



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

Wildcat Renovation, LLC,

Respondent.

OSHRC Docket No. **21-0387**

Representatives:

Richard A. Latterell, Esq.

U.S. Department of Labor, Office of the Solicitor, Atlanta, GA, for Complainant

John M. Miller, Esq. and Katherine Cook, Esq.

BOY AGNEW POTANOVIC, PLLC, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

### **DECISION AND ORDER**

On September 29, 2020, an employee of Respondent, Wildcat Renovation, LLC (Wildcat), was crushed to death when a concrete wall he was demolishing fell on him. Upon notification of the fatality, the Fort Lauderdale, Florida, Area Office of the Occupational Safety and Health Administration investigated the incident. As a result of that investigation, the Secretary issued Wildcat a citation alleging serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (the Act). In the citation, the Secretary alleges Wildcat failed to conduct an adequate engineering survey of the demolition operations prior to commencing work in violation of 29 C.F.R. § 1926.850(a) and failed to conduct continuing inspections as demolition work progressed in violation of 29 C.F.R. § 1926.859(g).<sup>1</sup> The Secretary proposes a penalty of \$13,653 for the alleged violation.

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<sup>1</sup> The original citation alleged a single serious violation of the § 5(a)(1) of the Act also known as the General Duty Clause. The Secretary moved to amend the citation to allege violations of the two referenced demolition standards, grouping the violations for penalty purposes. The court granted the Secretary's unopposed request to amend by order of December 16, 2021.

Wildcat timely contested the citation bringing the matter before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act. The court held a hearing in this matter on August 30 and 31, 2022, in Fort Myers, Florida. The parties filed post-hearing briefs on October 31, 2022.<sup>2</sup>

For the reasons discussed below, Items 1a and 1b, Citation 1, alleging violations of 29 C.F.R. §§ 1926.805(a) and 1926.859(g), respectively, are vacated.

### **JURISDICTION**

The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Joint Prehearing Statement, p. 10). The parties also stipulated that at all times relevant to this action, Wildcat was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Id.). Based upon the stipulations and the record as a whole, the court finds Wildcat is an employer covered under the Act and that the Commission has jurisdiction over this proceeding.

### **STIPULATIONS OF FACT**

The parties stipulated to the following issues of fact:

1. On September 30, 2020, OSHA conducted an inspection, number 1495408, of Respondent's worksite located at Respondent's worksite at the Sun 'n Fun Waterpark, 1500 Livingston Road, Naples, Florida 34109.
2. OSHA's inspection was prompted by Respondent's reporting to OSHA of a fatal worksite accident occurring on September 29, 2020, when one member of Respondent's 3-man demolition crew at the Sun 'n Fun waterpark was crushed by a steel reinforced, poured concrete wall that fell on him after he had cut a horizontal line along the width of its base.
3. Specifically, the accident involved the second and final steel reinforced concrete wall, one of two such walls that had been supporting a pedestrian bridge spanning the Lazy River at the Sun 'n Fun waterpark. The wooden pedestrian walkway and the first wall had already been demolished at the time of the accident.
4. Respondent's 3-man crew at the Sun 'n Fun worksite comprised foreman Matthew Norton, laborer [WH]<sup>3</sup>, and the decedent, laborer [AG].
5. The photographs show that the decedent cut a horizontal line near the base of the entire width of the second concrete wall.
6. The concrete wall measured approximately 6 feet high by 10 feet wide by 8 inches deep.

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<sup>2</sup> To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

<sup>3</sup> Initials are used in place of full names to protect the privacy of individuals.

7. The concrete was contained #5 rebar, on 9-inch centers (which means that the rebar had a 5/8-inch diameter, and it was placed every 9 inches both left and right, up and down). Exhibit 5 (Marked Up As-Built Plan).
8. The decedent was using a self-contained, gas engine, hydraulic concrete saw cutter, called a 20-inch Diamond Ring Saw.
9. The strength of the poured concrete was 3,000 psi.
10. The Collier County District Twenty Medical Examiner's report states the cause of death to be blunt force injuries.

(Tr. 9-10)

### **BACKGROUND**

Alan Miller founded Wildcat approximately 10 years ago and remains its owner (Tr. 431). Mr. Miller describes the business as a “selective demolition, concrete cutting and shoring erection specialty company.” (Tr. 431). Concrete cutting generates approximately 85% of Wildcat's revenue (Tr. 432). Mr. Miller has worked in demolition for 29 years and started the company after having worked his way up from a laborer, receiving training through the Operating Engineers apprenticeship program (Tr. 436-439). The business is a member of the National Demolition Association, among other industry groups (Tr. 438-39).

Sometime in 2020, Wildcat received an invitation to bid on a demolition project at the Sun 'n Fun Waterpark in Naples, Florida (Tr. 454). The project involved demolishing a footbridge that spanned a “lazy river” in the center of the waterpark (Exh. R-24). In addition to the wooden bridge, two concrete walls, serving as supports for the footbridge, were to be removed.<sup>4</sup> One wall was on the side of the lazy river closest to the entrance building, and the other was on the opposite side of the lazy river in an island-like area (Exh. R-24). The general contractor who invited the bid sent Wildcat a set of documents including the scope of work and the “as built” which are drawings depicting how a building or structure was constructed (Tr. 454). In conjunction with its review of the documents, Wildcat sent two estimators to the site (Tr. 456). Ultimately, Wildcat was awarded the job.

On September 16, 2020, prior to commencing work, Mr. Miller visited the site (Tr. 456). He visually inspected the structures to be demolished for deterioration or damage (Tr. 457). He took videos of the site conditions. The following day, Mr. Miller returned with Michael Nywening, the project manager. (Tr. 402, 474). The two men again performed a visual

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<sup>4</sup> The partially demolished footbridge and supporting concrete walls are depicted in Exhibit J-2, pp. 7-8.

inspection of the footbridge and supporting concrete walls (Tr. 402-04). Together they developed a plan for demolishing the structures (Tr. 404-471; Exh. J-9, p. 3). The plan called for using a method referred to as “score, break, and remove”<sup>5</sup> to demolish the concrete walls (Tr. 405) This method involved scoring or cutting partially through the concrete wall in a grid pattern and then breaking it with a sledgehammer or machine (Tr. 325-26, 388-91). Wildcat memorialized the plan in a scope of work document (Exh. J-6; Tr. 406, 471).

On September 24, 2020, Wildcat began the Sun ‘n Fun job. The onsite crew for the job comprised three individuals. Matthew Norton served as foreman of the job and two laborers, AG (the decedent) and WH, performed various jobs including concrete cutting and operating machinery. Wildcat brought three pieces of equipment to the site. Wildcat used a Brokk 170 radio-controlled demolition robot to remove the footbridge. Also on site were a Lull telehandler or booming forklift which Wildcat used to boom equipment to the island and move heavy debris, and a Bobcat mini track loader 85.<sup>6</sup> (Tr. 461-63)

On the morning of the first day, Project Manager Nywening met with Foreman Norton at the jobsite and reviewed the scope of work (Tr. 327, 408; Exh. J-9, p. 6). Over the next three days, the Wildcat crew removed the wooden footbridge with the demolition robot. By the end of the third day, the footbridge had been demolished and the wood removed to the dumpsters on site. During these three days, Project Manager Nywening visited the site twice each day. He memorialized his visits in a daily report.

On the following Monday, September 28, 2020, the crew began the project by demolishing the first wall, nearest the entrance building, without incident. On the morning of the next day, Project Manager Nywening met with the crew at the worksite. Debris from the first wall had not been removed and the crew was in the process of doing so (Tr. 420). According to Project Manager Nywening, once the debris was cleared, the plan was to move the equipment to the island and begin demolition of the second wall (Tr. 420). Project Manager Nywening then left.

After the crew had moved some of the equipment to the island, AG began cutting the second wall. Foreman Norton was in the parking lot area, moving the forklift and WH was watching the lines and the generator that powered the saw. As AG cut along the bottom of the

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<sup>5</sup> Witnesses used the term “score, snap, and remove” interchangeably with “score, break, and remove.”

<sup>6</sup> During the hearing, witnesses referred to the equipment by its commercial name and its descriptor interchangeably. Witnesses also referred to the Bobcat mini track loader 85 as a “dingo.”

wall, Foreman Norton saw the wall begin to tip and called out (Exh. C-5, p. 2). The wall continued to tip, falling on AG. Efforts to rescue AG were unsuccessful and he died of his injuries (Exh. J-3).

Local police and emergency services were immediately called to the accident scene where police took statements from WH and Foreman Norton. The following day, the OSHA Fort Lauderdale Area Office initiated its investigation.

OSHA's investigation was initially assigned to Compliance Safety and Health Officer (CSHO) Chad Schulenberg. CSHO Schulenberg, who was accompanied by Trainee Karen Alvarez, went to the site on September 30, 2020. They took photographs and measurements and interviewed Foreman Norton and WH. Prior to completing the investigation CSHO Schulenberg left the agency and the matter was reassigned to CSHO Reginald Benson. Upon taking over the investigation, CSHO Benson discovered CSHO Schulenberg had not preserved his working file. CSHO Benson's efforts to recover CSHO Schulenberg's original interview notes were unsuccessful and he determined he would have to start his investigation anew. CSHO Benson took a second set of interview statements from Foreman Norton and WH. Based upon the information gathered by CSHO's Schulenberg and Benson, the Secretary issued the Citation at issue.

### **THE CITATION**

Items 1a and 1b, Citation 1, as amended, allege violations of § 5(a)(2) of the Act. Item 1a reads:

Citation 1, Item 1a: Type of Violation: Serious

29 CFR 1926.850(a): An engineering survey was not performed by a competent person to determine the conditions of the walls and the possibility of unplanned collapse of any portion of the structure prior to permitting employees to start demolition operations:

At 1500 Livingston Road, Naples, Florida, on September 29, 2020, prior to permitting employees to start demolition operations, a competent person did not perform and document in writing an engineering survey of 6' x 10' cement walls to determine their condition and the possibility of unplanned collapse, thereby exposing employees to struck-by and crushing hazards.

Date By Which Violation Must Be Abated: April 20, 2021

Proposed Penalty: \$13,653.00

The Secretary contends, to the extent Wildcat performed an engineering survey, it was

inadequate because it did not take into account the possibility of unplanned collapse. He contends this is evidenced by the notation in Wildcat’s scope of work sheet that indicates no shoring was necessary.

Citation 1, Item 1b: Type of Violation: Serious

29 C.F.R. 1926.859(g): During demolition, continuing inspections by a competent person were not made as the work progressed to detect hazards resulting from weakened or deteriorated floors, or walls, or loosened material. Employees were permitted to work where such hazards existed before they those hazards were corrected by shoring, bracing, or other effective means.

At 1500 Livingston Road, Naples, Florida, on September 29, 2020, a competent person did not continually inspect to detect and correct hazards during the demolition of unbraced 6’ x 10’ cement walls, thereby exposing employees to struck-by and crushing hazards.

Date By Which Violation Must Be Abated: April 20, 2021

Proposed Penalty: \$0.00

The Secretary contends because Foreman Norton was in an area 40 to 50 yards from AG as AG began the process of cutting the wall, Foreman Norton could not have been performing the “continuing inspections” required by the standard.

### **DISCUSSION**

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Grp, Inc.*, No. 05-1907, 2009 WL 2567337, at \*2 (OSHRC Aug. 11, 2009).

#### ***Item 1a, Citation 1: Alleged Violation of 29 C.F.R. § 1926.850(a)***

In addressing Item 1a, Citation 1, the pivotal issue for the court is whether the Secretary has met his burden to establish Wildcat failed to comply with the requirements of the cited standard.<sup>7</sup> The standard requires:

Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the

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<sup>7</sup> There is no dispute regarding applicability of either cited standard to the work being performed.

condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure. Any adjacent structure where employees may be exposed shall also be similarly checked. The employer shall have in writing evidence that such a survey has been performed.

29 C.F.R. § 1926.850(a)

The standard is contained in Subpart T of Title 29. It was promulgated pursuant to § 6(a) of the Act which authorized the Secretary to adopt existing national consensus standards without resort to formal rulemaking procedures. 29 U.S.C. § 655(a). No where in the standard, or its source standard, ANSI A10.6 – 1969, *Safety Requirements for Demolition*,<sup>8</sup> is the term “engineering survey” defined.

The Commission addressed the standard’s requirements in *Ed Miller & Sons, Inc.* No. 934, 1974 WL 4291 (OSHR July 31, 1974). In *Miller*, the vice president of the company, who was experienced in demolition, inspected the structure to be demolished twice, from which he developed the sequence of the demolition. *Id.* at \*3. He memorialized his plan and confirmed he had conducted the inspections in a signed memorandum. *Id.* In the memorandum, the vice president wrote “Mike Regan and I inspected the Union station job today and inspected the type of construction and its condition.” *Id.* at \*4. The Commission found this adequate both in substance and form, rejecting the Secretary’s argument that the survey should have, among other things, defined the structure, referred to the structural integrity, and included plans for unscheduled collapses. Commission judges have followed the guidance of the Commission’s decision in *Miller*. See *Fabi Constr. Co.*, No. 96-0097, 1998 WL 239344, at \*11-14 (OSHR May 8, 1998) (ALJ); and *American Wrecking Corp.*, Nos. 96-1330 and 96-1331, 1998 WL 394907, at \*5 (OSHR July 13, 1998) (ALJ).

In *Fabi Construction*, for example, the judge found the employer’s conduct met the requirements of the standard. 1998 WL 239344, at \*14-15.<sup>9</sup> The employer had reviewed the

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<sup>8</sup> ANSI A10.6-1969 contains a provision similar to § 1926.850(a). It reads:

Prior to starting demolition operations, an engineering survey of the structure shall be made by a properly qualified person to determine the type and condition of the framing, floors, and walls to prevent collapse of any portion of the structure. When indicated as advisable, any adjacent structure(s) shall also be similarly checked.

ANSI A10.6- 1969, §4.1.

<sup>9</sup> In its post-hearing brief Respondent relies on the judge’s decision *Fabi Construction*. The Commission directed review on the judge’s decision but excluded from review the decision to vacate the alleged violation of § 1926.850(a). 2003 WL 21254205, at \*1 (OSHR May 30, 2003), *aff’d*, 370 F.3d 29 (D.C. Cir. 2004). The portion of the judge’s decision addressing the violation of § 1926.850(a) is an unreviewed judge’s decision and, consequently, not binding precedent. Nevertheless, the court finds it instructive.

structural drawings, made several visual inspections of the structures to be demolished, took photographs and notes during the inspections, and bore pilot holes into a slab to be demolished to determine how it was reinforced. *Id.* at \*11-12. The judge found the employer’s determination that manual demolition was the “safest method” was sufficient evidence the employer had considered the possibility of unplanned collapse. *Id.* at \*14. The employer produced as written evidence of having conducted the survey, the job superintendent’s “personal estimating sheet” which covered the scope of work. *Id.* at \*12. The judge found the estimating sheet met the requirement for written evidence of a survey. *Id.* at \*12, 14.

Wildcat’s pre-demolition actions mirror those found compliant by the Commission in *Miller*. Prior to receiving the contract to perform the demolition job at the Sun ‘n Fun waterpark, Mr. Miller received and reviewed the set of documents he referred to as the “plan set” that included the as-built drawings (Tr. 454-55). These documents gave Mr. Miller the height, size, and thickness of the walls, the psi of the concrete used, and the steel embedment of the wall (Exh. J-4). After Mr. Miller received the plan set, he sent two estimators to the site (Tr. 456). Next, Mr. Miller visited the site (Tr. 456). During his site visit, Mr. Miller took videos of the site conditions (Tr. 470). He visually inspected the structures to be demolished and observed no deterioration or damage (Tr. 457-58). Mr. Miller confirmed the structures on site were consistent with the as-built drawings. Mr. Miller concluded that, given the site conditions, no shoring or bracing was required and the most effective way to remove the walls was the “score, break, and remove” method (Tr. 459). This method, Mr. Miller believed, would keep the wall stable until it was brought down by a piece of equipment (Tr. 459).<sup>10</sup>

The following day, Mr. Miller returned with Project Manager Nywening. (Tr. 402, 474). The two men again did a visual inspection of the footbridge and supporting concrete walls (Tr. 402-04; 474). Together they agreed on a plan for demolishing the structures (Tr. 404, 471). Project Manager Nywening memorialized his visit in his daily report (Exh. J-9, p. 3). Wildcat also memorialized the plan in a scope of work document (Exh. J-6; Tr. 406, 471).<sup>11</sup> Prior to

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<sup>10</sup> The undersigned found Mr. Miller a credible witness. On the stand, he appeared calm and confident. His responses were straightforward and consistent.

<sup>11</sup> The scope of work document covers only the removal of the concrete structures. It explicitly excludes removal of the wooden footbridge, indicating that would be completed prior. The Citation and the Secretary’s case focus on demolition of the concrete walls only. Whether an engineering survey and continuing inspections were performed with regard to demolition of the footbridge is not at issue.



commencing work, Project Manager Nywening went over the scope of work and the videos with the crew (Tr. 320, 408). On the first day of work on the project, Project Manager Nywening went to the jobsite and met with Foreman Norton (Exh. J-9, at p. 5).

The scope of work document includes details of the project and how Wildcat intended to complete the job. It notes site conditions, such as the existence of water and power onsite. It specifies the equipment to be used. It identifies what structures were to be removed and the intended demolition method. Finally, the document contains a notation that no shoring was necessary.

The Secretary contends the actions taken by Wildcat were not sufficient to meet the requirements of §1926.850(a).<sup>12</sup> In support of his allegation Wildcat failed to conduct a compliant engineering survey, the Secretary called William Moore, an expert in demolition safety.<sup>13</sup> Mr. Moore testified to the industry standard for preparing to perform demolition work. He testified his process is to meet with the estimator, safety director, and foreman of the job and attempt to “determine everything that could go wrong on the job and what we were going to do to compensate for any potential hazards.” (Tr. 219) He testified he uses the National Demolition Association’s template for an engineering survey as a guide and would “fill out every blank” on the form (Tr. 226; Exh. C-7). The form is an eight-page document that covers all aspects of a

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<sup>12</sup> The Secretary did not argue Mr. Miller and Project Manager Nywening were not competent persons as that term is defined in the standards. The term “competent person” is defined in the construction standards as “one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.” 29 C.F.R. § 1926.32(f). Given Mr. Miller’s years of training and experience in the demolition industry and his overall responsibility for each of his company’s jobsites, the undersigned finds he meets the definition of a competent person (Tr. 436-39). Project Manager Nywening had a similar level of experience in the industry as well as the necessary safety training to qualify as a competent person (Tr. 395-98). The undersigned did not find the Secretary’s expert testimony to the contrary persuasive. That opinion was based solely on Wildcat’s failure to predict the wall would fall, not information regarding the training or background of any of Wildcat’s management officials (Tr. 243)

<sup>13</sup> Mr. Moore is currently employed as a consultant with Environmental Resources Management (EMS) performing work as a field safety officer and a demotion manager, overseeing demolition jobs (Tr. 210-11). He has worked for EMS since 2013. Prior to that, Mr. Moore was employed for over 28 years by Brandenburg Industrial Service starting as a safety director and ending as a vice-president (Tr. 212). Mr. Moore has a Bachelor of Science degree in environmental safety and safety management (Tr. 216). He holds licenses for asbestos remediation and several blasting licenses (Tr. 213-14). He has been a member of the American Society of Safety Engineers, the National Safety Council, the Casualty Safety Engineers, and is currently a member of the National Demolition Association (Tr. 214). He has held several leadership positions with the National Demotion Association and received lifetime achievement awards from the National Demotion Association and the World Demolition Award Group (Tr. 215-16). He helped write the OSHA field operations manual for demolition, edited a textbook and the National Demotion Association safety manual (Tr. 216). He serves on the American National Standards Institute (ANSI) for demolition (Tr. 216). The court recognized Mr. Moore as an expert in demolition safety (Tr. 217).

demolition project including, for example, the condition of the structures to be removed, stabilization plans, environmental issues, and other hazards. Mr. Moore stressed the importance of having the survey in writing. He would hold a pre-job safety meeting during which the document would be covered and then widely disseminate it. The National Demolition Association publishes a Safety Manual that covers a variety of demolition safety issues such as preparatory activities and the engineering survey (Exh. C-8). Mr. Moore testified he follows this manual in his work in the demolition industry. According to that document,

The purpose of this survey is to identify any hazards, to determine the condition of the structure, and to evaluate the potential for premature collapse...

The engineering survey provides the demolition contractor with the opportunity to evaluate the job in its entirety. The contractor should prepare a plan for the demolition of the structure, the equipment to do the work, the manpower requirements, and the protection of the public. The safety of all workers on the job site should be a prime consideration.

(Exh. C-8, p. 15). Mr. Moore testified Wildcat's engineering survey did not meet the requirements of the standard because it did not make note of any hazards on site and did not contain a plan for using shoring, bracing, or other protective measures (Tr. 239-40).

Mr. Moore's testimony does not establish Wildcat failed to meet the requirements of the standard. Mr. Moore's testimony focused on what is missing from Wildcat's documentation.<sup>14</sup> Mr. Moore infers from the lack of notation of existing hazards or of a shoring or bracing plan that Wildcat did not consider the possibility of unplanned collapse. The court declines to draw the same inference.<sup>15</sup> Mr. Miller credibly testified about the steps he took prior to commencing the demolition work which included inspections of the existing conditions of the structures with a comparison to the as-built drawings. He conducted a visual inspection consistent with that described by Mr. Moore (Tr. 300-02, 457-58). He developed a plan for demolition of the walls he believed would maintain their stability (Tr. 459). He chose a method he had used "thousands

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<sup>14</sup> In his post-hearing brief, the Secretary did not argue Wildcat failed to meet the requirement for written evidence of an engineering survey. Had he, the argument would have failed. The Commission has long interpreted the standard to require minimal written evidence an engineering survey was conducted. It has rejected an interpretation of the standard that would require a written survey or that the evidence of the survey take any particular form. That Wildcat conducted a pre-demolition survey is evidenced in writing sufficient to meet the minimal requirements of the standard in the scope of work document and Project Manager Nywening's daily report.

<sup>15</sup> Despite Mr. Moore's outstanding credentials, Mr. Moore's opinion is given little weight because it is based on limited information. Mr. Moore reviewed the OSHA file and the statements therein. Notably, none of the statements taken by CSHO Benson address the pre-demolition engineering survey. Mr. Moore did not review the depositions of Wildcat's management employees (Tr. 261-64), He did not know who might have reviewed the as-built plans or that individual's qualifications (Tr. 283-84).

of times.” (Tr. 494) He held a meeting with the project manager, the job foreman, and the crew (Tr. 476). Taken together, Mr. Miller took the steps necessary to conduct an adequate engineering survey.

Mr. Moore testified there are four considerations in completing an adequate engineering survey. It must cover the work to be performed, identify the hazards at the worksite, address measures to prevent hazards, and contemplate the danger of unplanned collapse (Tr. 285). Mr. Miller credibly testified he considered each of these matters identified by the Secretary’s expert when developing his plan for demolition of the concrete walls (Tr. 482-86). The Secretary did not rebut this evidence. The preponderance of the evidence establishes Wildcat addressed each element of a compliant engineering survey. Item 1a, Citation 1 is vacated.

***Item 1b, Citation 1: Alleged Violation of 29 C.F.R. § 1926.859(g)***

In Item 1b, Citation 1, the Secretary alleges Wildcat violated the standard at 29 C.F.R. § 1926.859(g). The cited standard requires:

During demolition, continuing inspections by a competent person shall be made as the work progresses to detect hazards resulting from weakened or deteriorated floors, or walls, or loosened material. No employee shall be permitted to work where such hazards exist until they are corrected by shoring, bracing, or other effective means.

29 C.F.R. § 1926.859(g). The pivotal issue is whether Wildcat violated the terms of the standard. The Secretary contends Wildcat violated the standard when Foreman Norton was 40 to 50 yards away from AG, and not observing him or the conditions, as AG cut the second concrete wall.<sup>16</sup>

There is little guidance in the regulatory history of the standard or Commission precedent on how the term “continuing inspections” is to be interpreted. The language of the standard, when read as a whole, suggests that such inspections are intended to discover hazards to which employees may be exposed that have been created by the progressing work. The duty must be discharged by a person capable of detecting and addressing hazards. An employer is responsible for protecting its employees from those hazards that could or should have been detected by a competent inspector. A performance standard, such as the one at issue here, does not identify specific obligations and therefore must be “interpreted in light of what is reasonable.” *Thomas*

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<sup>16</sup> The Secretary did not argue in his post-hearing brief that Foreman Norton was not a competent person under the standard. Based upon his experience and training, in conjunction with his authority at the worksite, the undersigned finds Foreman Norton is a competent person as defined in § 1926.32(f) (Tr. 312-16). The testimony of Mr. Moore to the contrary is rejected for the reasons previously discussed (see Tr. 288).

*Indus. Coatings, Inc.*, No. 97-1073, 2007 WL 4138237, at \*4 (OSHRC Nov. 1, 2007); *see also Siemens Energy & Automation, Inc.*, No. 00-1052, 2005 WL 696568, at \*6 n. 8 (OSHRC Feb. 25, 2005) (employer's exercise of discretion is judged either by a reasonable person or “reasonably prudent employer” standard).

Foreman Norton was on the job every day during the demolition operations supervising the progress of the job (Tr. 335). He confirmed he examined the walls for conditions that could have resulted in premature collapse during cutting operations (Exh. C-11, p. 3). Project Manager Nywening was at the jobsite observing the conditions twice each day while work was being performed. The question before the court is whether a reasonably prudent employer would have done more under the circumstances.

The Secretary contends Wildcat failed to meet its obligation under the standard because Foreman Norton was not always observing the condition of the wall for hazards, most critically, during the 20 minutes<sup>17</sup> it took AG to cut across the bottom of the wall just prior to its collapse. In support of this contention, the Secretary relied on the testimony of his expert Mr. Moore who found fault in the content and frequency of Wildcat’s inspections. Mr. Moore was asked whether Wildcat’s description of its inspection procedures would constitute continuing inspections (Tr. 245). The description the Secretary provided Mr. Moore read (in relevant part):

Except for the occasions during which Mr. Norton left the specific location where the cutting was occurring to perform some other job-related task, Mr. Norton was inspecting the work as it progressed. Additionally, Mr. Nywening inspected the work daily and sometimes was at the jobsite more than once per day. These inspections by supervisory personnel were conducted, in part, *to detect hazards associated with the demolition work.*

(Exh. J-7 p. 13-14; Tr. 245) (emphasis added) Mr. Moore responded this would not qualify because “they were not inspections for safety....[b]ecause it doesn’t, again, mention any potential hazards or protective measures.” (Tr. 345) Mr. Moore’s conclusory statements are unhelpful. Mr. Moore does not explain why he believed the inspections by Foreman Norton and Project Manager Nywening were “not inspections for safety” given the specific reference, in Wildcat’s description, to the purpose of the inspections as, in part, to detect hazards.

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<sup>17</sup> The parties disagree on the amount of time it would have taken to cut across the entire bottom of the second wall or how long AG was working without being observed by Foreman Norton. Because resolution of the issue is not necessary to determine whether Wildcat was in violation of the standard, the court assumes the facts most favorable to the Secretary.

Mr. Moore went on to testify Wildcat's inspection frequency would not meet the requirements of the standard because Foreman Norton admitted "he wasn't there all the time." (Tr. 247, 291-92) Mr. Moore testified supervision of the progressing work is required "as often as necessary" which, he opined, was constant in this case (Tr. 221, 291). Mr. Moore's opinion was informed by his underlying opinion that the manner in which Wildcat was demolishing the walls was unsafe.<sup>18</sup> However, he based this opinion on limited and inaccurate information. Mr. Moore had no first-hand knowledge about the condition of the concrete because he had never been to the site. He was not familiar with all of the witness statements (Tr. 262-64). He was unsure of AG's level of experience (Tr. 291-92). Prior to the hearing, he was mistaken about how the first wall had been demolished (Tr. 266, 269). Mr. Moore did not explain how this faulty premise might affect his opinion. He testified to the possibility the wall or portions of it could fall but did not explain how or why. Given the inadequate factual background provided to him and because he offered little explanation for the basis of it, Mr. Moore's opinion is of limited probative value. *See CSA Equip. Co.*, No. 12-1287, 2019 WL 1375918, at \*5 (OSHRC Mar. 19, 2019) (Commission judge properly discredited expert testimony because expert did not observe procedures at the worksite and his opinion was based on an inaccurate understanding of procedures).

The question before the court is whether Wildcat acted reasonably under the circumstances. To answer this question, the court borrows from cases addressing reasonable diligence, as the Commission has done in the past. *See, e.g., Cent. Fla. Equipment Rentals*, No. 88-1656, 2016 WL 4088876, at \*7 (OSHRC July 26, 2016), *citing Greenleaf Motor Express, Inc.*, No. 03-1305, 2007 WL 962961, at \*3 (OSHRC Jan. 9, 2007) *aff'd* 262 F. App'x. 716 (6<sup>th</sup> Cir. 2008)(unpublished); and *Concrete Const. Co.*, No. 82-1210, 1985 WL 44803, at \*3-4 (OSHRC Jan. 25, 1985) *aff'd* 986 F.2d 1164 (6<sup>th</sup> Cir. 1986) (looking to cases discussing reasonable diligence to inform its reasonably prudent employer analysis with regard to noncompliance). In doing so, the court finds little support for the Secretary's contention Wildcat failed to meet the requirements of the standard. The Secretary appears to suggest Wildcat's

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<sup>18</sup> Although testifying his opinion that constant supervision was required would not change if Wildcat was demolishing the wall using the score, break, and remove method or cutting along the bottom (Tr. 253; 295-96), Mr. Moore conceded, had Wildcat braced the wall or used a different method, less frequent inspections might have been acceptable (Tr. 293).

failure to detect the instability of the wall created by cutting straight across the bottom of it is *per se* evidence of a lack of diligence. To the contrary, the Commission has held an employer's failure to detect every hazard does not establish its failure to take reasonable measures to inspect its worksite. *Tex. A.C.A. Inc.*, No. 91-3467, 1995 WL 42340, at \*2 (OSHRC Feb. 1, 1995). Foreman Norton conceded he was aware cutting straight across the bottom of the wall would create a hazard (Tr. 357). He did not know why AG chose to do so (Tr. 356). Although Foreman Norton might have detected the hazard created by cutting across the bottom of the wall had he been providing constant oversight, the Commission has declined to equate reasonable diligence with constant oversight. *Ragnar Benson, Inc.*, No. 97-1676, 1999 WL 770809, at \*3 (OSHRC Sept. 27, 1999), citing *N. Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 109 (2d Cir. 1996) ("Insisting that each employee be under continual supervisor surveillance is a patently unworkable burden on employers.").

To the extent the imposition of a specific inspection requirement in the demolition standards implies a higher standard of diligence is required, the Secretary failed to identify circumstances supporting the need for greater oversight than what Wildcat provided. *Cf., Sw. Bell Tel. Co.*, No. 98-1748, 2000 WL 1424806, at \*2-3 (OSHRC Sept. 27, 2000) (finding inspections inadequate under 29 C.F.R. § 1926.651(k)(1), which requires excavation inspections be conducted prior to the start of work and "as needed throughout the shift", where competent person failed to inspect a trench before allowing employees inside after having been informed of the need for shoring). Wildcat planned to remove the second wall in the same manner as the first which, Mr. Miller testified, kept the wall intact and stable until it was broken by a piece of machinery (Exh. J-6; Tr. 325; 337, 459). This was a method Mr. Miller had seen used "thousands of times." (Tr. 494) Foreman Norton stated this was Wildcat's standard procedure for demolishing walls of equivalent size (Exh. C-1, pp. 2-3). And Foreman Norton testified he had no reason to believe AG would not follow the same procedure as he had with the first wall and that this procedure was safe (Tr. 353).<sup>19</sup> The composition of the two walls was the same (Exhs. J-

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<sup>19</sup> The evidence establishes the first wall was cut along the base, leaving the center uncut (Tr. 269; Exh C-2, p. 20). The Secretary relies on the testimony of Trainee Alvarez and statements from WH, who did not testify, in support of his contention Foreman Norton had instructed AG to cut along the bottom leaving four to six inches from the ends uncut. Notes of WH's statements are vague and inconsistent. Trainee Alvarez's testimony was less than credible. Trainee Alvarez demeanor was defensive; her answers were evasive. Her notes, the only record of the original interviews retained by the Secretary, are not clear. The preponderance of the credible evidence establishes Wildcat intended to use the same methodology to demolish both walls.

4; and J-5). Mr. Miller had seen no damage or deterioration to either wall during his pre-demolition inspections (Tr. 458).

Moreover, AG had at least 10 years of experience as a concrete cutter with “reputable companies.” (Tr. 328-29; 451) Foreman Norton had observed AG over a few months and found him knowledgeable in concrete cutting (Tr. 329). *See Armstrong Utilities, Inc.*, No. 18-0034, 2021 WL 4592200, at \*6 (OSHRC Sept. 24, 2021); *citing MasTec N. Am., Inc.*, No. 15-1574, 2021 WL 2311875, at \*3 (OSHRC Mar. 2, 2021)(experience level of employees being supervised is a consideration in determining whether employer acted with reasonable diligence). The record is insufficient to establish Wildcat’s conduct was not reasonable under the circumstances.

The Secretary failed to present sufficient evidence to establish Wildcat was not in compliance with § 1926.859(g).<sup>20</sup> Item 1b, Citation 1 is vacated.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

#### **ORDER**

Based on the foregoing decision, it is hereby ORDERED:

Items 1a and 1b, Citation 1, are **VACATED**.

**SO ORDERED.**

**Dated: March 16, 2023**  
Atlanta, GA

/s/ \_\_\_\_\_  
Heather A. Joys  
Administrative Law Judge, OSHRC

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<sup>20</sup> Although the amended citation alleges failure to correct hazards, the Secretary focused his arguments on whether Wildcat had performed inspections consistent with the requirements of the standard. Had the Secretary argued Wildcat failed to take the corrective action required by the second part of the standard, the record would have been insufficient to establish employer knowledge of the violative condition because the Secretary did not present evidence to establish Wildcat knew or with the exercise of reasonable diligence should have known its methodology was unsafe or that AG had engaged in conduct that created a hazard.