



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

K.M. DAVIS CONTRACTING, INC.,

Respondent.

OSHRC Docket No. 12-0643

**ON BRIEFS:**

Anne R. Ryder, Attorney, Office of the Solicitor; Charles James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC  
For the Complainant

Andrew N. Gross, Esq.; General Counsel, H B Training & Consulting, LLC, Lawrenceville, GA  
For the Respondent

**DECISION**

Before: MACDOUGALL, Acting Chairman; and ATTWOOD, Commissioner.

**BY THE COMMISSION:**

The Occupational Safety and Health Administration inspected a worksite where K.M. Davis Contracting, Inc. was engaged in an underground water line project for the City of Marietta, Georgia. At the time of the inspection, a KMD crew was installing vertical PVC pipes in an excavation that closely abutted a highway. Following the inspection, OSHA issued KMD a one-item citation alleging a willful violation of 29 C.F.R. § 1926.652(a)(1) for failing to protect an employee working in an excavation from cave-ins.<sup>1</sup> Former Administrative Law Judge Ken S. Welsch affirmed the violation, but characterized it as serious, and assessed a penalty of \$5,000.

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<sup>1</sup> The cited provision states that “[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system . . . .” 29 C.F.R. § 1926.652(a)(1).

The only issue on review is whether the judge erred in characterizing the violation as serious rather than willful.

We are divided as to whether the record before us is sufficient to establish that the violation was willful. *Schuler Haas Elec. Corp.*, 21 BNA OSHC 1489, 1495 (No. 03-0322, 2006); *see also Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1611 (No. 87-2007, 1992). To resolve this impasse, we agree to vacate the direction for review, thereby allowing the judge's decision to become the final appealable order of the Commission, with the precedential value of an unreviewed administrative law judge's decision. *See, e.g., Action Elec. Co.*, 25 BNA OSHC 2120, 2121 (No. 12-1496, 2016), *appeal docketed*, No. 16-1579 (11th Cir. Sept. 1, 2016); *Cranesville Aggregate Cos.*, 25 BNA OSHC 2001, 2002 (No. 09-2011, 2016), *appeal docketed*, No. 16-2055 (2d Cir. June 17, 2016); *Texaco, Inc.*, 8 BNA OSHC 1758, 1760 (No. 77-3040, 1980) (consolidated); *Rust Eng'g Co.*, 11 BNA OSHC 2203, 2205 (No. 79-2090, 1984); *Safeway, Inc.*, 20 BNA OSHC 1021, 1023 (No. 99-0316, 2003), *aff'd*, 382 F.3d 1189 (10th Cir. 2004); *Timken Co.*, 20 BNA OSHC 1070, 1072 (No. 97-0970, 2003). *See also* 29 U.S.C. §§ 659(c), 660(a)-(b), 661(i).

Accordingly, the direction for review is vacated. The separate opinions of the two Commission members follow.

SO ORDERED.

/s/ \_\_\_\_\_  
Heather L. MacDougall  
Acting Chairman

/s/ \_\_\_\_\_  
Cynthia L. Attwood  
Commissioner

Dated: April 26, 2017

## Separate Opinion of Acting Chairman MacDougall

MACDOUGALL, Acting Chairman:

The City of Marietta, Georgia engaged K.M. Davis Contracting, Inc. to install an underground water line. On August 17, 2011, a KMD crew was working on the project at the site of an excavation that closely abutted a four-lane highway. After happening upon the worksite, an OSHA compliance officer inspected it. On January 18, 2012, OSHA issued KMD a citation alleging a willful violation of 29 C.F.R. § 1926.652(a)(1), which requires employers to protect workers in excavations from cave-ins.<sup>1</sup> The one-day hearing before Administrative Law Judge Ken S. Welsch was held in this matter on June 14, 2012, in Atlanta, Georgia. The judge's decision finding a serious, rather than willful, violation of the cited standard and assessing a penalty of \$5,000 was issued on December 11, 2012. The Commission directed the case for review on January 25, 2013, on the sole issue of whether the judge erred by re-characterizing the violation as serious rather than willful, and briefing by the parties was completed on April 22, 2013.

I set forth those dates to drive home the fact that after the judge's decision and the Commission's direction for review, it has taken nearly four years since briefing on this case was completed to issue this decision—in a case where a remand order would have been appropriate.<sup>2</sup>

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<sup>1</sup> Section 1926.652(a)(1) states: “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.” Paragraph (b) sets forth requirements for “sloping and benching systems,” and paragraph (c) sets forth requirements for “shield systems” and other protective systems. 29 C.F.R. § 1926.652(b), (c).

<sup>2</sup> Given the circumstances, while I feel compelled to highlight the amount of delay in this case, I am hesitant to discuss the reasons for the delay based on deference to the agency's confidential and collegial deliberations and decision-making process. I do not wish for my separate opinion to have a chilling effect on intra-agency discussions. *See McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011) (*citing Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980)) (discussing that intra-agency memoranda are exempt from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), to protect the deliberative process). However, at the same time, I note that open government law as a whole recognizes the value of candor; in particular, it reflects a judgment that decision-makers are accountable for agency decisions. *See Government in the Sunshine Act*, Pub. L. 94-409, § 2, 90 Stat. 1241 (1976) (imposing procedural requirements on agencies to ensure that “the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government”); *see also* H.R. Rep. 94-880, pt. 1, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 2183 (Congress intended

We should seek to do better. The mandate of the Commission is to provide fair and timely adjudication of workplace safety and health disputes between the Department of Labor and employers. *See Dayton Tire v. Sec’y of Labor*, 671 F.3d 1249, 1254 (D.C. Cir. 2012) (“The Commission does a disservice to both employers and employees when it fails to clarify health and safety standards promptly.”); *see also* 5 U.S.C. § 555(b) (providing for prompt disposition of agency proceedings); *but see NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1970) (an agency “is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers”). In this case, the lengthy and unreasonable delay has done a great disservice to the parties since the judge failed to make necessary findings and to resolve conflicting testimony on a critical issue—whether the judge erred

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that, through the Sunshine Act, agencies become accountable directly to the people). In my opinion, within a multi-member agency where its members may disagree, and in particular where remand may be deliberated by one or more members, that should be taken into account without delay. Admittedly, it appears that during the history of the agency, some Commission decisions have issued after a “kalpa”—a Sanskrit word meaning an eon or a long period of time—a problem, as thoroughly discussed by my colleague, which is exacerbated by sustained periods of time when the Commission lacks all three members. Thus, I agree with my colleague that the Commission’s lack of a full complement can interfere with its statutory mandate. However, this is not one of those times.

Truth be told, despite my colleague’s focus in her separate opinion on the amount of time the Commission lacked a full complement of commissioners generally and specifically while this case was pending on review (even though the Commission is taking official action on this case without a full complement of commissioners), the speed with which this case proceeded while on review had little to do with the number of commissioners. My colleague’s discussion on this point is nothing more than a red herring or a desire to use this case as a platform for a broader, more appropriately, political discussion. In my view, the delay in this case is due to the Commission’s internal case management system.

This system, not found anywhere in the Occupational Safety and Health Act or Commission regulations and having little to do with the statutory authority of the commissioners or the number of them, currently guides case processing priorities and determines when a given case will be scheduled for consideration; then leading to the potential for a Commission decision. Under this system, despite the completion of briefing in April 2013, this case is only now being decided four years later. While I decline to provide further details out of respect for the agency’s deliberative process, it is this case management system that I believe would benefit from reevaluation and reform to make the Commission’s decisional process more efficient and bring its decision-making more in line with its sole statutory mandate to serve as an administrative court providing fair and expeditious resolution of disputes involving OSHA, employers charged with violations of federal safety and health standards, and employees and/or their representatives.

by re-characterizing the violation of § 1926.652(a)(1) as serious rather than willful. However, given the poor option of remanding a case 4 ½ years after the initial hearing,<sup>3</sup> I would affirm the judge's decision and find based on the record evidence before us that the Secretary has not met his burden to prove that the violation was willful.

### **Factual Background**

On August 17, 2011, a four-man KMD crew was installing vertical PVC pipes (known as “risers”), which involved depositing sufficient soil around the risers to keep them upright while the entire excavation was backfilled, in a portion of the project that abutted the highway. After the compliance officer happened upon the worksite, he stopped, parked his car, and walked over to inspect the worksite. He then introduced himself to KMD's foreman, who was standing at the edge of the excavation and directly above a laborer who was in the excavation. The CO asked the foreman if he knew why OSHA would stop at the site. According to the CO, the foreman replied: “Oh [expletive]. I know it's an illegal hole.” The CO determined that the excavation was approximately 9.5 feet deep where the employee was standing, 17 feet wide, composed of Type C soil,<sup>4</sup> and not sloped or shored.<sup>5</sup>

On review, the Secretary argues that the judge erred in rejecting the violation's willful characterization because the evidence shows that KMD's foreman allowed the laborer to work in the unprotected excavation, even though the foreman knew it violated the OSHA standard, because he wanted to save time and finish the job quickly. While KMD does not dispute that the foreman understood OSHA's cave-in protection requirements and knew that the laborer should not have been working in an unprotected excavation, KMD maintains that the evidence establishes the foreman did not initially realize the laborer had entered the excavation because his attention was

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<sup>3</sup> Judge Welsch retired from the Commission shortly after he issued his decision in this case.

<sup>4</sup> Appendix A to Subpart P (“Excavations”) of Part 1926 categorizes soil and rock deposits into “a hierarchy of Stable Rock, Type A, Type B, and Type C, in decreasing order of stability.” Type C soil is defined as: “(i) Cohesive soil with an unconfined compressive strength of 0.5 tsf (48 kPA) or less; or (ii) Granular soils including gravel, sand, and loamy sand; or (iii) Submerged soil or soil from which water is freely seeping; or (iv) Submerged rock that is not stable; or (v) Material in a sloped, layered system where the layers dip into the excavation or a slope of four horizontal to one vertical (4H:1V) or steeper.” *Id.*

<sup>5</sup> He also observed several trench boxes at the site that were not in use.

directed elsewhere, and when he turned and saw that the laborer had entered the excavation, he began trying to get his attention in order to instruct him to get out. Although KMD concedes that the foreman may have exercised “poor judgment,”<sup>6</sup> KMD argues that an instance of poor judgment during an unanticipated and unplanned sequence of events does not establish a willful state of mind.

Whether the violation at issue here is properly characterized as willful turns largely on how conflicting testimony between the CO and KMD’s employees is resolved. Three KMD employees who were at the worksite at the time of the inspection testified at the hearing—the laborer observed inside the excavation, the foreman at the site, and the operator of an excavator used in the project. Their accounts of the inspection day’s events differ from that of the CO, who was the Secretary’s only witness, on a key factual issue in dispute that relates to the alleged willful characterization—the length of time the laborer was in the excavation. In addressing this issue, the judge made no explicit credibility finding based on demeanor and credited different aspects of each witness’s testimony without explanation.

Specifically, he appears to have credited the CO’s testimony in finding that the foreman was at the side of the excavation the entire time and made no attempt to get the laborer out until the CO’s presence at the excavation.<sup>7</sup> At the same time, the judge apparently credited the

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<sup>6</sup> Since KMD claims that the foreman attempted to remove the laborer from the excavation as soon as he realized the laborer was there, it is not clear—and KMD does not identify—what the foreman did that may have involved or reflected “poor judgment.”

<sup>7</sup> The foreman and excavator operator testified that the foreman was trying to remove the laborer from the excavation the moment his presence was discovered. After a riser being held up by the foreman fell over, the foreman testified that he had focused his attention on the excavator to his left. The foreman intended to direct the excavator operator to pick up the pipe when he turned the excavator back around. While focused on the excavator, the laborer used a ladder to the right of the foreman to enter the trench and, with his back to the foreman, pick up the pipe. When the excavator turned back around to dump the dirt into the excavation, the foreman and the excavator operator both then noticed the laborer in the excavation. According to the foreman, before the CO identified himself, he immediately attempted to get the laborer’s attention to get him out of the excavation, which the foreman described as difficult because the crew could not hear each other over the noise of the excavator and traffic on the adjacent highway. However, the CO testified that the foreman did not attempt to remove the laborer until the CO identified himself and pointed out the violation. The judge appears to have credited the testimony of the CO on this issue when he found: “There is no showing that the foreman attempted to remove the laborer from the excavation prior to the compliance officer’s presence,” and “[t]he laborer . . . was allowed to remain until OSHA initiated the inspection.” However, the judge also credited the foreman for

testimony of the KMD employees in finding that the foreman did not direct the laborer to enter the excavation but that the laborer had entered the excavation of his own accord.<sup>8</sup> After making these findings, the judge stated that the foreman's failure to remove the laborer showed "a lack of good judgment," but he found that the foreman's "apparent attempt to quickly finish the job" was insufficient to establish willfulness. In sum, the judge concluded that "the KMD crew was overtaken by a quick sequence of unexpected events that were neither planned nor in compliance with KMD's written safety program."

However, the judge made no credibility findings that would resolve the conflicting testimony on the issue of how long the laborer was in the unprotected excavation. According to the CO, he was driving home from another inspection when he passed the excavation and noticed an individual working inside it.<sup>9</sup> He claims that he saw two people standing above the excavation

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"attempt[ing] to deal with the unexpected conduct of the laborer." It defies logic to surmise that the judge would credit the foreman for attempting to deal with the unexpected conduct of the laborer if the foreman's actions were compelled by the CO's presence.

<sup>8</sup> KMD personnel consistently testified that the foreman had not instructed the laborer to enter the excavation. The laborer testified that he was not directed to enter the excavation but entered "without thinking" when the riser fell over. The foreman also testified that the laborer went into the excavation of his own accord. When the foreman noticed the laborer in the excavation, he "couldn't believe [the laborer] was in the hole." He went on to testify that "[i]t just shocked me that he was down there." In contrast, the CO testified that the foreman told him during the inspection that he had instructed the laborer to enter the excavation and hold up the fallen riser. Additionally, the CO testified that the laborer told him during the inspection that he had been instructed to go into the excavation by the foreman. The judge credited testimony of the KMD personnel on this issue and found that "[t]he laborer entered the excavation on his own."

<sup>9</sup> There is no particular basis for either crediting or discrediting the CO's testimony on this point, and the judge made no credibility finding on it. The photographs show that the excavation was relatively close to the highway, irregularly shaped, and of uneven depth. The CO was traveling on a highway and was separated from the excavation by at least two lanes of traffic. If the laborer was in the excavation at the time the CO drove by, the laborer's head would have been at least three feet below the surface of the ground and his body partially obstructed from view by the riser, as well as the silt fence put up between the excavation and the highway edge. While it is possible the CO could have seen the laborer in the excavation, it is far from certain. The CO also testified that no one entered or left the excavation while he was gathering his materials from the trunk of his vehicle, and he observed the excavator unload two or three buckets of dirt into the excavation. One might engage in conjecture to stretch this testimony to conclude the foreman must have known the laborer was in the excavation and allowed the excavator to backfill the excavation while the laborer was holding the riser. However, it is a leap to conclude that the CO never took his eyes

and an excavator that was running and moving. The CO stated that he then turned around at the next stoplight, drove back, and parked at a gas station next to the site. After gathering his equipment from the back of his car, the CO walked toward the excavation, taking photographs for about twenty seconds as he approached.<sup>10</sup> The CO introduced himself to the foreman, and the foreman then instructed the excavator operator to “[s]hut it down” and yelled and signaled to the laborer to get out of the excavation. The excavator operator raised the excavator bucket out of the excavation, and the laborer then climbed a ladder out of the excavation. Under questioning by the judge, the CO testified—without explanation—that the laborer was in the excavation for five to ten minutes prior to the moment that he initially saw the laborer in the excavation while driving past.<sup>11</sup> The CO estimated that it then took about five minutes to turn around and park, and another

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off the excavation while he was removing items from his trunk. The laborer could have jumped into the excavation any time the CO took his eyes off the excavation.

<sup>10</sup> My colleague notes, based on her review of the CO’s testimony and the photographs, that “[n]either the foreman nor any other KMD employees appeared to be talking to one another.” On the walk from the car to the excavation, which is depicted in the photographs taken by the CO on his approach, it is true that during this twenty-second time of observation, he did not hear or see the foreman or any other employees attempt to get the laborer out of the excavation. However, my colleague ignores that even the CO recognized, like the KMD employees in their testimony, that it was very noisy at and around the worksite. Indeed, the CO acknowledged that “[i]f they were yelling, I couldn’t hear them. It was loud.” In addition, the photographs provide no insight on this point as none of them depict the foreman’s mouth. Therefore, I am unsure what evidence upon which my colleague relies to determine that the foreman was not instructing the laborer to get out of the trench at the time these photographs were taken.

<sup>11</sup> No explanation is provided by the CO as to why he believed that the laborer was in the excavation for five to ten minutes prior to when he stated he saw him in the excavation. In addition, the judge does not address this five to ten minutes of time. It appears that any reliance on this additional time is a theory based on speculation, not evidence; an inference based on conjecture cannot be used to make a legal determination. As the Supreme Court stated in *Roura v. Gov’t of the Philippine Islands*, 218 U.S. 386, 400 (1910):

[I]n reviewing the action of the court below, we are, of course, confined to the record and the case therein made, and may not, as the result of mistaken suggestions as to the issues and proof, disregard our duty by deciding, not the case as made, but an imaginary one, wherein issues not made and not presented below would have to be supplied, and whereby conjecture and surmise must be indulged to replace the total absence of all proof on a particular subject.

Absent evidence establishing this purported five to ten minutes of time before the CO saw the laborer in the excavation, one might conclude that there was some motivation to pad the amount



two minutes to gather his equipment and walk to the site, and stated that the laborer was in the excavation “maybe less than fifteen minutes.” The laborer testified, however, that he was only in the excavation for “roughly ten to fifteen seconds . . . maybe a little more.”<sup>12</sup> Thus, the amount of time appears to be somewhere between at least fifteen seconds but less than fifteen minutes.<sup>13</sup> The amount of time is important; without a finding on this central issue, further conclusions can only come from indulging in conjecture.

### Discussion

A violation is willful if the employer acted with “an intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.” *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2222 (No. 09-0004, 2014) (consolidated) (quoting *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff’d*, 268 F.3d 1123 (D.C. Cir. 2001)). “ ‘A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference.’ ” *Id.* (quoting *Hern Iron Works, Inc.* 16 BNA OSHC 1206, 1214 (No. 89-433, 1993)). “This state of mind is evident where the employer was actually aware, at the time of the violative act, that the

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of time the laborer was in the excavation to bolster the alleged willful characterization of the violation.

<sup>12</sup> The foreman explained that the installation of the risers involved holding the riser in place with a shovel while standing at the edge of the trench as the excavator backfilled around it. However, just before the laborer entered the excavation, the foreman testified that he lost control of the pipe, and it fell over while the excavator was turning to pick up more dirt. The laborer added that he entered the excavation “without thinking” to pick up the fallen riser. The foreman and the excavator operator both confirmed that the laborer had not been in the excavation when the riser fell. It was the excavator operator’s belief that the laborer entered the excavation while the excavator turned to get more dirt. The foreman, laborer, and excavator operator each estimated the laborer was in the excavation for between fifteen and twenty seconds.

<sup>13</sup> My colleague repeatedly states that the judge found that the laborer was in the trench for fifteen minutes. However, the judge never made a finding of fifteen minutes, but rather identified a possible *range* of fifteen seconds to less than fifteen minutes—thereafter, he made inconsistent statements such as “[d]uring the fifteen minutes, the foreman remained on the side of the excavation.” It is these inconsistencies that permeate the judge’s decision and make it difficult upon review to determine what credibility determinations and factual findings were made by him. These inconsistencies are evident in my colleague’s opinion, as well, where she herself vacillates between fifteen minutes and finding “the laborer was in the excavation for at least several minutes.”

act was unlawful,” or where the employer “possessed a state of mind such that if it were informed of the standard, it would not care.” *Id.* (quoting *AJP Constr., Inc. v. Sec’y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004)) (internal quotation marks omitted).<sup>14</sup>

In determining whether the Secretary has met his burden of proving a violation, the Commission generally reviews the evidence in the record de novo and need not defer to the judge’s findings. *See Metro Steel Constr. Co.*, 18 BNA OSHC 1705, 1706 (No. 96-1459, 1999); *Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1417-19 (No. 89-1206, 1993). However, the Commission will ordinarily defer to the judge’s findings regarding the credibility of a witness, if those findings are based on the demeanor of the witness or other factors peculiarly observable by the judge. *Metro Steel Constr. Co.*, 18 BNA OSHC at 1706; *see also Asplundh Tree Expert Co.*, 6 BNA OSHC 1951, 1954 (No. 16162, 1978) (the judge “must fairly consider the entire record and must adequately explain his findings”; it is “not sufficient for the [j]udge to merely state his ultimate findings and conclusions . . . [as he] must set forth sufficiently detailed findings and reasons”). If the judge did not make credibility findings, as is the case here, and such findings are necessary to resolve conflicting testimony on a critical issue, the Commission will typically remand the case to the judge for further consideration and explanation. *Schuler-Haas Elec. Corp.*, 21 BNA OSHC 1489, 1495 (No. 03-0322, 2006); *Asplundh*, 6 BNA OSHC at 1954 (remanding case to judge where he failed to “set forth sufficiently detailed findings and reasons to assist the Commission in fulfilling its role as the ultimate finder of fact”).

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<sup>14</sup> Both the cited worksite and KMD’s principal place of business are in Georgia, which is located in the Eleventh Circuit. Accordingly, the Eleventh Circuit and/or the D.C. Circuit would have jurisdiction if the case is appealed. *See* 29 U.S.C. § 660(a) (parties may appeal to circuit where worksite is located and/or employer is headquartered; employer may also appeal to D.C. Circuit). In general, “[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission’s precedent.” *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted). The Eleventh Circuit does not recognize good faith as a defense to a willfulness characterization. *See Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1240 (11th Cir. 2002). In the D.C. Circuit, an employer “cannot be found to have willfully violated a standard if it exhibited a good faith, reasonable belief that its conduct conformed to law . . . or if it made a good faith effort to comply with a standard or eliminate a hazard.” *Am. Wrecking Corp. v. Sec’y of Labor*, 351 F.3d 1254, 1263 (D.C. Cir. 2003) (citing *A.J. McNulty v. Sec’y of Labor*, 238 F.3d 328, 338 (D.C. Cir. 2002); *A. E. Staley Mfg. Co.*, 19 BNA OSHC 1199, 1202 (No. 91-0637, 2000) (consolidated), *aff’d*, 295 F.3d 1341 (D.C. Cir. 2002)).

Here, unfortunately, the judge is no longer with the Commission; thus, without assigning this case to a new judge (and holding a new hearing), further credibility assessments cannot be made. If the Commission’s review of this case had been handled expeditiously, the case might have been appropriately remanded to a new judge. However, given the passage of over five years since the date of OSHA’s inspection, witnesses may be unavailable and their memory poor, resulting in actual prejudice to either or both of the parties. For these reasons, I would conclude that the Commission, as the ultimate fact finder, should decide this case based on the limited record before us and the limited credibility determinations made by the judge. *See Schuler-Haas*, 21 BNA OSHC at 1495 (deciding to resolve matter based on record before Commission where judge who presided over hearing was deceased); *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1611 (No. 87-2007, 1992) (deciding to “complete the adjudication of th[e] matter” despite lack of credibility determinations where judge had retired); *cf. Asplundh*, 6 BNA OSHC 1951. The question then, is whether there is sufficient evidence in the record to find that the Secretary met his burden to prove a willful violation of § 1926.652(a)(1). I would say that there is not.

The amount of time the laborer was in the unprotected trench appears to be somewhere between ten to fifteen seconds to less than fifteen minutes. In finding a “quick sequence of unexpected events that were neither planned nor in compliance with KMD’s written safety program,” it is not clear whether the judge erred in his application of Commission precedent<sup>15</sup>—which would seem more likely if the foreman had stood on the side of the unprotected trench with the laborer inside for nearly fifteen minutes—*or* if the foreman did not have time to react and form the requisite state of mind because the laborer had been in the unprotected trench for mere seconds.<sup>16</sup> There is a world of difference between seconds and minutes in assessing KMD’s state

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<sup>15</sup> *See, e.g., Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2227 (No. 09-0004, 2014) (consolidated), *aff’d*, 811 F.3d 722 (7th Cir. 2016) (finding one excavation violation willful where, “[d]espite the foreman’s testimony that he had no idea at the time whether the excavation walls were sloped in accordance with ‘the OSHA regulation’ because he was ‘in a hurry’ and not ‘paying attention,’ the evidence show[ed] that he knew—or at least deliberately avoided knowing” they were not).

<sup>16</sup> *Id.* at 2223 (finding another excavation violation not willful where, “[b]ased on our review of the record, we find the Secretary has not shown that the superintendent was, in fact, aware that the excavation was noncompliant”) (*citing Gen. Motors*, 22 BNA OSHC 1019, 1043 (No. 91-2834E, 2007) (consolidated) (“[T]he Commission and courts distinguish ‘between mere negligence and willfulness, holding that the former is sufficient for affirming a non-willful violation, but that

of mind, and without a finding on this issue, further conclusions can only come from free-ranging guesswork. We cannot engage in guesswork or play detective; instead, it is our duty to review this case based on the record, including the evidence, relevant findings of fact, and necessary credibility determinations.

I am mindful that the Commission is reviewing a judge's decision that concluded the Secretary failed to prove a willful violation. Thus, where we are compelled to make the necessary findings without the judge's further assistance, it obviously cannot be said that the evidence in the record permits only a willful finding.<sup>17</sup> It is the Secretary who has the burden of proof, and he must produce the necessary facts in the record to establish the violation and its characterization. *Trinity Indus. Inc.*, 15 BNA OSHC 1788, 1789 (No. 89-1791, 1992) (finding that the Secretary has the burden of establishing a violation of the OSH Act by a preponderance of the evidence). Not only did the judge fail to make certain credibility findings, but the record leaves us with gaps in the evidence as to what occurred on August 17, 2011. *See U.S. Steel Corp.*, 10 BNA OSHC 1752, 1756 (1982) (holding that "[i]t is patently unfair to decide a case on facts not presented at trial"). Thus, I would find that the Secretary failed to prove his case for willfulness by a preponderance of the evidence and affirm the judge's decision that the Secretary failed to prove that the violation was willful.<sup>18</sup> *See Trinity*, 15 BNA OSHC at 1790 (based on record on review, Secretary could not prove that training was inadequate) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S.

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willfulness is characterized by an intentional, knowing failure to comply with a legal duty.' ” (citation omitted)).

<sup>17</sup> Although my colleague's opinion is that examination of the findings of facts, credibility determinations, and the evidence “can lead to only one supportable conclusion,” the judge and I both reach the conclusion that the violation is not appropriately characterized as willful. This highlights the circular nature of my colleague's reasoning that since her view is the “only one supportable conclusion,” remand was never really an option so the delay in this case had no impact.

<sup>18</sup> To reverse in view of the judge's failure to consider the entire record and to make necessary and specific credibility findings may unfairly deprive KMD of fair play and its opportunity to be heard—justice requires that due process and full litigation should be afforded an employer before penalizing it pursuant to the OSH Act. Given the judge's failure to make needed credibility determinations and the overall insufficient evidence in the record to find that the Secretary met his burden to prove a willful violation of § 1926.652(a)(1), any abrupt reversal of the decision finding a serious rather than willful violation would not only be contrary to this burden and Commission precedent, but it would be inherently unfair to the employer.

767, 776 (1986) (burden of proof is deciding factor when necessary facts cannot be determined conclusively from record)).

The Commission reached a similar conclusion in an earlier decision where the judge had rejected a violation's willful characterization but failed to address conflicting testimony. In *Sal Masonry Contractors, Inc.*, 15 BNA OSHC at 1613, the Commission found that "the testimony supporting a willful determination [was] in conflict." Acknowledging that normally this would result "in remanding the case to the judge for further consideration and explanation," the Commission concluded this was not an available option. *Id.* "Because the judge failed to resolve the conflicts," the Commission was "unable to choose from the conflicting versions of testimony, and . . . conclude[d] that the violation was not proven to be willful." *Sal Masonry*, 15 BNA OSHC at 1612; *see also Asplundh*, 6 BNA OSHC at 1954 (noting that "[i]n a case where the evidence permits only one result, the Commission can make the necessary findings without the Judge's assistance," but in view of the judge's failure to consider the entire record and to make necessary and specific credibility findings, rejecting the judge's conclusion and remanding for the judge to make specific findings on the question of whether violations of Asplundh's body belt rule were in fact as infrequent as claimed).

In considering this case, I would not adopt abstract theories without proof, nor substitute bare possibility for facts in evidence. Mere possibilities, conjectures, or theories should not be allowed to take the place of evidence. Where proof is wanting, as it was in *Sal Masonry* and is here, the allegation of fact should be deemed not established. The judge's failure to resolve conflicts where the evidence does not permit only one result—a point made obvious by the judge's finding that the violation was serious, not willful—and given my determination that remand is a poor option due to the lengthy passage of time, I would find that the Secretary has not met his burden of proving willfulness by a preponderance of the evidence.

Accordingly, I would find a serious, not willful, violation of the cited standard and affirm the judge's assessment of a penalty of \$5,000.

Dated: April 26, 2017

/s/  
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Heather L. MacDougall  
Acting Chairman

## Separate Opinion of Commissioner Attwood

ATTWOOD, Commissioner:

I would find that the judge erred by re-characterizing the violation as serious.<sup>1</sup> Whether the violation at issue here is properly characterized as willful largely turns on how the conflicting

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<sup>1</sup> As an initial matter, I note that I disagree with my colleague's statement that this case should have been remanded, and but for the Commission's lack of "expeditious" handling it might have been. As this separate opinion demonstrates, although I would conclude that the judge erred in characterizing the violation as serious rather than willful, I am of the view that a close examination of the judge's own findings of fact, credibility determinations, and the evidence related to the appropriate characterization of the violation—the very type of de novo examination the Commission was created to conduct—can lead to only one supportable conclusion: that the violation was willful. Thus, in my judgment, remanding this case for any purpose would never have been either necessary or appropriate.

In any event, it is by no means clear that a remand would have resulted in more expeditious handling of the case. At the time this case was directed for review, the judge who decided it had already retired. Thus, if remanded, the case would have necessarily required a new hearing before a new judge. Given that the case was not directed for review by the Commission until January 25, 2013, any potential new hearing would not have occurred, under the very best of circumstances, until the spring of 2013—at least one year after the prior hearing and almost two years after the date of the violation.

In my view, it strains credulity to believe that a new hearing—again, held by a new judge almost two years after the date of the violation—would necessarily lead to a more accurate or just decision for either party. My view is further cemented by the burden a remand would have placed on the parties who—through no fault of their own—would have been required to participate in and endure the expense of an entirely new hearing. Therefore, it would have been just as inappropriate to remand this case early in its review as it is now.

As to whether this case should have been resolved earlier, I share my colleague's concern regarding the time it sometimes takes for the Commission to decide a case and about the Commission's frequent lack of a full complement of three members. Regarding the latter concern, there has been a full complement of commissioners for only 12 of the 50 months that this case has been on the Commission's docket. Unfortunately, over the past 20 years, such a situation has been the norm. Thus, during these 20 years, the Commission has been without a full complement of commissioners about 65 percent of the time. And during this period, the same three commissioners have never served together, without a break, for longer than one year, ten months. This is because the six-year terms for the three commissioner positions are staggered, meaning that every two years, the term of one commissioner ends. 29 U.S.C. § 661(b). And when a term ends, as last occurred in April 2015, it can take several years before the vacancy is filled, truncating the new commissioner's term and leaving the Commission short-handed. Of the thirteen periods of commissioner vacancies in the last 20 years, almost half have lasted at least one year, and two have lasted more than three years. This case illustrates the point: as of the date of this decision, there has not yet been a presidential nomination to fill the currently empty third commissioner position,

testimony of the OSHA compliance officer and three of the KMD employees present at the worksite is resolved in light of photographic evidence presented by the Secretary. The testimony differs with regard to two key issues material to the violation's willful characterization: the length of time the laborer was in the unprotected excavation; and whether the foreman had been attempting to remove the laborer prior to the compliance officer's arrival.

## BACKGROUND

### 1. *The Compliance Officer's Testimony*

The compliance officer testified that he was driving home from another OSHA inspection when he passed the KMD worksite and noticed an individual inside an excavation.<sup>2</sup> He also saw two people standing above the excavation, and an excavator, which was running and moving. After turning around at the next stoplight, the compliance officer drove back and parked near the

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which has now been vacant for 24 months. Moreover, commissioner turnover always has been high. Of the 24 commissioners who have served over the last 45 years, only six have served for more than one term, while seven have served for *two years or less*.

The lack of three commissioners can have a destabilizing effect on the work of the agency and can result in delays in the decision-making process. By statute, the Commission may take official action "only on the affirmative vote of at least two members." 29 U.S.C. § 661(f). Two commissioners may, as is the case here, disagree. Without a third—tie-breaking—commissioner, the two must compromise and reach a decision (*see, e.g., Architectural Glass & Metal Co., Inc.*, 19 BNA OSHC 1546, 1548 (No. 00-0389, 2001) (Eisenbrey, concurring) (joining in decision to remand to expedite ultimate resolution, but "would have preferred simply to vacate the dismissal order")); agree to vacate the direction for review and write separately (*see cases cited in joint opinion, supra*); or hold the case pending the appointment of a third member. Resort to any of these options may result in delay. And holding a case in the hope of gaining a third commissioner may prove to be precarious if, as has happened, another commissioner's term ends before the empty position is filled, resulting in what has been referred to as a single commissioner being "home alone." *Beverly Enters. Inc.*, 19 BNA OSHC 1161, 1197 n. 85 (No. 91-3144, 2000) (consolidated) (Weisberg, Sep. Op. on Feasibility of Abatement).

Although my colleague gives lip service to the need to protect the internal decision-making process of the Commission, she posits that responsibility for the delay encountered in this case rests with the Commission's "internal case management system." I have served as a Commission member, Acting Chairman, and Chairman, for all but three months (falling between the expiration of my prior term and the start of my current one) of this case's pendency on review and strongly disagree with my colleague's comments. As one might well imagine, there is more here than meets the eye. But out of respect for the confidentiality of the agency's deliberative process, I will not comment further.

<sup>2</sup> KMD is an underground utility contractor. At the time of the inspection it was engaged in an underground water project for the City of Marietta, Georgia.

worksite so that he could conduct an inspection. As he was driving back past the worksite, he saw the excavator “going back and forth and doing something in the hole.” While gathering his equipment from the back of his car, the compliance officer saw the excavator pick up and lower into the excavation “about two or three buckets” of dirt from a spoil pile (“backfilling”); each time, the bucket came back out of the excavation empty.

The compliance officer took a photograph while standing beside his car and then began to walk toward the worksite, taking a series of photographs along the way. He photographed the KMD laborer standing in the excavation and holding a white PVC pipe upright so that it protruded from the trench.<sup>3</sup> Between the time that he observed the excavator dumping dirt into the excavation and the time that he saw the laborer holding the pipe, the compliance officer did not see anyone enter or exit the excavation. As the compliance officer neared the worksite, the excavator was in the process of lowering another bucket of dirt into the excavation, and it appeared to be about to drop the dirt at the base of the pipe that the laborer was holding. During this entire time, KMD’s foreman was standing at the edge of the excavation immediately above the laborer, looking down at the laborer, while the excavator backfilled around the pipe. Neither the foreman nor any other KMD employees appeared to be talking to one another, nor were they making any gestures or hand movements.

Once the compliance officer came up to the foreman and asked if he knew why OSHA would stop at the worksite, the foreman replied: “Oh [expletive]. I know it’s an illegal hole.” The foreman then instructed the excavator operator to “[s]hut it down,” and yelled and signaled to the laborer to get out of the excavation. At that point, the excavator operator stopped dumping dirt at the foot of the pipe and raised the excavator bucket—which was blocking the laborer’s exit—and the laborer climbed a ladder out of the unprotected excavation. The compliance officer testified that the foreman told him he had instructed the laborer to go into the excavation, even though the foreman knew it was not permissible under the OSHA excavation standard, because the laborer

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<sup>3</sup> The vertical pipe’s purpose was to mark the location of fittings (connections) in the underground water pipes. The PVC pipe was to rest on top of a fitting and extend to the top of the trench. Because it was not affixed to the water pipe fitting in any way, the PVC pipe had to be held in place until sufficient dirt had been backfilled around it to support it. Once the trench had been fully backfilled, KMD would partially fill the PVC pipe with gravel and then drop a small GPS device into it. The pipe was then filled with more gravel. The GPS device would then signal the location of the water pipe fitting, to enable ease of access should problems with the fitting (such as a leak) later arise.



would only need to be in there for “five to ten minutes.” The laborer confirmed that the foreman had instructed him to go into the unprotected excavation. The compliance officer also testified that the excavator operator told him that he was aware the laborer was in the excavation, but did not instruct the laborer to get out because the foreman was in charge.

The compliance officer estimated that it had taken him about five minutes to turn his car around and park, and another two minutes to gather his equipment and walk to the worksite, such that about seven minutes passed from the time that he first saw the laborer in the excavation from his car until the laborer exited the excavation.

## *2. The KMD Employees’ Testimony*

The KMD employees testified to a very different version of events. According to their testimony, the laborer was not instructed to go into the unprotected excavation, did not hold the PVC pipe upright while the excavator backfilled around it, and was not inside the excavation for more than a few seconds. Their version also has the foreman attempting to remove the laborer from the excavation before OSHA’s presence was known, rather than just watching him hold the pipe.

The foreman, who was trained as a competent person under the excavation standard, testified that he did not instruct the laborer to go into the unprotected excavation, nor did he immediately realize the laborer had climbed into the excavation because he was looking in the direction of the excavator operator at the time.<sup>4</sup> He stated that prior to the laborer’s entry, he had been balancing his shovel on top of the pipe to hold it in place as he stood at the edge of the excavation. However, his shovel slipped, the pipe fell over, and he looked toward the excavator operator intending to ask him to pick the pipe up using the excavator bucket.<sup>5</sup> The operator,

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<sup>4</sup> Under the excavation standard “competent person means 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 § 1926.650(b).

<sup>5</sup> As the Secretary did not explicitly challenge this statement, my analysis assumes that this is how the PVC pipe came to have fallen over inside the excavation. The excavator operator testified that the pipe was initially propped up on the water pipe fitting by “somebody standing on top of the trench holding the shovel.” Presumably, this involved someone on the edge of the excavation placing the base of the PVC pipe on the fitting in the bottom of the excavation and then balancing it on that fitting by placing the shovel on the top of it and pushing the pipe upright. The shovel would then hold the pipe in place until it had been stabilized by backfill.

however, had turned the excavator away to pick up more dirt from the spoil pile, and the foreman was waiting for the operator to turn back around so he could get the operator's attention. Once the foreman looked back at the excavation and noticed the laborer inside, he began trying to get the laborer's attention to tell him to get out, but the laborer could not hear him due to the noise from the running excavator and the adjacent busy highway.

The laborer testified that when the pipe fell over, "without thinking" and without any direction from the foreman, he "grabbed the ladder and ran down in the hole and stood [the pipe] back up and came right back out of the hole." He stated that he realized he should not have been in the trench "[o]n [his] way out." When asked how long he had been in the excavation, the laborer testified, "roughly 10 to 15 seconds . . . maybe a little more."<sup>6</sup>

The excavator operator—who was also trained as a competent person under the excavation standard—similarly testified that he did not see the laborer go into the unprotected excavation, as he had turned the excavator away to pick up more dirt from the spoil pile. When he turned back around and first saw the laborer in the excavation, he claims that the foreman was yelling out the laborer's name and waving at him, trying to get the laborer's attention. The excavator operator then also began yelling at the laborer to try to get his attention.

### 3. *The Judge's Decision*

In addressing the two key factual issues, the judge credited the compliance officer's testimony and relied on the photographic evidence (and explicitly discredited the KMD employees' testimony) to make the following findings:

KMD's claim that the laborer was in the excavation for 15 seconds is rejected as contrary to the evidence. A time of less than 15 minutes is deemed more appropriate based on the compliance officer's activity in first observing the laborer in the excavation, parking his car, gathering his equipment, walking to the excavation, and taking photographs . . . . The laborer did not exit the excavation until after the foreman became aware of the OSHA compliance officer's presence. There is no showing that the foreman attempted to remove the laborer from the excavation prior to the compliance officer's presence. Although the area was noisy, the compliance officer did not hear or observe the foreman "yelling" or use hand signals to gain the attention of the laborer prior to exiting the excavation. The photographs support the compliance officer's testimony. The compliance officer's

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<sup>6</sup> Contrary to the laborer's testimony, on review, KMD asserts that "the actual time interval was *most likely* substantially less than the fifteen minutes alleged by the Secretary, and *quite possibly* the five minutes that it would take to right the fallen pipe." (emphasis added.)

estimate of less than 15 minutes from the time he first observed the laborer while driving on Cobb Parkway is accepted . . . . During the 15 minutes, the foreman remained on the side of the excavation and knew the laborer was in the unprotected excavation.<sup>7</sup>

The judge also found that “the foreman in this case with twenty-one years of experience was the same person who permitted the laborer to remain in an unprotected excavation for 15 minutes in order to complete the task.” And the judge discredited the excavator operator’s testimony that he did not see the laborer until he looked in the excavation and saw the foreman yelling for the laborer to get out: “[The excavator operator’s] claim that he did not see the laborer in the excavation is rejected. The photographs taken by OSHA show the excavator’s bucket filled with dirt passing in front of the laborer holding the PVC pipe or passing by him.” The judge therefore ruled that KMD had violated the cave-in protection standard. However, although the judge found that “[d]uring the 15 minutes the foreman remained on the side of the excavation and knew the laborer was in the unprotected excavation” and “[t]here is no showing that the foreman attempted to remove the laborer from the excavation prior to the compliance officer’s presence,” he found that the violation was not willful:

The events occurred too quickly for KMD to have the requisite heightened awareness to establish willfulness. The laborer entered the excavation on his own and was allowed to remain until OSHA initiated the inspection. The conduct by the foreman shows a lack of good judgment and an attempt to deal with the unexpected conduct of the laborer. But it fails to establish willfulness. . . . KMD’s good faith effort to comply is evident from its consistent use of trench boxes at the site and that the same boxes were still on site, properly sized and ready for re-insertion in only five minutes. The foreman’s apparent attempt to quickly finish the job is not sufficient to elevate KMD’s conduct to willful.

## **DISCUSSION**

In my view, the photographic evidence directly contradicts the KMD employees’ version of events, wholly undermines their credibility, and renders their testimony implausible. The compliance officer’s testimony, on the other hand, is entirely consistent with the photographs and

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<sup>7</sup> Elsewhere in his decision the judge explicitly rejected “KMD’s argument that the foreman was attempting to remove the laborer”: “The compliance officer heard and saw no evidence of such attempts . . . . His photographs and the amount of time the laborer was in the excavation support the compliance officer’s testimony.”

circumstances surrounding the violation. Therefore, as discussed below, I would find that the record supports the judge's findings that the laborer worked in the unprotected excavation for several minutes and that the foreman knowingly failed to remove the laborer during that time. Based on this evidence, which I believe establishes the foreman's heightened awareness of the standard's requirements and the excavation's violative condition, as well as his intentional disregard of the requirements of the standard, I would affirm the violation's willful characterization. *See Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2227 (No. 09-0004, 2014) (consolidated), *aff'd*, 811 F.3d 922 (7th Cir. 2016) (excavation violation willful where supervisor allowed employee to work in an unprotected excavation with the knowledge that it violated the OSHA standard); *MVM Contracting Corp.*, 23 BNA OSHC 1164, 1167-68 (No. 07-1350, 2010) (same); *Fiore Constr. Co.*, 19 BNA OSHC 1408, 1409-10 (No. 99-1217, 2001) (same).

#### *1. Evaluation of Competing Testimony in Light of Photographic Evidence*

The credibility of a witness's testimony can be determined by evaluating that testimony in light of other evidence in the record to which it can be compared, and by examining it for internal consistency and intuitive plausibility. *See, e.g., Kulka Constr. Mgt. Corp.*, 15 BNA OSHC 1870, 1874 (No. 88-1167, 1992) (crediting the compliance officer's testimony over that of the employer's on the basis that it was more consistent with the photographic evidence); *see also Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (“[F]actors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness's story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it.”). Although the judge made no *demeanor-based* credibility determinations,<sup>8</sup> he evaluated the credibility of the compliance

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<sup>8</sup> Throughout her separate opinion, my colleague appears to conflate the different types of credibility findings, and assume that the conflicting testimony here can only be resolved through a judge's demeanor-based credibility findings. This, in my opinion, is a misreading of Commission precedent. In *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1613 (No. 87-2007, 1992), a decision to which my colleague cites, the Commission states that it was unable to resolve the conflicting testimony because “the judge failed to provide . . . credibility findings, *and the record does not help . . . resolve the conflicts in the testimony*” (emphasis added). Here, although the judge did not make demeanor-based credibility findings, he evaluated the evidence, including the testimony of the witnesses and the photographic evidence, and credited the Secretary's evidence on the facts relevant to the characterization issue. This is a perfectly acceptable means of resolving conflicting evidence.

officer and the KMD employees in light of the photographic evidence and credited the compliance officer.<sup>9</sup>

I would agree with the judge that the series of photographs taken by the compliance officer as he approached the worksite directly contradicts the KMD employees' testimony and confirms the compliance officer's version of events. There are seven photographs that are directly relevant here.<sup>10</sup> Of those, the first four photographs were taken as the compliance officer approached the worksite, before he made his presence known to the foreman and laborer. In order, the seven photographs show the following:

- Ex. C-1. Taken while the compliance officer was still standing by his car, the foreman is holding a shovel and looking almost straight down into the excavation while standing at its edge; the excavator bucket is over the excavation.
- Ex. C-2. The foreman is standing in the same place and looking into the excavation while the excavator bucket is being lowered into the excavation.
- Ex. C-3. The photograph shows the legs of the foreman and the shovel in the same location, while the excavator bucket is fully inserted into the excavation.
- Ex. C-4. The photograph, taken once the compliance officer is standing at the edge of the excavation, shows the foreman's legs and shovel in the same location as all the preceding photographs while the laborer holds the pipe and the excavator begins to dump dirt close to the bottom of the pipe.

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<sup>9</sup> The judge, without explanation and without making a credibility determination, found that the foreman did not direct the laborer to enter the unprotected excavation—that the laborer had entered of his own accord. Although this finding is irrelevant to a determination of willfulness in this case (because, whether or not the foreman gave such an order, the foreman *knowingly allowed the laborer to remain* in the excavation for several minutes), it appears that the judge may have relied on it in rejecting the violation's willful characterization. There is directly contradictory testimony on this point. The compliance officer testified that both the foreman and the laborer had told him that the foreman had ordered the laborer into the trench. In contrast, both employees testified that the laborer entered the excavation of his own volition. The judge explicitly discredited the laborer's and the foreman's testimony regarding every fact critical to a finding of willfulness. Yet, he apparently credited the testimony of the KMD employees and implicitly discredited the compliance officer's testimony on this specific point. In light of the general lack of truthfulness of KMD's witnesses, discussed below, and absent some objective reason to credit the KMD employees' testimony on this point, I would reject this unsupported finding.

<sup>10</sup> In light of the significance of these seven photographs, I have attached them to my opinion in an Appendix.

- Ex. C-5. The foreman is leaning over the edge of the excavation and extending his arm toward the pipe being held by the laborer, while dirt is continuing to be dumped from the excavator bucket.
- Ex. C-6. The laborer holding the pipe has turned toward the excavator operator, while the foreman continues to lean over the edge of the excavation. The compliance officer testified that at this point the foreman is trying to get the excavator operator to remove the bucket from the trench so that the laborer can reach the ladder to make his exit.
- Ex. C-7. The laborer still holds the pipe while watching the excavator bucket being removed. The foreman continues to look on.

The compliance officer's testimony is internally consistent throughout and completely in accord with these photographs. That he stopped to inspect the worksite because he saw an individual inside the excavation while driving past is supported by the photographs showing the laborer inside the excavation when he arrived. His testimony that he observed the excavator backfilling the excavation while the laborer held the pipe and the foreman stood above watching is also plainly depicted in the photographs. When viewed in sequence, the photographs show that the excavator bucket was being lowered into the excavation and was in the process of dumping a load of dirt at the base of the pipe that the laborer was holding, all while the foreman stood directly above the laborer. In fact, the first photograph clearly shows that the excavator bucket is filled above the brim with dirt, while the seventh photograph shows that the bucket is partially empty. And the compliance officer's testimony regarding the time that elapsed between his observations while driving past the worksite and his arrival at the edge of the excavation (which is explicitly credited by the judge) supports the conclusion that the laborer was inside the excavation for at least several minutes.

On the other hand, the claims of the foreman and the excavator operator that, prior to the compliance officer's arrival, they were attempting to get the laborer's attention in order to get him out of the unprotected excavation, simply cannot be squared with the chain of events depicted in the photographs and confirmed by the compliance officer. Although the foreman testified that the first photograph shows him attempting to get the laborer's attention, up until the fifth photograph—taken just after the compliance officer made his presence known—none of the pictures depict the foreman, or any other employee for that matter, making gestures or motions that would suggest an

attempt to remove the laborer.<sup>11</sup> And the laborer’s testimony that he “ran down into the hole,” stood up the pipe, and exited the trench, all within 10 to 15 seconds, is demonstrably false.<sup>12</sup>

It is also undisputed that the foreman was standing in close proximity to the laborer while he was inside the unprotected excavation holding the pipe—the foreman admitted that he was only two or three feet back from the edge of the excavation and that the laborer was merely another three or four feet directly beneath the foreman in the excavation. Given their proximity the foreman’s claim that he never saw the laborer enter the excavation is not credible, even if he was looking towards the excavator. The photographs not only confirm this close proximity but show the laborer continuing to hold the pipe despite the foreman’s purported attempts to get his attention from just a few feet above.<sup>13</sup> Indeed, after the compliance officer announced his presence, it took the foreman “[n]o more than a few seconds” to get his crew’s attention, stop the excavator, and

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<sup>11</sup> The excavator operator testified that he had picked up a load of dirt from the spoil pile, turned the excavator back around toward the trench, and then spotted the laborer in the trench. He stated that the foreman “was waving his hands like he was looking at me, and then he was looking at Tyler, and it was just like he was trying to get his attention. He kept, you know, hollering at him, like ‘Tyler, Tyler.’ ” When asked about his own efforts to get the laborer’s attention, he gave two different responses. First, he said he really did not remember. “I don’t know if I [blew] the horn, the excavator got shut off, and then I was trying to get his attention or what.” On cross-examination, however, he stated that “[w]hen I turned back around, you know, I looked at him. Like I said, it looked like everybody was trying to get his attention, and then I’m like, ‘What are you doing?’ I don’t know if he ever heard me or not.”

<sup>12</sup> My colleague’s assertion that “[t]he foreman, laborer, and excavator operator each estimated the laborer was in the excavation for between fifteen and twenty seconds” does not appear to be accurate. It is true that the laborer estimated that he was in the trench for “10 to 15 seconds . . . maybe a little more.” However, the excavator operator testified that he did not see the laborer enter or exit the trench and did not know how long it took the foreman to get the laborer’s attention when attempting to remove him from the excavation. And his response that it would take him “15, 20 seconds” to turn his excavator from the front around to the place where he could not see what had been going on in front of him cannot be correlated with the time the laborer was, in fact, in the trench. Finally, it does not appear to me that the foreman gave any testimony related to the time the laborer was in the trench, and he also testified that he did not see the laborer enter it. As noted above at n. 8, before us KMD states that “quite possibly” the laborer was in the trench for five minutes.

<sup>13</sup> It is instructive that once the laborer was in the unprotected excavation, holding the pipe upright, the foreman did not attempt to support the pipe with his shovel, as he had done before the pipe fell over. Instead, he opted to leave the laborer holding the pipe in the unprotected trench while the excavator dumped dirt around the base of the pipe.

remove the laborer from the excavation.<sup>14</sup> Finally, in contradiction of the photographic evidence, the foreman expressly denied that the excavator operator dumped dirt at the base of the pipe while the laborer “was in the hole.” I would therefore credit the compliance officer’s account and agree with the judge that the laborer was in the excavation for at least several minutes and that neither the foreman nor the excavator operator attempted to remove him prior to becoming aware of the compliance officer’s presence. As I discuss below, in my view, these two findings require that the violation be characterized as willful.

## 2. *The Violation’s Characterization*

Although the judge found that the foreman failed to order the laborer to leave the unprotected trench for several minutes (resolving in the Secretary’s favor two key facts in dispute), he concluded that KMD’s violation was not willful. In so ruling, the judge—who devoted a mere three paragraphs of his opinion to discussing willfulness—reached conclusions that are contrary to his own findings of fact and misapplied the law. Based on my evaluation of the facts and application of the law to those facts, I would conclude that KMD’s actions were willful.

“The hallmark of a willful violation is the employer’s state of mind at the time of the violation—an ‘intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.’” *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1111 (No. 11-2559, 2016) (quoting *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff’d*, 268 F.3d 1123 (D.C. Cir. 2001)). “A willful violation is differentiated by 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, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). To prove intentional disregard, the Secretary must show that the employer (1) had a heightened awareness of the “applicable standard or provision prohibiting the conduct or condition,” and (2) “consciously disregarded the standard.” *Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1239-40 (11th Cir. 2002) (quoting *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000)).

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<sup>14</sup> I note that KMD’s claim that the foreman attempted to remove the laborer from the excavation as soon as he realized the laborer was there is inconsistent with its concession on review that the foreman exercised “a momentary lapse of judgment,” as immediately removing the laborer is precisely what the foreman was required to do. See 29 C.F.R. § 1926.651(k)(2) (requiring competent person to remove exposed employees from hazardous areas of excavation when hazardous conditions observed).



*a. Heightened Awareness of the Applicable Standard and the Violative Condition*

The judge found that KMD did not possess heightened awareness because “[t]he record shows that the KMD crew was overtaken by a quick sequence of unexpected events that were neither planned nor in compliance with KMD’s written safety program . . . . The events occurred too quickly for KMD to have the requisite heightened awareness to establish willfulness”—apparently positing that the foreman did not have time to absorb the fact that the laborer was in the illegal trench before the OSHA compliance officer arrived. I believe these characterizations distort the record evidence, are directly contrary to facts *that the judge himself found*, and misapply the law.

Heightened awareness can be shown through a supervisor’s testimony, a supervisor’s prior work experience, the employer’s safety requirements, and the employer’s previous violation of the same standard. *Fluor Daniel*, 295 F.3d at 1239-40 (finding heightened awareness of cited requirements established through, among other things, the testimony of the company’s safety officer); *Altor, Inc.*, 23 BNA OSHC 1458, 1471 (No. 99-0958, 2011) (finding heightened awareness where employer previously had been cited for violation of standard and OSHA had previously discussed fall protection standards with employer) *aff’d*, 498 F. App’x 145 (3d Cir. 2012) (unpublished); *Fiore*, 19 BNA OSHC at 1409 (finding heightened awareness of requirements of cave-in protection standard where foreman had 12 years’ excavation work experience, had completed 40-hour OSHA excavation training course, knew that OSHA standards required trench box, and had previously used trench box at same worksite); *Conie Constr., Inc.*, 16 BNA OSHC 1870, 1872 (No. 92-0264, 1994) (finding heightened awareness established through, among other things, the foreman’s testimony “that he had received specific training about the most recent OSHA regulations on excavations”) *aff’d*, 73 F.3d 1382 (D.C. Cir. 1995); *Williams Enters. Inc.*, 13 BNA OSHC 1249, 1257 (No. 85-355, 1987) (finding heightened awareness based on the respondent’s “long familiarity” and experience with steel erection standards).

In my view, the record plainly establishes KMD’s heightened awareness through the testimony, experience, and training of the foreman, as well as the requirements of the company’s safety manual and its extensive experience in the excavation business. First, the compliance officer testified without contradiction that the foreman had admitted to the compliance officer that he

knew it was illegal for the laborer to work inside the unprotected excavation.<sup>15</sup> Second, the foreman testified that he was trained in trench safety requirements at KMD, including training sufficient to qualify him as a competent person; attended safety meetings at KMD every week, several of which included discussion of trench safety as well as the need to use trench boxes; and knew that KMD's safety manual required that employees be protected from cave-in hazards.<sup>16</sup> Significantly, he testified that he had used a trench box earlier in the day to install another PVC pipe. And he acknowledged knowing that the excavation here was composed of Type C soil with visible cracks.<sup>17</sup> Third, he had 21 years of experience as a foreman, and 20 years of experience with KMD. Fourth, the fact that the foreman testified that he had been holding onto the pipe with his shovel from outside the excavation before it fell over supports the finding that he knew no one should enter the excavation. These facts irrefutably establish that KMD had a heightened awareness of the "applicable standard or provision prohibiting the conduct or condition." *Fluor Daniel*, 295 F.3d at 1239-40; *see Conie*, 16 BNA OSHC at 1872 (imputing supervisor's awareness to employer in finding willfulness); *Hern*, 16 BNA OSHC at 1214.

Yet the judge discussed none of these highly relevant facts in finding a lack of heightened awareness on KMD's part, instead basing his finding on his unsupported agreement with KMD's arguments that there was "a quick sequence of events" and that "the events took place too quickly" for there to be heightened awareness. Although it is certainly reasonable to conclude that the pipe dislodged from beneath the foreman's shovel and fell over in the excavation "quickly," the photographs, the compliance officer's testimony, and the judge's own findings establish that there

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<sup>15</sup> KMD argues that the judge did not make a finding based on this undisputed testimony "very likely because the judge understood that the foreman never made such a statement." However, at the hearing, the foreman explicitly acknowledged that, at the time of the inspection, he knew the trench was illegal. In fact, he testified that "I couldn't believe [the laborer] was in the hole. It just shocked me that he was down there." The whole import of his testimony was that, knowing the illegality of the excavation, he had been actively trying to remove the laborer.

<sup>16</sup> KMD's Safety and Health Manual paraphrases the provision of the excavation standard that KMD violated, and its "Safety Orientation Package," in an obvious reference to 29 C.F.R. § 1926.652, provides that "[n]o one shall enter a trench or excavation unless it is properly sloped, shielded or shored."

<sup>17</sup> Under the excavation standard, soils are categorized in a hierarchy of Stable Rock, Type A, Type B, and Type C, in decreasing order of stability. 29 C.F.R. pt. 1926, subpt. P, app. A(b). In addition, "[c]rack-like openings . . . could indicate fissured material" which can be an indication of potentially hazardous situations. *Id.* at app. A(d)(iii).

was nothing “quick” about the ensuing events. The foreman was not faced with an emergency that required split-second action. He merely needed to figure out a way to return the pipe to its upright position and support it there while the excavator backfilled around it without placing his laborer at risk. For these reasons, I would conclude that the judge erred in finding no heightened awareness.

*b. Conscious Disregard of the Requirements of the Standard*

I am also of the view that the Secretary has established that KMD consciously disregarded the requirements of the cave-in standard and that the judge’s conclusion to the contrary is erroneous. An employer is found to have conscious disregard when, having knowledge of an OSHA requirement, it consciously and voluntarily chooses to violate it. *Fluor Daniel*, 295 F.3d at 1240; *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1153 (11th Cir. 1994); *W. Waterproofing Co. v. Marshall*, 576 F.2d 139, 142-43 (8th Cir. 1978); *Intercountry Constr. Co. v. OSHRC*, 522 F.2d 777, 779-80 (4th Cir. 1975); *Kaspar*, 18 BNA OSHC at 2181; *Conie* 16 BNA OSHC at 1872; *Sal Masonry*, 15 BNA OSHC at 1611.

In his discussion of willfulness, the judge correctly found that the foreman knew that the laborer was in the unprotected trench for several minutes, yet chose not to take action until he learned of OSHA’s presence: “The laborer entered the excavation on his own and *was allowed to remain until OSHA initiated the inspection.*”<sup>18</sup> (emphasis added.) Yet, in the very next sentence, the judge ruled that “[t]he conduct by the foreman shows a lack of good judgment and an attempt to deal with the unexpected conduct of the laborer. But it fails to establish willfulness.” Whether or not the foreman ordered the laborer into the excavation, his knowing failure to *remove* the laborer from the violative trench for several minutes is the epitome of “conscious disregard.” *See Stark Excavating v. Perez*, 811 F.3d 922, 928 (7th Cir. 2016) (finding conscious disregard where supervisor watched employee work in violative trench for 10 minutes). The judge also concluded that “[t]he foreman’s apparent attempt to quickly finish the job is not sufficient to elevate KMD’s conduct to willful.” On the contrary, it is precisely this kind of behavior that *does* elevate an employer’s conduct to willful. *See Stark*, 24 BNA OSHC at 2227 (foreman’s testimony that “he

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<sup>18</sup> Elsewhere in his decision, the judge found that the foreman “permitted the laborer to remain in an unprotected trench for 15 minutes in order to complete a task” and “[d]uring the 15 minutes, the foreman remained on the side of the excavation and knew the laborer was in the unprotected excavation.”

was in a hurry and . . . just wanted to get the job done” supports finding that violation is willful); *Stark Excavating v. Perez*, 811 F.3d at 924 (violation willful given, among other factors, “[foreman’s] statement that he wanted to complete the project quickly”). It is impossible to square the judge’s well-supported findings regarding the foreman’s failure to remove the laborer from the violative trench over a period of several minutes with his determination that KMD did not consciously disregard the requirements of the standard. Therefore, I would reverse this finding.

*c. Good Faith*

Finally, the judge appears to rely on KMD’s “good faith” to support his re-characterization of the violation:

KMD’s good faith effort to comply is evident from its consistent use of trench boxes at the site and that the same boxes were still on site, properly sized and ready for re-insertion in only five minutes. KMD has a good written safety program and attempts to regularly monitor each worksite. The same compliance officer was unable to find any safety problems at other KMD excavations.

There are several errors embedded in this statement. First, in cases involving conscious disregard of the requirements of a standard, “ [t]he [employer’s] good faith effort’ must . . . have been made in an ‘effort to comply with the cited provision.’ ” *Jim Boyd*, 26 BNA OSHC at 1112 (quoting *Calang Corp.*, 14 BNA OSHC 1789, 1793 (No. 85-319, 1990)); see *Lanzo Constr. Co.*, 20 BNA OSHC 1641, 1648 (No. 97-1821, 2004) (“[A]n employer may defend against a showing of willfulness by producing evidence tending to show that it acted in good faith with respect to the requirements of the standard at issue.” (emphasis added)), *aff’d*, 150 F. App’x 983 (11th Cir. 2005) (unpublished). Here, KMD made no effort to comply with the cited standard; it merely made an effort “to quickly finish the job.” Second, the burden of proof for good faith effort is on the employer. *N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1476 (No. 96-0721, 2001) (citing *Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1124 (No. 88-572, 1993)). There is simply no indication that the judge placed that burden on KMD, or, in my view, that KMD met it. Third, that the compliance officer found no other violations at KMD’s site is simply irrelevant to a determination of good faith effort. And fourth, that KMD had trench boxes on site, “ready for reinsertion,” weighs *against* KMD, as it chose not to use them.

\* \* \* \* \*

As the long-standing Commission and circuit court precedent set out above plainly demonstrates, there is nothing particularly unusual about this case. In my view, it presents typical

evidence that supports an evident conclusion. Therefore, I would determine that the foreman allowed the laborer to remain in an unprotected excavation for several minutes and failed to remove him—despite fully understanding the requirements of the applicable standard, the excavation’s violative condition, and the cave-in risks posed to the laborer—so that the crew could finish the job quickly. His decision to consciously disregard a known OSHA requirement demonstrates a willful state of mind. And, as a supervisory employee, his knowledge and actions can be imputed to KMD. See *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003); *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000); *Conie*, 16 BNA OSHC at 1872; *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (No. 86-0360, 1992) (consolidated).

For all of these reasons, I would find that the violation was properly characterized as willful and assess the \$53,900 penalty proposed by the Secretary.

Dated: April 26, 2017

/s/ \_\_\_\_\_  
Cynthia L. Attwood  
Commissioner

# **Appendix**

## **Photographic Exhibits for Commissioner Attwood's Separate Opinion**





PERICAD 800-851-5889  
EXHIBIT  
C-2  
12-0643









EXHIBIT  
C-5  
12-0643





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.

K. M. Davis Contracting, Inc.,

Respondent.

OSHRC Docket No. 12-0643

Appearances: Rolesia Butler Dancy, Esq., U. S. Department of Labor, Office of the Solicitor  
Atlanta, Georgia  
For the Complainant

Andrew N. Gross, Esq., HB Training and Consulting  
Lawrenceville, Georgia  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

K. M. Davis Contracting Inc. (KMD) is an underground utility contractor in Marietta, Georgia. On August 17, 2011, a KMD laborer was observed holding a PVC pipe upright for the placement of a GPS device in an unprotected excavation along U. S. Highway 41 (Cobb Parkway) when the Occupational Safety and Health Administration (OSHA) initiated an inspection.

As a result of the OSHA inspection, KMD received a citation on January 18, 2012, alleging a willful violation of 29 C. F. R. § 1926.652(a)(1) for failing to shore or slope the walls of an excavation more than 5 feet in depth. The citation proposed a penalty of \$53,900.00. KMD timely contested the citation.

The hearing was held on June 14, 2012, in Atlanta, Georgia. At the hearing, the parties stipulated jurisdiction and coverage (Tr. 4). The parties filed post hearing briefs on August 31, 2012.

KMD denies the alleged violation and willful classification. KMD claims unpreventable employee misconduct because the laborer unexpectedly entered the excavation and the foreman was attempting to remove him when OSHA initiated the inspection.

As discussed more fully, KMD's violation of § 1926.652(a)(1) is affirmed as serious and a penalty of \$5,000.00 is assessed.

### **BACKGROUND**

KMD is a family-owned business in Marietta, Georgia, engaged in installing underground utilities. KMD has been in business for 20 years. In August 2011, it employed approximately 35 employees (Tr. 191, 199).

The City of Marietta, Georgia, contracted KMD in 2011 to install 2,700 linear feet of replacement main water line and fire hydrants along Cobb Parkway (Tr. 66). The contract also required KMD to bury approximately twenty, 12-foot PVC pipes (risers) for the placement of GPS devices. The GPS device would locate pipe fittings on the main water line after the excavation was backfilled. The white PVC pipes were to be placed upright in the excavation with approximately 2 feet above the ground level (Tr. 112-113, 114, 158, 189).

On August 17, 2011, at the corner of Allgood Road and Cobb Parkway, the crew had dug an irregular shaped excavation approximately 9 feet deep. The walls of the excavation were vertical on three sides and the excavation also contained existing sewer and gas lines (Exhs. C-8, C-9; Tr. 33, 35-36, 38). To install the new main water line, the KMD crew used two sizes of trench boxes. The crew consisted of the foreman, an excavator operator (competent person), and two laborers (Tr. 61, 109, 150-151, 155).

By the afternoon, the crew had completed the installation of the main water line and the placement of one PVC pipe (Exh. C-5; Tr. 19, 70, 110). Another PVC pipe needed to be installed near the side of the excavation. To install this PVC pipe, the laborers exited the excavation and the trench boxes were removed. The foreman standing on the side of the excavation attempted to hold the PVC pipe upright with the head of a shovel while the excavator placed dirt around the pipe.<sup>1</sup> However, the pipe fell over in the excavation. When it fell, a laborer entered the excavation and began holding it upright (Exh. C-7; Tr. 29-30, 96, 122, 159).

As the OSHA compliance officer was driving along Cobb Parkway, he observed "somebody working in the excavation" (Tr. 12, 64). He parked his car and initiated the inspection. As he approached the excavation, the compliance officer observed the laborer holding the PVC

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<sup>1</sup> According to KMD, in wide trenches, the PVC pipes were installed with the employees holding the pipe inside a trench box until it was secured by backfill. For narrow trenches, or where the pipe was to be placed near the side, an employee standing on the side of the excavation would hold the pipe upright with their hands or by the head of a shovel (Tr. 113, 156).

pipe upright and the excavator moving a bucket of dirt in front of him (Exh. C-6; Tr. 17). The foreman was standing at the side of the excavation above the laborer. The other laborer was also standing on the side of the excavation, near the ladder (Tr. 15-16, 19, 21)

After introducing himself, the compliance officer observed the laborer ordered out of the excavation by the foreman and the excavator shut down (Tr. 23). According to the compliance officer, the foreman acknowledged that the excavation was “an illegal hole” (Tr. 22). He told the compliance officer that he knew it was necessary to use a trench box (Tr. 30). He had not put it back into the excavation because the job would take a short time – “five or ten minutes” (Tr. 42-43).

The compliance officer measured the excavation where he observed the laborer to be 9½ feet deep and 17 feet wide (Exhs. C-8, C-10; Tr. 34). The excavation was 7 feet deep where the ladder was located. The compliance officer observed cracks in the wall of the excavation near where the laborer was holding the pipe (Tr. 34, 48). He also noted that vibration from the nearby traffic and the location of existing utilities lines could affect its stability (Tr. 38). He classified the soil as Type C.

As a result of the OSHA inspection, KMD received a willful citation for violation of § 1926.652(a)(1) because of the lack of a cave-in protection system. KMD issued written safety citations to the laborer and foreman for their conduct on August 17, 2011 (Exh. R-5).

## **DISCUSSION**

The Secretary of Labor has the burden of proving, by a preponderance of the evidence, an employer’s violation of a safety standard such as § 1926.652(a)(1). The Secretary must show: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employees access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the condition. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

KMD claims the foreman was unaware the laborer had entered the excavation and was attempting to get him out as the OSHA compliance officer arrived on site. The laborer testified that no one directed him into the excavation (Tr. 80). KMD argues that the noise level from the excavator and highway traffic was so high that communication was difficult. It maintains that the total time the laborer was in the excavation was less than fifteen seconds (Tr. 81, 91, 99, 161).



According to the Secretary, the foreman told the OSHA compliance officer that he instructed the laborer into the excavation because there was no other way to retrieve the fallen PVC pipe. The compliance officer estimated that the laborer was in the excavation for approximately 15 minutes and throughout that time, the foreman was standing on the side of the excavation watching the laborer hold the pipe and directing the work (Exh. C-5: Tr. 30, 69, 94-95, 101-102).

**Alleged Violation of § 1926.652(a)(1)**

The citation alleges that on “Cobb Parkway, Marietta, GA – The employee working in the excavation at a depth of 9 feet was not protected from potential wall collapses or cave-ins by the use of a protective system.”

Section 1926.652(a)(1) provides:

Each employee in an excavation shall be protected from cave-in 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.

There is no dispute the *Excavations* standards at Subpart P, § 1926.650 *et seq.*, applied to KMD’s excavation on Cobb Parkway on August 17, 2011. KMD does not dispute that the excavation was dug in Type C soil and exceeded 5 feet in depth. The excavation was in previously disturbed soil as evident by the existing sewer and gas lines (Exh. C-6; Tr. 38). It was 9 feet in depth and not in stable rock. The photographs establish that at the time the laborer entered the excavation to hold the PVC pipe, it lacked any cave-in protection system such as a trench box or other shoring and the walls were not sloped (Exh. C-4; Tr. 36).

Thus, the Secretary has met her burden of proof with regard to the application of the standard, KMD’s failure to comply with the terms of § 1926.652(a)(1), and the laborer’s exposure to a 9-foot deep, unprotected, excavation without shoring or sloping.

The issue in dispute to establish a violation of § 1926.652(a)(1) is whether KMD had the requisite knowledge of the violative condition.

*KMD’s Knowledge*

KMD argues that the events on August 17 transpired too quickly to support either KMD’s actual or constructive knowledge. The laborer entered the excavation on his own and exited

immediately upon recognizing his mistake. According to KMD, he was only in the excavation a matter of seconds (KMD Brief, p. 9).

In order to establish an employer's knowledge of a violation, the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). A supervisor's actual or constructive knowledge of a hazardous condition may be imputed to the employer. *Superior Electric Co.*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996). A condition which is plainly visible to a supervisor is sufficient knowledge chargeable to the employer. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994).

KMD's foreman was present at the excavation and supervised the laborer's work. He was standing on the side of the excavation immediately above the laborer holding the PVC pipe (Tr. 94-95). Although there is an issue as to whether the laborer was instructed to enter the excavation, there is no dispute that the foreman knew the laborer was in the excavation by the time OSHA arrived on site. The photographs taken by OSHA show the foreman looking into the excavation where the laborer was holding the pipe (Exhs. C-2, C-3). The foreman as a supervisor, who directed the work of the crew, was responsible for the laborer's safety (Exh. R-2). A supervisor's knowledge of the violative conditions and his own actions or inactions is imputed to his employer. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). The foreman's knowledge in this case is imputed to KMD.

KMD's argument that the laborer was in the excavation for only a brief time before exiting, is immaterial to a finding of a violation. The Review Commission has repeatedly held that although an employee's exposure to a hazardous condition may have been comparatively brief, such exposure is still sufficient to support the finding of a violation. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991) (brief exposures involved in passing or standing near an open edge constitutes access); *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2156 (No. 87-1238, 1989) (although the risk of falling was not great, the consequences of a fall was significant, justifying a serious violation). A brief exposure to a hazardous condition does not negate a violation or its seriousness. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992).

KMD's claim that the laborer was in the excavation for 15 seconds is rejected as contrary to the evidence. A time of less than 15 minutes is deemed more appropriate based on the

compliance officer's activity in first observing the laborer in the excavation, parking his car, gathering his equipment, walking to the excavation, and taking photographs (Exh. R-1). The laborer did not exit the excavation until after the foreman became aware of the OSHA compliance officer's presence. There is no showing that the foreman attempted to remove the laborer from the excavation prior to the compliance officer's presence. Although the area was noisy, the compliance officer did not hear or observe the foreman "yelling" or use hand signals to gain the attention of the laborer prior to exiting the excavation (Tr. 21-22). The photographs support the compliance officer's testimony. The compliance officer's estimate of less than 15 minutes from the time he first observed the laborer while driving on Cobb Parkway is accepted (Tr. 69). During the 15 minutes, the foreman remained on the side of the excavation and knew the laborer was in the unprotected excavation.

KMD's violation of § 1926.652(a)(1) is established unless it can show unpreventable employee misconduct.

#### **Unpreventable Employee Misconduct**

KMD asserts that the laborer who entered the excavation violated its work rules and was engaged in unpreventable employee misconduct. KMD claims the laborer entered the excavation on "his own volition" when he saw the PVC pipe fall and realized that he made a mistake when he exited the excavation (Tr. 6). KMD does not assert unpreventable misconduct on the part of the foreman.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

The Secretary does not dispute that KMD has adequate written safety policies and rules requiring a protective system before employees enter an excavation (Secretary's Brief, p. 14). The company's *Safety and Health Manual* provides that "each employee in an excavation shall be protected from cave-ins by an adequate protective system" (Exh. R-2, p 2.4). KMD's rule was designed to prevent the cited condition.

With regard to KMD's communication of its safety rules, the record shows that the laborer received training and testing by KDM as part of its safety program (Exh. R-6; Tr. 86). He had

worked for KMD for more than three years (Tr. 75). KMD offered evidence of regular weekly safety meetings where the laborer was present (Exh. R-7; Tr. 164).<sup>2</sup> On January 12, 2008, the laborer was given a test showing he understood the information regarding in part the need for a cave-in protection system (Exh. R-3; Tr. 77). The laborer even won a company safety award in 2010 for demonstrating “safety awareness and follows the company’s safety policy” (Exh. R-4).

However, as noted by the Secretary, no tests, orientation packages or other records were shown for the other three employees at the excavation site. Also, the sign-in sheets for the safety meetings fail to provide any detail regarding the specific information discussed, the length of the meeting, or who provided the training (Tr. 173). The sign-in sheets state only “trench safety” or “trench box safety.” Although the record shows that the employees received training on general safety matters and procedures, the evidence is insufficient to establish that the specific rule to avoid entering excavations without cave-in protection was communicated to the employees. *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999).

As to the reasonable steps to discover violations, KMD’s safety officer purportedly visits each work crew weekly and conducts safety meetings. He checks work sites for safety and completes safety worksheets. Other company officers also inspect sites for safety with someone visiting every site at least once every workday (Tr. 192, 196-197).

The worksheets allegedly prepared by the safety officer during his site inspections were not made part of the record. Although foremen are part of KMD’s monitoring program, the foreman in this case with twenty-one years of experience was the same person who permitted the laborer to remain in an unprotected excavation for 15 minutes in order to complete the task. The lack of good judgment by a supervisor such as a foreman raises an inference of a lax safety program. *Daniel Construction Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982). KMD’s argument that the foreman was attempting to remove the laborer is rejected. The compliance officer heard and saw no evidence of such attempts (Tr. 21-22). His photographs and the amount of time the laborer was in the excavation support the compliance officer’s testimony.

KMD’s enforcement of safety rules is not supported by the record. KMD introduced recent discipline records involving violations of safety rules (Exh. R-9). Both the foreman and laborer received written safety citations as a result of the August 17, 2011, incident. The laborer was cited

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<sup>2</sup> Exhibit R-8, which also contains sign-in sheets, is not given weight because the meetings occurred after the OSHA inspection on August 17, 2011.

by KMD for entering a “ditch 10’ without box.” The foreman was cited for not stopping a “man from jumping into ditch to line up pipe on operator to fire hydrant” (Exh. R-5; Tr. 172).

Despite receiving the written citation, the foreman testified that he did not understand the write-up (Tr. 187). The company’s safety manual provides that a written warning is supposed to be “followed by an explanation and/or training” (Exh. R-2, p. 16). There is no showing the foreman received such explanation and/or training. The foreman could not recall when he received the warning (Tr. 172). The laborer also could not recall when he received the warning. He did not lose any money as a result of the citation and it was the only safety warning he had ever received (Tr. 102). The other two employees on site did not receive any warnings although they were present and watched the unsafe conduct without apparent objection.

Where multiple employees participate in or witness an activity that violates a work rule, “the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule.” *GEM Industry, Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996). There was one employee in the excavation and at least three employees outside the excavation including the foreman who were watching the laborer. All employees on site were purportedly aware of KMD’s work rule against working in an unprotected excavation, yet none of them assured compliance with the rule. Prior to the OSHA inspection, it is noted that most of the written safety warnings involved hard hats, safety vests and glasses (Exh. R-9).

The excavator operator (competent person) testified that he has worked for KMD for more than ten years and has never been disciplined by KMD. He was not familiar with other employees receiving discipline. He was not disciplined for the August 19 activity although the excavator was operating while the laborer was in the excavation (Tr. 138-139). His claim that he did not see the laborer in the excavation is rejected. The photographs taken by OSHA show the excavator’s bucket filled with dirt directly in front of the laborer holding the PVC pipe or passing by him (Exhs. C-6, C-7; Tr. 93).

The foreman, who has worked for KMD for more than 20 years, also had no recollection of any prior discipline or of disciplining other employees. The foreman described a more informal system of verbal communications on how to perform tasks correctly (Tr. 187-188). There is no evidence of the foreman’s safety training and instruction. KMD’s monitoring results of the foreman’s safety practices on other projects were not submitted into the record.

In the *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), the Review Commission noted that “where a supervisory employee is involved, 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 . . . . A supervisor’s involvement in the misconduct is strong evidence that the employer’s safety program was lax.” *Id.* at 1017.

KMD’s claim of unpreventable employee misconduct is not established.

#### **Willful Classification**

KMD’s violation of § 1926.652(a)(1) was classified by OSHA as “willful.” “It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). A willful violation is differentiated by an employer’s heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

The record shows that the KMD crew was overtaken by a quick sequence of unexpected events that were neither planned nor in compliance with KMD’s written safety program. The experienced crew had used trench boxes earlier to perform its work in the excavation. At another KMD trench site approximately 150 yards from the excavation at issue, the OSHA compliance officer found no safety problems (Tr. 56-57). The events occurred too quickly for KMD to have the requisite heightened awareness to establish willfulness. The laborer entered the excavation on his own and was allowed to remain until OSHA initiated the inspection. The conduct by the foreman shows a lack of good judgment and an attempt to deal with the unexpected conduct of the laborer. But it fails to establish willfulness. There were a variety of other options available to retrieve the fallen pipe instead of allowing the laborer to remain in an unprotected excavation. KMD claims that the excavator could have picked up the fallen PVC pipe and put it back in place within five minutes. The trench boxes could also have been reinserted which would have taken five minutes (Tr. 116, 118).

KMD’s good faith effort to comply is evident from its consistent use of trench boxes at the site and that the same boxes were still on site, properly sized and ready for re-insertion in only five minutes. The foreman’s apparent attempt to quickly finish the job is not sufficient to elevate

KMD's conduct to willful. KMD has a good written safety program and attempts to regularly monitor each worksite. The same compliance officer was unable to find any safety problems at other KMD excavations.

KMD's violation of § 1926.652(a)(1) is reclassified as serious.

#### **Penalty Assessment**

Section 17(j) of the Act requires the Commission to give due consideration to four criteria when assessing penalties: (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. 29 U.S.C. § 666(j). The gravity of the violation is given primary consideration.

KMD employed approximately 35 employees at the time of the OSHA inspection (Tr. 48). KMD is not entitled to credit for history because of a serious citation within the past three years. It is entitled to credit for good faith because it has a good written safety program. The company safety training program and its communication to employees also appears adequate.

A penalty of \$5,000.00 is deemed reasonable for KMD's serious violation of § 1926.652(a)(1). The excavation was 9 feet in depth and dug in Type C soil. One employee was exposed to the unprotected excavation. His exposure was brief and resolved quickly.

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

This 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 on the foregoing decision, it is ORDERED that:

1. A willful violation of 29 C. F. R. § 1926.652(a)(1) is affirmed as serious and a penalty of \$5,000.00 is assessed.

/s/ \_\_\_\_\_ Ken S. Welsch  
Ken S. Welsch  
Judge

Date: December 11, 2012  
Atlanta, Georgia