

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING  
COMMISSION REVIEW**

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,  
Complainant,

v.

UNITED CONTRACTORS MIDWEST, INC  
d/b/a R.A. CULLINAN & SON,  
Respondent.

OSHRC DOCKET NO. 10-2096

Appearances:

Ruben R Chapa, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois  
For Complainant

Julie O'Keefe, Esq., Armstrong Teasdale LLP, St. Louis, Missouri  
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

**DECISION AND ORDER**

**I. Procedural History**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a United Contractors Midwest, Inc. (“Respondent”) worksite in Washington, Illinois on April 20, 2010. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging three violations of the Act. Respondent timely contested the citation, and a trial was held on June 26–28, 2012, in Springfield, Illinois. Both parties have filed post-trial briefs.

**II. Jurisdiction**

The parties stipulated and the Court finds that the Act applies and the Commission has

jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). (Ex. J-1). Further, the parties also stipulated that, at all times relevant to this matter, Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

### **III. Background<sup>1</sup>**

Respondent was formed on June 5, 2001 when R.A. Cullinan & Son, Inc., Illinois Valley Paving Co., and Freesen Inc. combined to form United Contractors Midwest, Inc. (Ex. C-55). Respondent is a road contractor that specializes in asphalt paving, concrete paving, and bridge and overpass development. (Tr. 440–41). Respondent’s primary customers are the State of Illinois and the State of Missouri Departments of Transportation. (Tr. 441). On April 20, 2010, Complainant conducted an inspection of Respondent’s worksite, which was located at the intersection of Crestlawn Drive and Illinois Route 8 in Washington, Illinois.<sup>2</sup> (Tr. 39, 45, Ex. R-55).

The site of the inspection was a new sewer line and manhole installation that was part of a larger road project known as the “Route 8 Project”. (Ex. R-55). The Route 8 Project began in the spring of 2009 and consisted of the removal and replacement of a one-and-a-quarter mile section of street and the relocation of a sewer. (Tr. 698). The entire project was overseen by Respondent’s Project Manager/Superintendent, Ken Volk. (Tr. 458). The portion of the project at issue in this case involved the installation of a new 24-inch sewer line, which ran from an existing manhole at the south end of the worksite to a new manhole, which was being installed at the north end of the worksite. (Tr. 45, 537–38, 711, 733). The length of the entire excavation was approximately 65–70 feet; however, by stipulation of the parties, the focus of the citations

---

1. The parties stipulated to a number of issues that are too numerous to reprint here. References to the parties’ stipulations are indicated by citation to Joint Exhibit Number 1, or Ex. J-1.

2. Route 8 is also known as Washington Street.

involved a circular excavation at the north end of the worksite. (Tr. 353–54, Ex. J-2). Respondent’s foreman, Jim Davis, oversaw the work in the excavation. (Tr. 533).

When Compliance Safety and Health Officer (“CSHO”) Jeff Strain arrived at the worksite, he observed Davis and Volk standing at the edge of the excavation. (Tr. 94, Ex. C-15). As he approached the excavation, CSHO Strain also observed two of Respondent’s employees, Brad Vonderheide and Todd Leichtenberg, in the excavation working around a manhole at the north end of the excavation. (Tr. 196). Upon CSHO Strain’s arrival, Vonderheide and Leichtenberg exited the excavation at the north end. (Tr. 123). Prior to beginning a full-scale inspection of the site, CSHO Strain contacted his Area Director, Tom Bielema, to assist him with the physical assessment of the excavation. (Tr. 487). CSHO Strain conducted an opening conference with Volk, who contacted Kevin Wilkins, Respondent’s northern region risk manager, to inform him of the inspection. (Tr. 41–42). While CSHO Strain waited for Bielema to arrive, he conducted interviews of Respondent’s employees, including Volk and Davis. (Tr. 44, 71–74, Ex. C-10, C-11). Eventually, Wilkins and Respondent’s head of risk management, Scott Ketcham, arrived at the worksite. (Tr. 155, 658).

After Bielema arrived, he and CSHO Strain took a number of measurements of the excavation. As a result of the inspection, Complainant issued a two-item serious citation and a one-item willful citation. Each of these citation items are discussed below.

#### **IV. Findings of Fact and Conclusions of Law**

##### **A. Citation 1, Item 1**

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to:

United Contractors Midwest, Inc. dba R.A. Cullinan & Son, Inc. had an employee exposed to struck-by/crushing hazards from the swing radius of the excavator, which was not barricaded to warn and prevent employee entrance.

Among the feasible means of abatement would be to comply with the Association of Equipment Manufactures [sic] for Hydraulic Excavators requirements for swing radius protection.

## **1. Facts**

In order to dig the excavation at the worksite, Respondent used a John Deere 690 E LC hydraulic excavator. (Ex. J-1). At its most basic, the excavator is comprised of two primary parts—the tracks and the rotating superstructure, which contains the cab. (Tr. 207–208). The superstructure rotates around a center pivot point, which allows the excavator to rotate 360-degrees. (Tr. 206, 559). In order to prevent the excavator from tipping over while carrying a load, the superstructure is equipped with a counterweight, which is situated on the back of the excavator cab. (Tr. 209, 559, Ex. R-53, R-54). When the superstructure rotates around the pivot point, the counterweight swings over the tracks, and, depending on how the cab is oriented, the counterweight will overhang the tracks. (Tr. 283–84). This overhang creates what is known as the swing radius.<sup>3</sup> (Ex. R-54 at 115-1). The swing radius creates a pinch point between the tracks and the rotating superstructure, which, if not properly controlled, poses a hazard to any employee that enters into the area.

Although the parties came to different conclusions as to the exact measurement of the swing radius and amount of overhang, the Court finds that the most accurate measurement of the swing radius is reflected in the specification sheet of the operator’s manual. (Ex. R-54). The two key measurements for the purposes of determining the area of danger are the amount of overhang when the superstructure is parallel to the tracks and the amount of overhang when the

---

3. Although the boom and bucket are also attached to the superstructure, CSHO Strain testified, and the Court accepts, that the swing radius hazard is limited to the overhang created by the counterweight. (Tr. 284). This understanding is confirmed by the specification sheet in the operator’s manual. (Ex. R-54).

superstructure is perpendicular to the tracks. Based on the specifications, the counterweight extends over the front or rear of the tracks by 1 foot, 8.5 inches when the superstructure is parallel to the tracks. When the superstructure is perpendicular to the tracks, the counterweight extends 3 feet, 9.5 inches beyond the sides.<sup>4</sup>

The parties agree that barricades had not been placed around the excavator while it was being used to dig the excavation; however, the photographs of the excavator show that it had a sign affixed to its body in two locations that stated “stay clear of the swing radius.” (Ex. J-1, R-52). Complainant contends that Respondent recognized the hazard posed by the swing radius of the excavator and that barricades should have been used to provide warning of, and prevent entrance into, the swing radius. Respondent contends that it implemented adequate measures such as training, communication, and eye contact to prevent exposure to the hazard.

Respondent has a general, corporate safety manual as well as an excavation-specific safety manual. (Ex. C-4, C-5). Each of these manuals has provisions that address the swing radius hazard. Specifically, the corporate safety manual provides: “The swing radius of a crane and/or other equipment, such as cherrypickers, shall be barricaded with caution tape, marked with cones or other means to warn employees from entering the area and encountering pinch points.” (Tr. 418–19, Ex. C-4). The excavation safety manual provides: “The swing radius of the equipment being used to excavate will be properly demarcated with barrels, cones, barricades, caution tape, or the like, to warn employees of the impending hazard.” (Tr. 418, Ex. C-5). According to Ketcham, the supervisor on duty was expected to determine whether to use a barricade or some other method, which is why he drafted the work rules in somewhat open-ended fashion. (Tr. 419, 468–69, 613). Thus, as was the case at this particular worksite,

---

4. These lengths are based upon the difference between the swing radius, indicated in the specifications as D<sup>1</sup>, and one-half of the length (or width) of the excavator, indicated as B and I, respectively. (Ex. R-54 at 115-1). Because no testimony was given as to the size of the tracks, or “shoes”, the Court utilized the largest measurement available.

Respondent could utilize options such as training, employing an experienced excavator operator, communication between employees, observation, and eye contact to prevent entry into the swing radius. (Tr. 430–31, 607–608, 615–17). Ketcham testified that barricades were more appropriate on projects involving confined spaces, such as a bridge deck, because heavy equipment tends to be stationary and the likelihood of entering the swing radius is greater. (Tr. 611–12).

Respondent opted to use communication, eye contact, and observation on the Route 8 project because it claims that the excavator was continually moving<sup>5</sup> and thus made using barricades an unworkable option. Specifically, Davis testified that he and his crew were aware that they needed to stay out of the swing radius. (Tr. 563). He also testified that he kept watch to ensure that no one would enter the area. (Tr. 560, 62). Davis said that, based upon his work history with the excavator operator, Larry Lohnes, he usually knew when Lohnes was about to swing the excavator and that they made eye contact with one another to ensure that they were on the same page. (Tr. 562, 565). Davis stated that the only time he would enter the swing radius was to communicate with Lohnes or to hand him a cup of water, at which time he knew that Lohnes would not attempt to swing the excavator. (Tr. 564). Davis stated that he knew he would be safe if he remained four to five feet away from the front of the tracks and approximately seven to eight feet from the sides. (Tr. 564). Likewise, Vonderheide also testified that he made a conscious effort to stay 30 to 40 feet away from the counterweight and that he would position himself so that the operator would be able to see him. (Tr. 758–60, 765).

CSHO Strain observed Davis standing in close proximity to the tracks of the excavator; however, he did not measure how close Davis actually was. (Tr. 210–12, Ex. C-16, C-19, C-20).

---

5. The specific process involved: (1) the excavator digging a portion of the excavation measuring approximately 15 feet in length; (2) rotating the excavator back outside the excavation to attach a segment of pipe to the backhoe bucket and moving it into the excavation; (3) connecting the pipe; and (4) rotating the excavator back out of the excavation to collect fill material, which was then placed in the section where the pipe segment was installed. (Tr. 544–46).

CSHO Strain also testified that Leichtenberg was exposed to the hazard as he exited the excavation on the north end. (Tr. 211). Complainant's biggest concern in this regard was the fact that there was nothing to notify employees of or prevent them from entering into the swing radius of the excavator. Although the counterweight had signs affixed to its body that stated "stay clear of the swing radius", these signs were not highly visible and were located on the tail of the counterweight, which does not provide much warning to an individual: (i) standing to the side of the cab, (ii) to the front of the cab; or (iii) exiting the excavation. (Ex. J-1, R-52, R-53). In support of her position that Respondent's preventative measures were inadequate, Complainant introduced the Association of Equipment Manufacturer's Safety Manual ("AEM Manual") for hydraulic excavators, which states: "Before starting to excavate, set up safety barriers to the sides and rear of your swing pattern to prevent anyone from walking into the working area." (Ex. C-13). The AEM Manual is also consistent with Respondent's own policy.

## **2. Analysis**

To establish a *prima facie* violation of Section 5(a)(1) of the Act, also known as the general duty clause, Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co.*, 17 BNA OSHC 1869 (No. 92-2596, 1996). The Court finds that Complainant has established each of the elements of a Section 5(a)(1) violation.

With respect to the first element, the Court finds that there is ample evidence to establish that the swing radius of the excavator presented a hazard to employees at Respondent's worksite. Respondent contends that Complainant proved nothing more than a "potential" hazard posed by the swing radius of the excavator. *See Pelron Corp.*, 12 BNA OSHC 1833 (No. 82-388, 1086)

(“Defining the hazard as the ‘possibility’ that a condition will occur defines not a hazard but a potential hazard.”). In other words, Respondent argues that Complainant failed to prove that the steps it took to prevent the hazard were inadequate. The Court disagrees. First, after reviewing Respondent’s safety manuals,<sup>6</sup> as well as the AEM Manual, the common thread is a system that, at the very least, warns employees that they are entering into the zone of danger. (Ex. C-4, C-5, C-13). Although this could theoretically be accomplished by the use of a spotter or “stim” man, whose sole responsibility would be to warn employees that they were in the zone of danger, Respondent had no such policy or practice in place; rather, Respondent relied on a vague system of communication through eye contact and mutual understanding of work habits and experience. (Tr. 565–66). Respondent’s foreman, Davis, made this clear when he testified that he never really learned this system; he just knew it. (Tr. 561). In that regard, he stated that he received information about barricades and cones being used with cranes and cherry pickers, but that he did not recall that information being discussed with respect to an excavator. (Tr. 561). Further, Davis also testified that he did not have to communicate with his employees about the swing radius hazard because “everyone was fully aware of it.” (Tr. 563). In the Court’s view, Respondent’s system is little more than a post-hoc justification for its failure to abide by the requirements of its own excavation safety manual, which required that the area be marked with “barrels, cones, barricades, caution tape, or the like.” (Ex. C-5). Nor does the Court find that the signs affixed to the back of the counterweight satisfy this obligation because they would only be visible to someone standing directly behind the cab and would not provide adequate warning as to the extent of the hazardous area for those employees in front of or to the side of the excavator.

The foregoing also establishes the second element—employer or industry recognition of the hazard. The AEM Manual, Respondent’s corporate safety manual, and Respondent’s

---

6. By Ketcham’s own admission, Respondent’s own excavation safety manual superseded Chapter 18 of the corporate safety manual.

excavation safety manual all address the swing radius as a hazard—thus, in this case there is both employer and industry recognition of the hazard. (C-4, C-5, C-13). Clearly, Respondent recognized the hazard considering that it went so far as to provide policies and procedures to address it. In addition, Respondent stipulated that it recognized the hazard posed by the excavator’s swing radius. (Tr. 79–80).

Respondent also contends that Complainant failed to prove that anyone was exposed to the swing radius hazard. The Commission, however, does not require definitive proof of actual exposure to the hazard; rather, the question is whether employees have access to the hazard. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). Access to a hazardous condition exists “if there is a ‘reasonable predictability’ that employees ‘will be, are, or have been in’ the ‘zone of danger.’” *Kokosing*, 17 BNA OSHC 1869 (citing *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994)). Although CSHO Strain did not specifically measure the distance between Davis and the tracks of the excavator, the photographs show that Davis was standing close to, if not in, the zone of danger. (Ex. C-15, C-16, C-18). Likewise, in another photograph, one of the laborers, Leichtenberg, is shown exiting the trench in close proximity to the tracks of the excavator. (C-20). Respondent introduced evidence showing that the excavator moved along the trench as new pipe segments were installed. While Respondent argues that this suggests the infeasibility of installing barricades or warning devices, the Court finds that this fact illustrates the importance of using proper warnings or barricades because the swing radius/zone of danger is a moving target that changes with the location of the excavator. The Court finds it is reasonably predictable that, without proper warning, one of the employees, in the course of their duties, would end up in the swing radius of the excavator. This is especially the case with Davis, who is shown in multiple photographs standing/working in close proximity to the excavator. Operating simply on the basis of “just knowing” the location of the hazard is insufficient when

the zone of danger changes based on the location of the excavator and an individual's location relative to the excavator's cab. An employee's knowledge of the hazardous area based upon a verbal rule is not an adequate substitute for instituting the types of protections recognized under the AEM Manual or the Respondent's policies. *Tobacco River Lumber Company*, 3 BNA OSHC 1059, 1064 (No. 1694, 1975) ("Mental fences might serve to reduce the probability of intentional entry but they do nothing to prevent accidental entry.").

The Court also finds that the hazard was likely to cause death or serious physical harm. All of the individuals that testified agreed that exposure to the swing radius hazard could result in serious crushing injuries and potentially death. (Tr. 218, 561, 612). For the same reasons, the Court also finds that the violation was serious. *See Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp.*, 15 BNA OSHC 15 BNA OSHC 2072 (No. 88-0523, 1993).

The defense of infeasibility requires an employer to prove that: (1) the means of compliance prescribed by the standard are technologically or economically infeasible, or necessary work operations are technologically infeasible after implementation; and (2) there are no feasible alternative means of protection or an alternative method of protection was used. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1993-95 CCH OSHD ¶ 30,485 (No. 91-1167, 1994). *See also A. J. McNulty & Co.*, 19 BNA OSHC 1121, 1129 (No. 94-1758, 2000). The employer has the burden of proving infeasibility of compliance. *State Sheet Metal*, 16 BNA OSHC 1155, 1161 (No. 90-2894, 1993). The Court finds Complainant established that the use of a barricade or other warning devices was a feasible and effective means to eliminate or materially reduce the hazard. Respondent contends that, in light of the fact that the excavator has to move laterally along the excavation, using barricades or some other warning device, such as cones, would not be feasible because they would have to be constantly repositioned. Further,

Respondent argues that because the workers have to be in front of the excavator during sewer line installation, the proposed abatement illustrated in the AEM Manual would not protect its employees from the swing radius hazard. First, the Court finds that the act of repositioning the barricades or other warning devices, although not ideal, is not infeasible. While installing the sewer pipe segments and backfilling, the excavator was moving from the south side of the excavation to the north side. This means that the proposed barricades or warning devices would have to be moved in the same direction as the excavator. To the extent that moving the barricades along with the excavator proved to be inconvenient,<sup>7</sup> Respondent could also create a wider area for the excavator to operate within, thus eliminating the need to constantly reposition the barricades or warning devices. Second, although the workers may be in front of the excavator during the installation, the work of attaching pipe segments and disconnecting them in the base of the excavation occurs at the end of the boom and bucket, which is far outside the swing radius hazard discussed above and referenced in Exhibit R-54. Finally, Complainant proved that the use of barricades or warning devices would materially reduce the hazard by creating a clear line of demarcation (which is required by Respondent's own excavation safety manual) that indicates the extent of the swing radius hazard and warns and/or prevents employees from entering that area. The Court notes that the abatement outlined by the Complainant is none other than the abatement set forth in the Respondent's own policies, which illustrates that Respondent recognizes that such abatement measures are feasible. In light of the foregoing, the Court finds that Complainant has established a violation of Section 5(a)(1) of the Act. Accordingly, Citation 1, Item 1 will be AFFIRMED.

---

7. The Court would note that although a proposed method of abatement may be inconvenient, this does not equate to unworkable or infeasible.

**B. Citation 1, Item 2**

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

29 C.F.R. 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

United Contractors Midwest, Inc. dba R.A. Cullinan & Son, Inc. had two employees working an excavation at a depth of 7 ft., and the employer did not provide a safe means of egress from the excavation.

To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991).

The cited standard applies specifically to trench excavations. According to 29 C.F.R. § 1926.651(b), a trench is defined as “a narrow excavation (in relation to length) made below the surface of the ground. In general the depth is greater than the width, but the width of the trench (measured at the bottom) is not greater than 15 feet (4.6m).” An excavation, on the other hand is defined as “any man-made cut, cavity, trench or depression . . . formed by earth removal.” 29 C.F.R. § 1926.651(b). Thus, by definition, all trenches are excavations; however, not all excavations are trenches. By agreement of the parties, the area addressed by the citation is limited to the circular area at the north end of the excavation. This area was approximately 7 to 8 feet deep and measured approximately 13 to 17 feet wide.<sup>8</sup> (Tr. 91, 140–42, 149, Ex. J-2).

---

8. Although no measurement was taken of the trench at the bottom, the Court finds that, when the slope of the east and west walls are taken into consideration, the width of the trench at the bottom was still greater than the depth of the trench. (Ex. J-2).

Because the excavation's width was greater than its depth, the excavation is not a trench. Thus, the cited standard does not apply. Accordingly, Citation 1, Item 2 will be VACATED.

### **C. Citation 2, Item 1**

Complainant alleged a willful violation of the Act in Citation 2, Item 1 as follows:

29 C.F.R. 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) sloping and benching systems, or paragraph (c) support systems, shield systems, and other protective systems:

United Contractors Midwest, Inc. dba R.A. Cullinan & Son, Inc. had two employees working in an excavation at a depth of 7ft., and the employer did not provide cave-in protection in accordance with 1926.652(a)(1).

#### **1. Facts**

##### The Excavation

As noted above, in Section IV.B, the excavation at issue measured 7 to 8 feet deep and was approximately 13 to 17 feet wide. CSHO Strain and Bielema also took measurements of the walls of the excavation, which surrounded the newly installed manhole. They made the following observations: (1) the wall to the southeast of the manhole had a slope of 72 degrees; and (2) the wall to the north of the manhole had a slope of 40 degrees. (Tr. 149, 181–82, Ex. C-25). The wall to the southwest of the manhole had a cut in it, which required to CSHO Strain and Bielema to take two separate measurements: (1) below the cut, the wall measured 2 feet, 3.5 inches in height and had a slope of 80 degrees; and (2) above the cut, the wall measured 4 feet, 4 inches in height and had a slope of 87 degrees.<sup>9</sup> (Tr. 141–42, Ex. C-24). The slope of the walls in these areas was of particular concern to Complainant because CSHO Strain and Bielema

---

9. Respondent points out that no measurement was taken of the width of the cut, which it refers to as a cutback. However, given the steep slope of the two separate angle measurements, and considering the photographs illustrating the cut, the Court ascribes no significance to this cut as a method of cave-in protection. (Ex. C-29). As will be discussed below, the excavation was dug in Type B soil, which would require cutbacks/benches that have a ratio of 1:1 (height to width). This cut appears to be nothing more than a scrape from the excavator. Respondent did not provide any testimony that this particular cut was formed with the intent to protect against cave-ins; in fact, Davis testified that he thought the slope, standing alone, was sound. (Tr. 555).

identified footprints, tools, and equipment adjacent to the walls. (Tr. 140, Ex. J-2).

Davis testified that he had tested the soil of the excavation around 7:20 a.m. and found a compressive strength of more than 1.5 tsf (tons per square foot). (Tr. 534–36, 538, Ex. C-9). Accordingly, he characterized the soil as Type A. This was reflected in his daily report. (Ex. C-9). During the inspection, CSHO Strain also took three samples of the soil. (Tr. 92). The results of Complainant’s soil testing showed that the soil had a compressive strength of 0.75 tsf, which is properly characterized as Type B. (Ex. J-1). Respondent also took additional samples of the soil and also found that it was Type B. (Ex. J-1).

#### On-Site Management – Ken Volk and James Davis

As noted above in Section III, when CSHO Strain arrived at the worksite, he observed Davis and Volk standing at the edge of the excavation. Davis was the foreman in charge of the excavation, and Volk was the project manager/superintendent<sup>10</sup> in charge of the Route 8 project as a whole. Neither Volk nor Davis claimed to be aware that certain walls of the trench were out of compliance with the standard. (Tr. 555, 716). Nevertheless, both Volk and Davis were responsible for the safety and health of the employees working underneath them and had the authority to direct the work and correct safety violations. (Tr. 456–57, Ex. C-4).

Davis testified that approximately 40–50% of the work he performed for Respondent was underground. (Tr. 530, 572). Davis also testified that he had worked with the excavator operator, Lohnes, repeatedly over the course of 20 years and that Lohnes was adept at properly sloping the walls of excavations. (Tr. 540). Specifically, Davis stated that he does not measure the slope of the walls—relying instead upon visual observation—and that he “usually just rel[ies] on an operator to get it right . . . .” (Tr. 539, 553). As a result of Complainant’s findings during this inspection, Davis was fired by Respondent. (Tr. 590–91).

---

10. The Court shall use these terms interchangeably as the parties did at trial. The Court ascribes no significance to the particular term because it is the nature of the duties performed that are controlling.

Volk testified that he has 22 years of experience as a project manager and that approximately 70% of the projects that he supervises involve excavations. (Tr. 727). On the day of the inspection, Volk visited the worksite around lunchtime and approximately 20 minutes prior to the beginning of the inspection. (Tr. 713–16). In the interim, he had visited the other sites that were a part of the Route 8 project. (Tr. 713–15). During the time he was at the worksite in question, he stated that he did not pay careful attention to the sloping because he was watching the crew install the new manhole at the north end of the excavation, where CSHO Strain found the non-compliant walls. (Tr. 716). Volk testified that, in light of breadth of his duties on the Route 8 Project, he did not usually determine whether an excavation was properly sloped and instead relied upon his foreman to make that determination. (Tr. 716–17, 731). This, he claims, was due to the fact that he could not recall the specific sloping requirements without looking them up. (Tr. 717–18). Volk testified that, as a result of the inspection, he was verbally reprimanded by the board of directors and his year-end bonus was cut. (Tr. 718). Ketcham testified that Volk was not terminated in light of the breadth of his duties as a project manager and his reliance upon Davis. (Tr. 662).

#### Respondent's Safety Program

Scott Ketcham has been the risk manager for Respondent since 1999. He wrote the safety policies, including the corporate safety manual and the excavation safety manual, provided annual training, and conducted site visits. (Tr. 439–40). Ketcham supervised a staff of four risk management personnel that were assigned to different regions. (Tr. 440). Kevin Wilkins was responsible for the northern region, which included the worksite at issue in this case. (Tr. 388, 461).

In 2005, R.A. Cullinan & Son, Inc. received a citation for cave-in protection violations. In response to that citation, Respondent provided training on excavations and instituted its

excavation safety manual, which was designed to replace Chapter 18 of the Respondent's corporate safety manual. In addition, Respondent hired an independent consultant, Greg Swinson of Safety Management Resources, to perform inspections of its jobsites for a period of six to eight months. (Tr. 654–55). Ketcham testified that Swinson found no violations on the sites that he inspected. (Tr. 654–55).

Respondent conducts safety training once every year in January or February and invites its supervisory personnel and individuals that it anticipates may become supervisory personnel. (Tr. 443). This training usually lasts one day and typically includes a discussion of excavation safety. (Tr. 443, 619, Ex. R-33 to R-37). In addition to the annual training provided to supervisory personnel, Respondent also provides annual orientation training for new employees, which includes a review of the minimum safe work rules and the issuance of personal protective equipment. (Tr. 452–53, 455). Supervisors are also expected to provide tool-box talks and on-site training. (Tr. 443).

As part of its safety program, Respondent has a written disciplinary policy that is contained within the corporate safety manual. (Tr. 446, Ex. C-4). The disciplinary policy is a progressive system of enforcement that begins with a verbal warning and, if policies are repeatedly violated, ends with termination. Ketcham pointed out, however, that intermediate steps can be skipped over depending on the severity of the violation. (Tr. 448–49). In order to determine whether rules were being complied with, Respondent would conduct unannounced inspections of its jobsites. (Tr. 461, 650). Prior to April 20, 2010, Ketcham does not recall any of these inspections uncovering non-compliant excavations. (Tr. 655). In that regard, Respondent introduced evidence of a number of written disciplinary actions; however, it was unable to produce any documentation of the actions taken against Volk or Davis.

Ketcham and Wilkins both visited the worksite prior to the April 20, 2010 inspection.

Approximately ten days prior to the inspection, Ketcham testified that he visited the worksite because he knew that excavation work would be required. (Tr. 656–57). He spoke with Davis for about 20 minutes and reminded him to comply with the trenching requirements, reminding him of the need for a ladder, personal protective equipment, and soil typing. (Tr. 657). Wilkins had visited the site a number of times in 2009 when the project began and also visited twice in 2010 prior to the inspection. He testified that he also discussed the excavation program with Davis. (Tr. 786–87). In addition, Earl Koch, construction manager, dispatch, visited the worksite to determine whether any manpower changes were needed. (Tr. 744–46). Koch testified that he told Davis to “lay it back” if the excavation got any deeper. (Tr. 747).

#### Violation History

Part of the reason for Complainant alleging a willful violation of the cited standard is that Respondent has previously been cited for failure to comply with 29 C.F.R. 1926.652(a)(1). The earlier citations were issued to R.A. Cullinan & Son, Inc. in 1998, 2002, and 2006. (Ex. C-40, C-41, C-42). As noted above, R.A. Cullinan & Son, Inc. was merged with two other companies to form United Contractors Midwest, Inc. (Respondent). (Ex. C-55). Since the time of the merger, Respondent has been governed by the same corporate safety manual and has had the same corporate risk manager, Scott Ketcham, who started with the company in 1999. (Tr. 395, 408). For the purposes of this case, the Court finds that it is appropriate to consider the citations issued in 2002 and 2006 to R.A. Cullinan & Son, Inc., because there is a clear nexus between the two entities, as well as substantial continuity in that the nature of the business (road work), the area served, the customers, and the risk management personnel are substantially the same. *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286 (No. 00-1402, 2010).

## 2. Analysis

### Prima Facie Case

Prior to determining whether a willful violation occurred, the Court must ascertain whether a violation occurred in the first instance. To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991). Based on the foregoing, the Court finds that the standard applies and was violated.

The cited standard requires protective systems in excavations that are greater than five feet in depth. 29 C.F.R. § 1926.652(a)(1). The excavation at issue ranged from 7 to 8 feet in depth. Thus, the standard applies. Further, the terms of the standard were violated. The parties agree that the soil in the excavation was Type B. (Ex. J-1). Accordingly, the maximum allowable slope, or allowable configurations for sloping and benching systems, is determined in accordance with Appendix B to Part 1926, Subpart P. *See* 29 C.F.R. § 1926.652(b)(2). Type B soil requires a maximum allowable slope of 1 horizontal to 1 vertical, or 45 degrees. *See* Part 1926, Subpart P, Appendix B. The two problem areas in this particular excavation were sloped at 72 degrees on the east wall and between 80 and 87 degrees on the west wall. Therefore, the terms of the standard were violated.

CSHO Strain observed two of Respondent's employees in the excavation at the time that he arrived. (Tr. 196). In addition, he also observed footprints and tools in the base of the trench near the improperly sloped walls. (Tr. 140). This satisfies the third element of Complainant's

*prima facie* case.

Complainant has also established its *prima facie* case of employer knowledge. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 193 WL 275823 at \*7 (No. 91-862, 1993) (“[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer’s safety program.”). Both Davis and Volk were present on the worksite, looking into the trench, and observed the violative condition. There is no question that they were supervisory employees. Accordingly, Complainant has established its *prima facie* case.

Although Complainant has established its *prima facie* case, Respondent contends that, in light of its safety program, it has taken reasonable measures to prevent the occurrence of the violation. *See id.* (holding that employer can rebut *prima facie* showing of knowledge by taking reasonable measures to prevent violations). Respondent poses a two-part argument in this regard. First, Respondent relies on a line of case law from various circuit courts of appeal that have recommended the Commission adopt a test requiring the Secretary to prove that the supervisor’s conduct was foreseeable. *See, e.g., W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006). Second, Respondent contends that it has established the defense of unpreventable supervisory misconduct.

The Court declines to adopt the test of foreseeability for the purposes of rebutting Complainant’s *prima facie* case of employer knowledge. The Commission, which the Court is obliged to follow, has not adopted this test, nor has the Seventh Circuit, which is the court of appeals for Illinois. The cases cited by Respondent do not suggest otherwise. The Commission in *Diamond Installations* merely references, in a footnote, the fact that a number of circuit courts of appeal have adopted the test of foreseeability, but it did not apply that test to make the

determination that the Secretary established the element of knowledge. *Diamond Installations*, 21 BNA OSHC 1688 at n.5 (No. 02-2080, 2006). Further, the administrative law judge in *W.G. Yates & Sons Constr. Co.*, 22 BNA OSHC 1196 (No. 03-2162, 2008), applied the foreseeability test upon remand orders from the Fifth Circuit and not based upon application of Commission precedent. The proper method to rebut Complainant's *prima facie* case is through the use of the employee misconduct defense.

#### Affirmative Defense

In order to prove the affirmative defense of employee misconduct, it is the employer's burden to prove that: (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *GEM Industrial, Inc.*, 17 BNA OSHC 1861 (No. 93-1122, 1996). "[W]here 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 Constr. Co.*, 10 BNA OSHC 1549 (No. 16265, 1982). "A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

Based on the foregoing findings of fact, the Court finds that Respondent has established elements (1), (3), and (4) of the affirmative defense of unpreventable employee misconduct. First, it clearly had work rules designed to prevent the violation. (Ex. C-4, C-5). Second, its risk management team employed unannounced visits to worksite to ensure compliance with those work rules. And, in response to the 2006 violation, Respondent also employed an independent auditor to ensure compliance with the work rules. Third, based on the documentation of

disciplinary actions introduced as Exhibit R-32, it appears that Respondent effectively enforces the rules that it expects to be followed.<sup>11</sup> (Ex. R-32). The problem, however, is that it does not appear that Respondent adequately communicated the rules to its supervisory personnel.

The Court's primary concern with respect to Respondent is that not one, but both supervisory personnel on the worksite failed to address a clear violation of the excavation standard. Complainant identified two separate locations in the excavation where the slope was as little as 30 and as many as 40 degrees steeper than what is required for Type B soil. Furthermore, even if Davis had properly analyzed the soil as Type A, the slope was still 19 to 34 degrees too steep. Davis' and Volk's failure to address this glaring violation is compounded by the fact that both Ketcham and Wilkins were able to look at the excavation and recognize that the walls were non-compliant. (Tr. 660, 817–18). There is clearly a disconnect between the expectations of Respondent's risk management team and the implementation of the rules by Respondent's supervisory personnel. It is true that Respondent has annual training that typically involves an excavation component. (Ex. R-33, R-34, R-36, R-37). It is also true that Davis was told multiple times in the week leading up to the inspection that he needed to be "dialed in" to the excavation requirements.<sup>12</sup> (Tr. 786). The failure in this case, however, was not just about the communication of specific rules that were to be followed—though Davis' failure to address the slope and Volk's stated inability to recognize that there was a problem does raise some flags—rather, Respondent's failure is not adequately communicating *who* is responsible for ensuring the safety and health of the employees at the worksite.

According to Respondent's corporate safety manual, superintendents and foreman are expected, among other things, to: (1) ensure proper implementation of the Safety and Health

---

11. This was a closer call, however. See *GEM Industrial, Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) ("Where all employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule.").

12. Though the Court would note that, in terms of adequately communicating the rules, telling someone to follow the rules is little different than admonishing an employee to "be safe".

Program; (2) develop a safe work plan in advance of each stage of a project; (3) be accountable for unsafe acts by employees; and (4) conduct regular job site safety inspections. (Ex. C-4). The problem, however, is that Volk testified that he relied on Davis to ensure that details like adequate sloping were addressed. Davis, in turn, stated that he relied on his operator “to get it right.” In other words, what is lacking in this system is accountability. Now, it is not unreasonable to expect that subordinates will do their jobs correctly; however, as Respondent’s safety program succinctly states, it is incumbent upon supervisory personnel to *ensure* that they do so. In this case, that did not happen; instead, at each level of supervision the responsible person claimed to be relying on the person below him. The lack of understanding regarding the safety requirements, coupled with the failure of any supervisor to take responsibility for the safety and health of Respondent’s employees, makes it clear that Respondent has failed to adequately communicate the rules and effectively ensure the accountability of its supervisors. As such, the Court finds that Respondent failed to establish that the violation was the result of unpreventable employee misconduct.

#### Classification

“A willful violation is one committed with either intentional disregard of or plain indifference to the requirements of the Act or a standard.” *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). “[I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference.” *Hern Iron Works*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). In other words, Complainant must show that, at the time of the violative act, the employer was either actually aware that the act was unlawful or “that it possessed a state of mind

such that if it were informed of the standard, it would not care.” *Propellex Corp.*, 18 BNA OSHC 1677 (No. 96-0265, 1999). Thus, it is not enough to show that Respondent was merely careless or displayed a lack of diligence. *Beta Constr. Co.*, 16 BNA OSHC 1435 (No. 91-102, 1993). The Commission has found such heightened awareness where an employer has been previously cited for a violation of the standard in question, is aware of the standard’s requirements, and is on notice that a violative condition exists. *See J.A. Jones*, 15 BNA OSHC 2201; *D.A. & L Caruso, Inc.*, 11 BNA OSHC 2138, 2142 (No. 79-5676, 1984).

Good faith efforts to correct a particular hazard can negate a claim of willfulness; however, the Commission applies a test of objective reasonableness to determine whether an employer acted in good faith. *J.A. Jones*, 15 BNA OSHC 2201 (citing *A.P. O’Horo*, 14 BNA OSHC 2004, 2013 (No. 85-369, 1991); *Calang Corp.*, 14 BNA OSHC 1789 (No. 85-319, 1990). Thus, an employer “is not necessarily spared from a finding of willfulness by taking any measure, regardless how minimal, to enhance employee safety.” *Id.* (citing *Coleco Indus.*, 14 BNA OSHC 1961 (No. 87-2007, 1992).

The Court finds that Respondent’s violation was willful. Complainant established Respondent’s heightened awareness of the illegality of the condition by showing: (1) Respondent violated the same standard in 2002 and in 2006; (2) Respondent was aware of the standard’s requirements in that it implemented an excavation-specific safety manual, employed an independent inspector, and instituted excavation safety as a part of its annual training seminar; and (3) Davis and Volk were on notice of the violative condition, as they were both present at the edge of the excavation prior to the beginning of the inspection and yet did nothing to abate the hazard. *See J.A. Jones*, 15 BNA OSHC 2201.

It is not enough, however, to merely say that Respondent was on notice of the condition and allowed the condition to exist. *Id.* Nor is it sufficient to establish that the condition was so

obvious that Respondent should have known of the violative condition. *See Sec'y of Labor v. Amer. Wrecking Corp.*, 351 F.3d 1254 (D.C. Cir. 2003). Complainant must prove that Respondent was either actually aware of the condition or that it was plainly indifferent to employee safety. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078 (No. 99-0018, 2003). There is nothing in the record to suggest that Davis or Volk were specifically aware of the improperly sloped walls and made a conscious decision to proceed with the manhole installation in the face of the violation. That said, the Court finds that both Davis and Volk were plainly indifferent to the safety of Respondent's employees.

Both Davis and Volk have extensive experience in the road construction industry and both testified that 40–70% of the projects that they work on involve excavations. Notwithstanding their extensive experience, both of them failed to recognize a clear violation of the excavation standard. Now, as the Court previously stated, mere negligence is not sufficient to establish a willful violation; however, this is not a case of merely failing to recognize an obviously hazardous condition. Rather, this is a case of what the Court will refer to as institutional indifference. The gist of Volk's testimony is that, although he went to annual trainings that discussed the excavation standards and worked on projects that regularly involved excavations, he was not well-versed in the specific requirements because it had been so long since he had worked in one. Accordingly, he testified that he left it to his foreman to ensure that the excavation was compliant even though his responsibilities included ensuring proper implementation of Respondent's safety and health program and conducting regular job site safety inspections. Thus, Respondent put a man in a supervisory role that lacked the knowledge and wherewithal to carry out his responsibilities. Similarly, Davis testified that he would "just leave it up to the operator" to ensure conformity with the standard. The superintendent/project manager relied on the foreman and the foreman relied on the operator, which left no one in a

supervisory role to ensure conformity with the standard. Respondent suggests that this “pass the buck” mentality does not constitute indifference because there is a justified need for someone like Volk or Davis to be able to rely on their subordinates to execute their work safely and properly, especially when the scope of management’s duties extends beyond checking the slope of an excavation. In this case, though, the attitude that “someone else will handle it” extended all the way down the chain of supervision until the ultimate responsibility devolved to the very people whom the standards are designed to protect.

Respondent argues that it exercised good faith, which can negate a finding of willfulness. *See Rawson*, 20 BNA OSHC 1078. In this regard, Respondent does not argue that Davis’ determination that the excavation was compliant was objectively reasonable; rather, Respondent argues that, by virtue of its safety program and response to the 2005 OSHA inspection, it has acted in good faith to prevent excavation hazards. While the Court recognizes the thorough nature of Respondent’s safety program, the Court finds that the “pass the buck” mentality among Respondent’s supervisors illustrates the sort of institutional indifference to employee safety that cannot negate a finding of willfulness.

## **V. PENALTY**

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer’s prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case

and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Respondent owns a large road construction company and employs over 600 employees. With respect to Citation 1, Item 1, CSHO Strain based his assessment of a \$2,250 penalty on the fact that employees were exposed to severe crushing injuries and potentially death; however, he also indicated that there was a low probability of exposure to the hazard. With respect to Citation 2, Item 1, CSHO Strain based his assessment of a \$63,000 penalty on the fact that two employees were observed in an inadequately protected trench, which exposed each of them to a cave-in hazard. CSHO Strain found that the probability of an accident occurring was likely considering Respondent's failure to address the obvious hazard, a fissure running parallel to the west side of the excavation, and the vibration caused by trucks driving on Route 8, which was adjacent to the excavation. Further, falling soil from a collapsing excavation can cause serious crushing injuries, broken bones, and even death. (Tr. 197). Based on the totality of the circumstances presented here and above, the Court finds that the penalties assessed on Citation 1, Item 1 and Citation 2, Item 1 are appropriate.

### **ORDER**

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED and a penalty of \$2,250.00 is ASSESSED.
2. Citation 1, Item 2 is VACATED.
3. Citation 2, Item 1 is AFFIRMED and a penalty of \$63,000.00 is ASSESSED.

Date: February 4, 2013  
Denver, Colorado

/s/ \_\_\_\_\_  
Patrick B. Augustine

Judge, OSHRC