bring shoring box." This does not provide proof that someone had entered a hole while it was 5.5 feet. It simply means that the auditor may have watched the excavation work and the competent person determined that a shoring box was required after the excavation was complete.

The April 29 audit form (Exhibit 14) states, "Trench Exc. Form indicates depth as 5ft. Crew added rock while I was on site to bring depth to 4' 7". They are aware that 5' requires a box and will adjust the form." Again, the form does not indicate when the auditor showed up on site or whether anyone entered the hole prior to adding rock. In any event, the auditor made sure that the crew understood its obligations rather than demonstrating plain indifference to the excavation regulation's requirements.

The June 12 audit form (Exhibit 14) does not indicate that anyone entered an excavation prior to or during the audit. Rather it states that the crew had planned to add rock to make sure that all sides of the excavation were less than five feet deep. Not only that, the form states that the crew had benched the front side of the excavation as a means of cave-in protection.

The February 12 audit form (Exhibit 15) states, "Tim aware no (illegible) going to get in hole after five feet as hole was approaching that depth." This statement suggests that the crew leader was aware of the regulation and that he was not going to allow anyone to get in the hole when it was five feet or greater.

The May 7 audit (Exhibit 15) form stated that the auditor told the crew leader he should fill out the excavation sheet as the hole was being excavated. This does not suggest that anyone entered into a noncompliant hole. In fact, the same form indicated that the crew was benching the walls of the hole for cave-in protection.

The May 14 audit form (Exhibit 15) states that the hole was greater than five feet, but no one had been in the hole yet. The auditor also noted that the crew was going to get a shoring box. It does not indicate a violation or deliberate indifference by the auditor or crew.

The May 29 audit form (Exhibit 15) states that the excavation was not even finished yet. This hardly suggests that anyone had entered into the excavation in violation of the excavation regulation.

The June 3 audit form (Exhibit 15) states that the excavation when the audit was completed was only at two feet, but the crew expected it to be five feet requiring a shoring box. There is no evidence suggesting that anyone entered the hole while it was five feet or more without the shoring box.

The June 20 audit form (Exhibit 15) states, "excavation not complete, no one in hole, stepping back." This does not indicate a violation. In fact, stepping back may indicate that the crew was benching or sloping the walls of the hole.

In sum, the audit forms and checklists indicate that the crew leaders did not fill out the excavation checklists consistently or accurately. As stated above, this made it more difficult to establish that there was an adequate method to evaluate the performance of crew leaders, and thus prove the affirmative defense of employee misconduct. This does not necessarily mean that Covert, other crew leaders, or LWC in general were plainly indifferent or had a conscious disregard for the cave-in protection standard as our hearing officer so found.

Other Violations/Penalty Amounts

LWC does not seek dismissal of the other violations relating to the ladder. Instead, it seeks a reduction in penalty for those violations and the excavation violation because the penalties "were arbitrarily assessed and not sufficiently reduced by the hearing officer." Petition for Discretionary Review, p. 56. We agree that the proposed penalties should be reduced. The penalty amount for the excavation violation must be reduced based on our finding that it was not willful. We also find that each citation does not merit the maximum statutory penalty for serious violations based on principles of fairness and the guidance contained in the Field Operations Manual (FOM).

Bendorf testified that he applied the factors in the FOM and determined that the violations merited the maximum penalties, $7000 for each item of Citation 2, and $70,000 for Citation 1. He claimed that LWC was not entitled to any reductions from the statutory maximum penalty amount when applying various penalty factors, including (1) gravity of the violation, (2) the size of the business, (3) the good faith of the employer, and (4) the employer's history of previous violations.

According to the FOM, "gravity" is determined by looking at the severity of the safety hazard at issue and the probability that an injury could occur from the violative condition. According to the FOM, the Secretary should assess a maximum penalty only when there is both high severity and greater probability of serious injury or death. Once a baseline amount from the table is determined, the FOM allows for certain reductions for size of the business (up to 50% reduction for small businesses), good faith (up to 25%), and employer's history (10% reduction for first time citations).

The FOM is a useful guideline for determining an appropriate penalty amount, but the Review Commission has the discretion to vary from it and instead look into the fairness of the penalty based on the facts of each case:

> We do not approve of the "formula" method used by the Hearing Officer, since even though he properly considered the gravity of the situation by reducing the starting point of the penalty to that commensurate with his evaluation of the gravity, it is not a methodology to which a reviewing official should tie himself. If the Commission were to restrict itself to such mechanical formulas, then discretionary review as to fairness and factual circumstances would be forfeited.

Big Sandy R.E.C.C., KOSHRC Case No. 2 (June 5, 1974).

Having found that the excavation standard violation was not willful, we must reduce the penalty to at least $7,000, which is the statutory maximum for serious violations. We believe a further reduction is appropriate. Applying the FOM, the severity assessment is high because cave-ins frequently result in death. We do not believe, however, that the probability of cave-in for the subject excavation falls in the "greater probability" category. A geotechnical engineer testified that cave-in was not likely even though Petrowski entered a hole greater than five feet deep. We also find that LWC made good faith efforts to comply with the excavation violations by

conducting training and performing safety audits. Based on these considerations, we hereby assess a $5000 penalty for the excavation violation.

As to the ladder violations in Items 1 and 2 of Citation 2, Bendorf testified that he assessed a $7000 penalty for each violation based on two hazards. First, he claimed that a person could fall off the five-foot ladder into the hole and be injured severely on the piping at the bottom. He also believed that a person in the hole might not be able to exit quickly in the event of a cave-in. We believe that these two items should have been grouped under one penalty since they both at their root criticize LWC for using the same unsafe ladder. We also are not convinced that the Secretary offered sufficient evidence to suggest that the damaged rung and short height created a high probability of serious injury to justify the maximum statutory penalty. For these reasons, we hereby reduce the penalties for Items 1 and 2 to $3500 per item.

Order

For the reasons discussed above, we hereby order as follows:

1. Affirm that Respondent committed a violation of 29 CFR §1925.652 (a)(1) as alleged in Citation 1;

2. Amend the violation in Citation 1 from willful to serious and reduce the proposed penalty of $70,000 to $5000;

3. Affirm Item 1 of Citation 2 and reduce the proposed penalty of $5000 to $3500; and

4. Affirm Item 2 of Citation 2 and reduce the proposed penalty of $5000 to $3500.

Respondents shall pay the penalties stated herein and complete all required abatements within thirty (30) days of entry of this Order. Payments shall be made payable to the Kentucky State Treasurer and mailed to the Office of General Counsel, 1047 US 127 South, Suite 4, Frankfort, Kentucky, 40601.

It is so ordered.

September 5th, 2017.

Paul Cecil Green
Chair

DeBorah J. McCormack
Commissioner

Steven Griffin
Commissioner

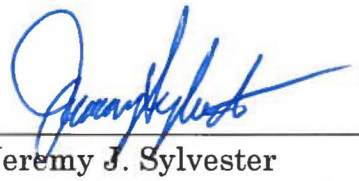
Certificate of Service

I certify that a copy of the foregoing brief has been served this 5th day of September, 2017, on the following as indicated:

Messenger Mail:

Steven N. Fields, Esq.
Kentucky Labor Cabinet
Office of General Counsel
1047 US 127 South, Suite 4
Frankfort, Kentucky 40601
US Mail postage pre-paid:

Todd Logsdon
Mark J. Gomsak
Fischer & Phillips, LLP
220 West Main Street, Suite 2000
Louisville, Kentucky 40202



Jeremy J. Sylvester
Kentucky Occupational Safety and
Health Review Commission
4 Millcreek Park
Frankfort, Kentucky 40601
(502) 573-6892
Executive Director