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

Secretary of Labor, Complainant, v. Sunland Construction, Inc., Respondent.	OSHRC Docket No.: **12-0486**

Appearances:

Jeremy K. Fisher, Esquire
U.S. Department of Labor, Atlanta, Georgia
For the Secretary

Melissa A. Bailey, Esquire and Tressi L. Cordaro, Esquire
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For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (Act). On August 12, 2011, the Occupational Safety and Health Administration (OSHA) inspected a worksite of Sunland Construction, Inc. (Respondent or Sunland) at Newnan, Georgia. On December 30, 2011, OSHA issued a two-item willful citation to Sunland with a total proposed penalty of $140,000.00. The citation items allege Sunland violated the requirements for safe egress from a trench and for cave-in protection while employees were working in a trench. Sunland filed a timely notice of contest, bringing this matter before the Commission. A hearing was held in Atlanta, Georgia, on October 4 and 5, 2012. The parties filed post-hearing briefs on January 7, 2013.

Jurisdiction

The parties stipulated that Sunland is an employer within the meaning of the Act and that the Commission has jurisdiction over the matter (Tr. 8). On this basis, the undersigned finds that at all relevant times Sunland was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. The undersigned also finds that the Commission has jurisdiction over the parties and subject matter in this case.

Background

The OSHA Inspection

Sunland is a pipeline construction company which operates nationwide (Respondent's Brief, p. 6). At the time of the inspection, Sunland was installing a high-pressure gas line in a trench near Fischer Road in Newnan, Georgia (Tr. 23-24). Sunland had been at the Newnan worksite for three to four months; it had approximately 77 employees working at the site (Tr. 78). The trench at issue was the third it had excavated at the site (Tr. 60).

OSHA began an inspection at the site in response to a complaint that employees were working in an unprotected trench (Secretary's Brief, p. 2). The OSHA Compliance Officer (CO) arrived at the site just after 10:00 a.m., on August 12, 2011 (Tr. 22). Sunland's site safety coordinator Bill Elliott met the CO upon his arrival at the site (Tr. 23-24). As they were speaking, the CO observed two employees working in a trench which was 400 to 600 yards away (Tr. 24-25, 95). From that distance, it appeared to the CO that the trench was steeper than 45 degrees and not properly sloped (Tr. 29). Using the zoom lens on his video camera, the CO video recorded the two employees working around a pipe in the trench (Tr. 27-28; Exh. C-1). These employees were identified as Monroe Teems and Keweecise Gallaspy (Tr. 243-44).

After recording the employees, the CO walked over to the trench with Elliott. Dennis Nichols, Sunland's site superintendent (Superintendent) met them beside the trench (Tr. 23, 31). By then, the two employees had exited the trench; the CO did not see them exit the trench (Tr. 32). The CO observed sandbag "pillows" along the bottom of the pipeline in the trench and at two locations across the trench where the sandbags divided the trench into three separate areas (Tr. 42-43, 29; Exh. C-2). The CO saw no ladder, stairs, or ramp for egress in the area where the employees had been working (Tr. 50-51, 59; Exhs. C-6, C-7). With Nichols standing next to him, the CO measured the depth and the angle of the trench's south wall, the area where he believed the employees had just been working. The CO measured the depth at 5 feet 10 inches

(Tr. 33-34; Exhs. C-1, C-2). He measured the lower 2 1/2 feet of the wall and found it was sloped at 70 degrees; he found the upper part of the wall was sloped at 65 degrees (Tr. 38-41). The CO did not measure or observe other areas of the trench (Tr. 92-93, 100). The CO testified that later, during a deposition, he discovered that the employees were actually working in a different area of the trench, in Area Three above TB-2, as described *infra* (Tr. 86, 92).

The CO interviewed Teems and Gallaspy, the two employees who had been in the trench (Tr. 71-73). According to the CO's testimony, Teems said they never used ladders in a trench, and Gallaspy said he did what he was told because he needed the job[1] (Tr. 71-73). The CO also interviewed the competent person and foreman (Foreman) for this trench crew[2] (Tr. 64). The CO wrote down the Foreman's answers and then had him sign the statement (Tr. 64; Exh. C-8). In response to the question of how employees would exit the trench, the Foreman's recorded answer was that the employees could get out of the trench by "jump[ing] up it's only three [feet] and then walk up the breakers" [sic] (Secretary's Brief, p. 9; Exh. C-8 at 3).

Based on his measurements and observations, and the employees' interviews, the CO recommended the issuance of the willful citation to Sunland (Tr. 83).

The Trench

The trench at the Newnan site had three distinct work areas, referred to here as Areas One, Two, and Three. Exhibit R-1 is a photograph that illustrates these three areas.[3] Exhibit R-1 shows a pipeline in an open trench with two sandbag trench "breaks" that extend across the pipeline (Tr. 164). At the top of Exhibit R-1 is an "over-bend" in the trench; at the bottom of Exhibit R-1 is a "bell-hole." The two sandbag trench breaks are between the over-bend and the bell-hole areas of the pipeline's trench. Each trench break consists of sandbag "pillows" placed across the pipeline "to keep the water from . . . washing the cover off of it in the years to come" [4] (Tr. 164). The trench break was built by stacking sandbags up between the pipe and the side of the trench and then over the pipe, forming a sort of wall or "break" across the trench (Tr. 164).

[1] Neither employee testified at the hearing; nor did the CO take notes regarding what the employees told him during the inspection (Tr. 110-14).

[2] The Foreman had been in his position with Sunland for about three years (Tr. 281; Exh. C-8).

[3] Both parties utilized Exhibit R-1 during the hearing and marked on it various items pertinent to this matter. When referring to Exhibit R-1, the "top" and "bottom" means the top and bottom of the photograph itself. The pipeline runs from the top to the bottom of Exhibit R-1. The undersigned notes that the length from one end of the trench to the other was not measured; further, the testimony as to the length of parts of the trench varied. It is therefore not possible to come to a reasonable conclusion regarding the actual length of the open trench.

[4] The Foreman testified the pillows were about 18 inches in size (Tr. 297). From photographs in the record, the undersigned notes they are rectangular in shape and appear several inches thick (Exhs. C-4 and R-4).

Sandbags are also used as cushion or "filler" under the pipe to prevent gaps between the pipe and the bottom of the trench (Tr. 296). The over-bend is the area where the pipeline changes elevation, resulting in a shallower trench in that area (Tr. 177). The bell-hole is the area which is dug deeper than the rest of the trench to facilitate a crew's welding of a "tie-in point" in the pipeline[5] (Tr. 163-64).

In Exhibit R-1, the bell-hole area is at the bottom of the pipeline, and the "first" trench break ("TB-1") is above the bell-hole area; the "second" trench break ("TB-2") is 20 to 30 feet above TB-1. The over-bend is above TB-2 and is shown near the top of Exhibit R-1 (Tr. 43). Area One extends from the bottom of the pipe up to just below TB-1. Area Two is the area of the trench extending from TB-1 up to just below TB-2 (Tr. 43). Area Three extends from TB-2 up to the over-bend area (Tr. 86, 178, 196, 198; Exh. R-1). Area Three is where the employees were video recorded in the trench; when the video was taken, they were building TB-2. The CO acknowledged that he took no measurements in this area (Tr. 100). Rather, he measured the trench's depth and slope in Area Two, just above TB-1 (Tr. 87). The undersigned finds much of the CO's recollection of the details of his inspection to be vague.

DISCUSSION

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more 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. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

Citation No. 1, Item 1

This item alleges a willful violation of 29 C.F.R. § 1926.651(c)(2), which states:

> (2) *Means of egress from trench excavations.* A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees.

There is no dispute that employees were working in the trench just above TB-2 in Area Three, at the time the CO video recorded them. There also is no dispute there was no stairway, ladder, or ramp for egress from the trench when the CO video recorded the employees. Therefore, violation of the terms of the standard and employee exposure are not at issue. The

[5] A "tie-in" is an area of the pipeline where the crew welds, x-rays, sandblasts, and coats the weld (Tr. 164).

other facts relating to this citation item, however, are in dispute. The evidence in this regard is set out below.

Depth of the Trench

The Foreman testified the area of a bell-hole is typically dug to 8 feet to allow room for the welding (Tr. 245). Superintendent Nichols testified the bell-hole area would generally be about 2 feet deeper than the area where the CO measured. TB-2, further from the bell-hole and closer to the over-bend, would have been a "little shallower" than the area measured by the CO, but Nichols did not know by how much (Tr. 198-99).

As noted above, the CO measured the trench depth just above TB-1 in Area Two to be 5 feet 10 inches. While he did not measure above TB-2, his video recording shows the trench wall to be at or above the top of an employee's head (Exh. C-1). The CO testified the employee's height was about 5 feet 11 inches, which Sunland did not dispute (Tr. 118). Also, the pipe in the trench was 3 feet in diameter with sandbags below it and stacked on top of it (Tr. 200). Based on the record, the undersigned finds that the area where the employees were working was over 5 feet deep.

Inspection Day

On the day of the inspection, Superintendent Nichols held a routine safety meeting with the Sunland crews between 6:45 a.m. and 7:00 a.m. (Tr. 162). After this meeting, the Foreman held a pre-job briefing with his crew to discuss that day's work, which was documented on an Authorization to Work (ATW) form (Tr. 237). The Foreman's crew began work between 7:30 and 8:00 that morning (Tr. 240). The Foreman testified he told Teems and Gallaspy to do what was needed to finish installing the sandbags in the trench (Tr. 239, 304). The Foreman then walked down to the bell-hole in Area One (200 to 300 yards away) to supervise the employees who were doing a welding tie-in[6] (Tr. 239).

The Foreman testified that a little while later he walked to where Teems and Gallaspy were assigned to work and found they had not started building the trench break because they did not have any sandbags. The Foreman then took a pallet of sandbags to the area near TB-2 (Tr. 284-86). He testified he did not remind them or tell them to put a ladder in the trench because he believed they were "pretty good" about putting ladders in the trench (Tr. 267). He also testified

[6] Testimony varied regarding the distance from TB-2 to the tie-in point in the bell-hole area (Secretary's brief, p. 14). Eric Cook, a labor foreman, testified it was about 150 yards, while Nichols thought it was 400 yards (Tr. 186, 220).

he felt he did not need to closely supervise the sandbag work because they had been doing this work for several months (Tr. 339-340). According to the Foreman he had worked with Teems and Gallaspy for "several years" (Tr. 243).

Nichols testified a welding foreman called him that morning about a car driving by the worksite which could be that of an OSHA inspector (Tr. 166). Nichols called the Foreman to let him know an OSHA inspector was on site and to "make sure all of his ducks were in a row" (Tr. 167, 242). Nichols then drove his truck a mile to the work area, which took about ten minutes (Tr. 167). The Foreman testified that after receiving the call from Nichols, he walked from the bell-hole area to the area where Gallaspy and Teems were working, just above TB-2 (Tr. 242). The Foreman testified he "told [the two employees] twice to get out of the ditch" and he then looked up and could see the OSHA CO standing by the road (Tr. 243-44). He also testified that when he saw there was no ladder, he told the employees to get out of the trench, OSHA was on site and "we have no egress" (Tr. 243). The Foreman stated that after he told them to get out of the trench, they "crawled on top of it and they stepped out" (Tr. 289). He further stated he did not put a ladder in the trench because by the time he told them to get out, "they just jumped out and up on the sandbags" (Tr. 290). Some of the Foreman's testimony conflicted; for example, he said he had to tell the employees several times to get out, but he also said they jumped out so quickly he did not have time to put in a ladder (Tr. 244, 290-91, 320).

Nichols testified sandbags were placed in the trench by employees, not with equipment (Tr. 191-92). He further testified that for a trench break, four or five bags were stacked on top of the 3-foot-diameter pipe with sandbags under the pipe (Tr. 200). The Foreman testified it was common to build a trench break without entering the trench (Tr. 235). However, he also testified that periodically an employee would put one foot on the pipe in the trench, with the other on the trench wall, and then throw the sandbags in (Tr. 234). According to the Foreman, sometimes an employee had to get in the trench to rearrange or "fix" the sandbags (Tr. 332). Although Sunland's policy required a ladder for egress when standing on the bottom of the trench, the Foreman testified a person could get out of the trench using the trench breaks, pipe and sandbags, which was safer than a ladder (Tr. 276-77). He noted "[y]ou just jump up and like you're getting out of a swimming pool." (Tr. 277).

Despite this testimony, the Foreman claimed he was "surprised" the employees were standing in the trench to build the sandbag break (Tr. 303). He conceded, however, that at times

employees would need to enter the trench to rearrange or "fix" the sandbags (Tr. 332). He also conceded the CO's video recording depicted an employee "stuffing sandbags underneath the pipe." (Tr. 294). The Foreman's testimony about being "surprised," therefore, would seem to be an assertion that what the CO videoed was not the normal practice when building trench breaks.

Credibility Determination

The undersigned observed the Foreman's demeanor on the witness stand. While some of his testimony seemed credible, some was not, such as his testimony that a trench break could be built simply by standing on the side of the trench and throwing in the sandbags. Further, parts of his testimony seemed vague or ambiguous, and some of it was contradictory.

Based on these observations, the undersigned credits the Foreman's testimony where it is supported by other evidence in the record; otherwise, his testimony will not be credited. In view of this credibility determination, the undersigned finds that the two employees were standing in the trench to build the trench break and that this was the normal practice when employees performed such work.

Applicability of the Standard

Based on the aforementioned findings, the undersigned finds that two Sunland employees were working in a trench which was over 5 feet deep at the time of the inspection. As such, the standard applies, and a safe means of egress was required.

Sunland argues the configuration of the sandbags in the trench provided a safe means of egress (Respondent's Brief, p. 2). The Foreman testified although he knew it was Sunland's policy to use ladders, he felt using sandbags to climb out was safer (Tr. 277). Sunland offered an expert to support its position that the sandbags provided a safe means of egress.[7] The expert opined the use of sandbags for egress was safe, and possibly safer than a ladder. However, his testimony shows he did not observe any work at Sunland's worksite, and he did not explain how the sandbags in the cited trench were arranged to provide egress. His opinion seemed to be based on nothing more than conjecture, and he provided no documents or other information beyond his "25-plus years of experience" as a certified safety professional to support his

[7] The expert testified regarding geotechnical engineering, the proper way to measure a trench, and the quality of Sunland's trenching and excavation safety program (Tr. 431). Most of the expert's testimony was related to his analysis of Exhibit R-30, a photograph of the trench at issue. From Exhibit R-30, he had calculated the angle of the trench's slope (Tr. 431, 433-447, 464-87; Exh. R-30). The undersigned finds the expert's testimony unpersuasive.

position[8] (Tr. 491). In sum, he offered nothing to show how he acquired this knowledge, and he failed to establish that his opinion was based on any recognized or reliable standards, principles, or methods. *See generally, Daubert v. Merrill Dow Pharm.,* 509 U.S. 579 (1993) (*Daubert*).[9]

The undersigned finds the record does not support Sunland's position that the sandbags in the trench provided safe egress. As one court aptly stated, the regulation "only allow[s] employers to choose from a limited universe of acceptable procedures, not to jury-rig convenient alternatives and impose them on an imperiled work force." *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997), *aff'g* 17 BNA OSHC 1825 (No. 95-0322, 1996); *see also Conie Constr., Inc. v. Sec'y*, 73 F.3d 382, 384 (D.C. Cir. 1995), *aff'g* 16 BNA OSHC 1870 (No. 92–0264, 1994) (holding that an employer's alternatives are not unlimited).

In addition, OSHA has stated the purpose of the egress requirement is to provide "a means of egress that permits a quick and easy means of escape in case of an emergency." *See* OSHA's May 11, 2004 Letter.[10] An interpretation by the Secretary is given deference when it is reasonable and "sensibly conforms to the purpose and wording of the regulation[ ]." *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069 (No. 96-0563, 1997) (quoting *Martin v. OSHRC*, 499 U.S. 144, 151 (1991)). The preamble to the excavations standard provides that the purpose of the egress requirement is to "provide employees working down in a trench with a safe means of escape from the trench in case of an emergency." 54 Fed. Reg. 45,918 (Oct. 31, 1989). This point is further clarified in the interpretation letter, which states the egress method cannot have its own hazards (slipping, tripping) and must provide an escape from the trench excavation that is "quick and easy." The Secretary's interpretation is reasonable, and, viewing the record as a whole, the undersigned finds safe egress was not provided for the employees working in the trench. The Secretary has shown the terms of the standard were violated and employees were exposed to the violative condition.

[8] When asked why he thought it was safe to use sandbags for egress, he replied: "My past experience – I don't know of an epidemic of people falling off of sandbags. It's common practice." (Tr. 454-55). This opinion, without more, is not a credible explanation as to how he reached his conclusion regarding using sandbags for egress.

[9] "[T]he word knowledge connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." *Daubert*, 509 U.S. at 590-91 (1993) (citations omitted, quotation marks omitted).

[10] The May 11, 2004 letter of interpretation to Engelken can be found on OSHA's website as follows: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24839.

Knowledge

The Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). "The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citation omitted), *petition for review denied*, 255 F.3d 122 (4th Cir. 2001). Knowledge of a hazard may be established where the violative condition and the employees are in a conspicuous location or are otherwise readily observable. *Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88-1720, 1993) (*Hamilton*), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994).

Here, Sunland had both actual and constructive knowledge its employees were working in a trench without safe egress. The Foreman told the employees to get out of the trench because OSHA was on site and "we have no egress" (Tr. 243). This shows actual knowledge of the foreman that the employees were working in the trench without a safe means of egress. In addition, the undersigned finds that Sunland had constructive knowledge of the violation. The record shows the Foreman assigned the task of building the sandbag break to Teems and Gallaspy, and he delivered the sandbags to them in their work area. The Foreman could have reminded the employees at that time to put a ladder into the trench, and he could have inspected the area while they were working to ensure they had a safe means of egress. Further, the employees were in a readily observable location, as demonstrated by the video recording, and the Foreman was working nearby, at the other end of the same trench. The Foreman could have known, with the exercise of reasonable diligence, the employees had no ladder in the trench for safe egress. His knowledge is imputed to Sunland. The undersigned finds the Secretary has established her *prima facie* case.

Unpreventable Employee Misconduct

Sunland argues that if there was a violation, it was due to unpreventable employee misconduct. Unpreventable employee misconduct is an affirmative defense that must be proven by the employer. *American Engineering & Development Corp.*, 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012) (AEDC). To prove this defense, "an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively

enforced the rule." *Schuler-Haas Electric Corp*., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006) (citations omitted).

An employer can rebut the Secretary's showing of knowledge if it can prove it had a "thorough and adequate safety program which is communicated and enforced as written." *Hamilton*, 16 BNA OSHC at 1090 (citations omitted). For a safety program to be effective, it is necessary to include reasonable supervision to detect violations of work rules. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999) (citations omitted). Sunland argues the Secretary cannot show constructive knowledge because it had a strong safety program which included diligent monitoring of worksite safety (Respondent's Brief, p. 55).

Sunland points to *Texas A.C.A.* to support its argument that its safety monitoring program was adequate (Respondent's Brief, p. 58). *Texas A.C.A*, 17 BNA OSHC 1048 (No. 91-3467, 1995). There, the Commission found the employer did have "an established program for inspection" and that the Secretary did not present evidence to show "a lack of reasonable diligence" by the employer. *Id.* at 1050-51. However, *Texas A.C.A.* also provides "an employer is also chargeable with knowledge of conditions which are plainly visible to its supervisory personnel." *Id.* at 1050, n.4 (citations omitted). The Commission also has held "reasonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000) (*SWBT*) (citations omitted), *aff'd*, 277 F.3d 1374 (5th Cir. 2001).

Sunland asserts it is not required to "continuously supervise employees" or detect every instance of a hazard (Respondent's Brief, p. 55). *See Davis H. Elliott Constr. Co.*, 21 BNA OSHC 1320, 1323 (No. 04-0836, 2006) (ALJ). Here, the Secretary does not assert Sunland needed to continuously watch the employees that morning. Instead, the Secretary asserts the Foreman did not take reasonable actions based on Sunland's safety program and his regular duties.

Sunland presented various items of evidence regarding its safety program. For the reasons that follow, the undersigned finds that Sunland did have an adequate rule for safe trench egress that it communicated to its employees. However, it did not effectively implement the safety monitoring and disciplinary aspects of its program.

Sunland's Safety Program

Sunland's program included an employee handbook, annual training, new-hire orientation training, daily safety meetings, daily work (ATW) forms, trench permits, management safety audits, and a peer-based job behavior observation (JBO) program[11] (Exhs. R-5, R-7, R-10 through R-28). Sunland notes that with its safety program, it takes several steps to ensure worksite compliance through its ATW forms, trench permits, management audits and the JBO program. Sunland's Director of Safety, Ron Oakley, testified that every employee at orientation received an employee handbook and reviewed a 34-point checklist of safety items. Both the handbook and checklist include guidelines for trench safety, including egress (Tr. 351, 370-71; Exh. R-18). Further, Nichols testified he held a safety meeting each morning (Tr. 183).

The ATW form requires the foreman to determine and document the anticipated tasks and hazards for the day and the safety precautions or equipment needed (Exh. R-7). On the day of the inspection, the Foreman completed an ATW form, where he noted "excavations/trenching" and "backfill & sandbags" among the expected tasks for that day. He did not, however, note the need for a ladder or other safe egress from the trench on the ATW form (Tr. 238-39; Exh. R-7).

Also, the Foreman did not complete a trench permit that day, which would have included an evaluation for trench egress. One of the permit's items requires the foreman to verify that an excavation was safe for employees to work in – "Is there access/egress within 25 feet of each worker?" (Exh. R-11). Nichols testified Sunland's policy required the foreman to complete a trench permit before employees worked in a trench (Tr. 185-86). However, Nichols also testified the Foreman did not always fill out a trench permit or fill it out completely (Tr. 203-05, 207).

Sunland submitted four management audits conducted at the Newnan worksite from May through July 2011. A safety audit consisted of a site walk-through by senior corporate management, along with the area and site manager, the job site superintendent, and the foreman (Tr. 390-91; Exh. R-26). The audits included a review of the excavations at the worksite (Exh. R-26). Sunland also presented evidence of its JBO program, which promotes safety through workers observing the behavior of co-workers.

[11] Sunland also presented Exhibit R-17, its excavation procedure; however, because the procedure was dated January 2012, which was after the date of the inspection, the undersigned has not considered it in this decision.

In addition, Sunland's safety program includes a disciplinary component. The disciplinary program provides "depending on the severity and frequency of a safety violation, an employee may be: immediately discharged; suspended; or given a written warning" (Exh. R-27). Sunland provided evidence of seven disciplinary actions – three terminations and four written warnings (Exh. R-28). One was for hitting a power line, another had no description, and five of the actions were motor vehicle (DOT) incidents. None of these disciplinary actions relate to excavation safety. Further, of the seven actions, only one, a DOT violation, occurred prior to the date of the inspection (Exh. R-28). Nichols testified that after the OSHA inspection he verbally disciplined both Gallaspy and Teems for not using a ladder (Tr. 173). Nichols also testified that after the inspection, the Foreman was suspended without pay for a week due to leadership issues and inaccurate paperwork (Tr. 181-82).

Sunland asserts its management audits provide adequate monitoring of its safety rules. The undersigned disagrees and finds Sunland's management audits were insufficient to discover daily safety hazards on the worksite. In *SWBT,* the Commission found worksite visits conducted by managers occasionally and at no specific frequency were inadequate when there was no evidence the visits related to "enforcing the competent person's obligation to perform trench inspections." *SWBT,* 19 BNA OSHC at 1099.

Sunland also asserts its progressive disciplinary policy for safety rule violations demonstrates it has a strong safety program (Respondent's Brief, p. 59; Exh. R-27). The record in this case, however, does not show that discipline was carried out according to Sunland's policy. As noted above, Gallaspy and Teems were verbally disciplined after the inspection for not using a ladder. However, verbal warnings are not among the types of discipline listed in Sunland's written policy. As the Commission has noted, a lack of written warnings can indicate a company's work rules are not effectively enforced. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997).

Further, as set forth herein, the Superintendent knew the Foreman did not always turn in or properly complete the paperwork he was required to submit. Nonetheless, no evidence was adduced to show Sunland's management addressed this problem before the OSHA inspection or that it took any steps to ensure the Foreman was following its safety policy. Although the Foreman was disciplined after the inspection, the record fails to establish the discipline was for his allowing the employees to work in the trench without a ladder.

Finally, as indicated above, only a single DOT-related infraction resulted in discipline before the OSHA inspection; the other six infractions were after the OSHA inspection. Commission precedent allows consideration of both pre- and post-inspection discipline. *See American Eng'g & Dev. Corp.,* 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012) (*AEDC*) (finding that one instance of delayed discipline two months after the inspection did not undermine its otherwise strong enforcement policy). However, post-inspection discipline is not a substitute for an effective enforcement program prior to the inspection. *See Jersey Steel Erectors,* 16 BNA OSHC 1162, 1165 n.3 (No. 90-1307, 1993), *aff'd in unpublished opinion,* 19 F.3d 643 (3d Cir 1994) (termination of foreman following OSHA inspection did not make up for ineffective enforcement policy prior to inspection).

In *AEDC*, the Commission weighed the evidence of the company's extensive pre-inspection discipline (50 to 70 written warnings for safety violations in the prior year) against one incident of delayed discipline after the inspection. *AEDC,* 23 BNA OSHC, 2093, 2097 (No. 10-0359, 2012). It found that the employer's "pre-inspection enforcement efforts were extensive" and that the employer did adequately enforce its safety rules. *Id*. at 2097.

Here, despite Sunland having a well-written disciplinary policy, there is evidence of only one disciplinary action being imposed prior to the inspection. Further, most of the actions were DOT-related violations, not general worksite safety issues. Sunland introduced no evidence showing either before or after the OSHA inspection it had subjected an employee to termination, suspension, docked pay or written reprimand for failure to comply with an excavation-related safety rule. The two employees in the trench were verbally warned after the inspection, but oral discipline is not part of Sunland's written policy. The record is absent of a written warning given to these employees consistent with its disciplinary policy. Further, as set forth above, the record does not show that the Foreman's discipline related to the employees being in the trench without a ladder. Therefore, the undersigned finds Sunland's safety program, as a whole, was insufficient to rebut the Secretary's *prima facie* showing of knowledge. Sunland did not effectively implement either its safety monitoring program or its disciplinary program. Sunland's unpreventable employee misconduct defense accordingly fails, and this item is affirmed.

Classification of the Violation

The Secretary classified this violation as willful. A willful violation is done "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2140 (No. 04-0475, 2007) (*Burkes*) (quoted cases omitted). A willful violation differs from a serious violation by a heightened awareness and either conscious disregard or plain indifference. *Williams Enter., Inc.*, 13 OSHC BNA 1249, 1256 (No. 85-355, 1987). "The Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *Propellex Corp*., 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999) (citations omitted).

The Secretary argues that willful conduct by a supervisor is a "*prima facie* case of willfulness against his or her employer." (Secretary's Brief, p. 31). *See V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994) (*VIP*). In *VIP*, the Commission found the superintendent knew fall protection was needed and that employees were still exposed to a 25-foot fall for four days. *Id.* The cited case, however, is not an apt comparison to the instant case.

The Secretary has not adduced sufficient evidence to establish that the Foreman's conduct in this case was willful. The record merely shows the Foreman did not faithfully attend to his duties that day; it does not establish that he acted with plain indifference to employee safety or that he acted with conscious disregard of the requirements of the Act. The undersigned finds the Foreman was simply negligent in performing his expected duties that morning; therefore, a willful classification is not appropriate. *See, e.g., J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2210 (No. 87-2059, 1993) (*J.A. Jones*).[12] The instant case compares favorably with the Commission's decision in *Burkes.* *See Burkes*, 21 BNA OSHC 2136 (where employer's superintendent did not enter the pit to conduct a hazard assessment). There, the Commission found that while the superintendent's actions established constructive knowledge, they did not rise to the level of plain indifference to employee safety. *Id.* at 2141.

As shown herein, Sunland has a comprehensive training and safety program with adequate rules for trench safety. This militates against the finding of a willful classification.

[12] Multiple circuits recognize the distinction between mere negligence and a characterization of willful. *See generally, e.g., AJP Const., Inc. v. Sec'y*, 357 F.3d 70, 75 (D.C. Cir. 2004); *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000); *McLaughlin v. Union Oil Co.*, 869 F.2d 1039, 1047 (7th Cir.1989); *Georgia Electric Co. v. Sec'y*, 595 F.2d 309, 318 (5th Cir. 1979).

The undersigned finds that the Secretary has not established that the violation at issue was committed with conscious disregard of the Act or with plain indifference to employee safety. This item is therefore affirmed as a serious violation.[13]

Citation No. 1, Item 2

This item alleges a willful violation of 29 C.F.R. § 1926.652(a)(1), which states:

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

Applicability of the Standard

The parties have stipulated that the soil in the trench was Type B, which required the walls to be sloped at an angle no steeper than 45 degrees (Tr. 74). *See also* 29 C.F.R. § 1926.652(b)(2), App'x at Table B-1. As Sunland points out, in the area where the CO video recorded the employees working (Area Three above TB-2), no measurements were taken (Respondent's Brief, pp. 3-4). Sunland asserts that Area Three would differ significantly in depth from the area the CO measured for two key reasons: (1) it was much further away from the deeper bell-hole section in Area One, and (2) it was next to the over-bend area, which was dug to a shallower depth (Respondent's Brief, p. 4). However, as found above, the record establishes that the trench was over 5 feet deep where the employees were working. For this reason, the standard applies.

Violation of Terms of the Standard

With respect to the degree of the slope of the trench walls in the area where the employees were working, the Secretary presented no evidence to establish the slope was similar to the area of the trench where the CO took his measurements. The Secretary, in his brief, argues employees were exposed to the cited hazard in the area the CO measured (Secretary's Brief, p. 70). However, there is no evidence as to where in the trench the employees would have been standing to build TB-1; it could have been in Area One or in Area Two (Tr. 86-91). Further, the Secretary presented no evidence beyond the CO's testimony that he thought the employees had built TB-1 that morning – "I think he indicated to me they had started – I don't know if he said

[13] The serious nature of the violation is discussed in the penalty determination part of this decision, *infra*.

that particular trench, but I think he told me that they had started working that day" (Tr. 71). The CO's belief in this regard, without more, is not sufficient to show exposure in the area of the trench the CO measured. The Secretary's argument is rejected.

The Secretary points out that Sunland did not know the angle of the slope in the area where the employees were working (Secretary's Brief, pp. 76-77; Tr. 306). However, it is the Secretary's burden to show the slope of the trench was not in compliance with the standard's requirements. The Secretary also asserts he "believes that the area of the trench near the second break had walls even steeper than those measured by" the CO (Secretary's Brief, p. 78). The Secretary asks the undersigned to simply view the photographs in Exhibits C-1 through C-5 to see that the trench wall "is plainly not sloped at 45 degrees" (Secretary's Brief, p. 78). The undersigned declines this request, and, in so doing, notes the Secretary himself argued Sunland's expert could not determine the angle of a trench from a photograph. The undersigned agrees with the Secretary in this regard. *See* footnotes 7 and 8.

The Secretary has failed to meet his burden of proving that Area Three of the trench, where the employees were working, was not properly sloped for Type B soil. In light of this failure, the undersigned finds that the Secretary has not established a violation of 29 C.F.R. § 1926.652(a)(1). Therefore, Item 2 of Citation No. 1 is vacated.

Penalty Determination

Item 1 has been affirmed as a serious violation. In assessing penalties, the Commission is required to give due consideration to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *See* § 17(j) of the Act. Gravity is generally the primary factor in the penalty assessment. *See J.A. Jones*, 15 BNA OSHC at 2214.

A violation is classified as serious under § 17(k) of the Act if "there is substantial probability that death or serious physical harm could result." Commission precedent requires a finding that "a serious injury is the likely result should an accident occur." *Pete Miller, Inc.,* 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000) (citations omitted). Further, the Commission has recognized that "the likelihood of death or severe injury to employees in a collapsing trench is also high." *Calang Corp.,* 14 BNA OSHC 1789, 1794 (No. 85-0319, 1990). The undersigned finds that a serious injury would have been the likely outcome if there had been a need for

immediate egress due to the collapse of a trench wall. The maximum penalty for a serious violation is $7,000.00. *See* 29 U.S.C. § 666(b).

The CO testified Sunland had a total of over 250 employees. Sunland therefore did not qualify for any reduction in the penalty for size (Tr. 83-84). While Sunland's safety policy is evidence of good faith, that factor is offset by the company's prior history of OSHA violations. There is thus no reduction for good faith or history. Based on all these factors, the undersigned concludes that a penalty of $7,000.00 is appropriate for Item 1. Therefore, a penalty in the amount of $7,000.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that:

1. Item 1 of Citation No. 1, alleging a violation of 29 C.F.R. § 1926.651(c)(2), is AFFIRMED as serious and a penalty of $7,000.00, is assessed.

2. Item 2 of Citation No. 1, alleging a violation of 29 C.F.R. § 1926.652(a)(1), is VACATED and no penalty is assessed.

SO ORDERED.

/s/
Sharon D. Calhoun
Administrative Law Judge

Date: July 16, 2013