

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Minnesota Department of Labor and
Industry,

Complainant,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

v.

Dirt Merchant, Inc.,

Respondent.

The above-entitled matter came before Administrative Law Judge Jeanne M. Cochran for an evidentiary hearing on November 12, 2015. The parties filed initial post-hearing briefs on January 15, 2016, and reply briefs on January 29, 2016. The record closed on January 29, 2016 with the filing of the last responsive brief.

Scott A. Grosskreutz, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Jane L. Volz, Volz Law Firm, Ltd., appeared on behalf of Dirt Merchant, Inc. (Dirt Merchant or Respondent).

This matter involves Dirt Merchant's challenge to the Citation and Notification of Penalty issued to the company on November 10, 2014 by the Occupational Safety and Health Division of the Department, as amended.¹ The Citation cites Dirt Merchant for violations of 29 C.F.R. § 1926.651(c)(2) (Item 1) and 29 C.F.R. § 1926.652(a)(1) (Item 2) (2015).² Dirt Merchant has contested both Items.³

STATEMENT OF THE ISSUES

1. Whether a Dirt Merchant employee was exposed to a hazard in violation of 29 C.F.R. § 1926.651(c)(2) when he worked in an unprotected trench greater than four feet in depth without a safe means of egress at 1960 Adams St., Mankato, Minnesota, as alleged in Citation 1, Item 1?

¹ Notice and Order for Hearing and Prehearing Conference (May 7, 2015); Amended Notice and Order for Hearing (November 4, 2015); Amended Complaint (November 4, 2015).

² Exhibit (Ex.) 7.

³ Ex. 8.

2. Whether a Dirt Merchant employee was exposed to a hazard in violation of 29 C.F.R. § 1926.652(a)(1) when he worked in an unprotected trench greater than five feet in depth without adequate protection from cave-ins at 1960 Adams St., Mankato, Minnesota, as alleged in Citation 1, Item 2?

3. Whether the Commissioner has demonstrated by a preponderance of the evidence that Dirt Merchant knew of the violative conditions or, with the exercise of reasonable diligence, could have known of the violative conditions?

4. If so, whether Dirt Merchant has established the affirmative defense of unpreventable employee misconduct?

5. Whether Items 1 and 2 of the Citation are properly classified as Willful, or in the alternative Serious?

6. Whether the penalties for Items 1 and 2 were properly calculated pursuant to Minn. Stat. § 182.666 (2014)?

7. Whether the abatement periods for Items 1 and 2 in the Citation are reasonable?

SUMMARY OF DECISION

The Department has established that a Dirt Merchant employee was exposed to a hazard in violation of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) when he worked in a trench on October 31, 2014, which was greater than five feet in depth, without a safe means of egress and without adequate protection from cave-ins. The Department has also demonstrated by a preponderance of the evidence that Dirt Merchant knew or, with the exercise of reasonable diligence, could have known of the violative conditions. In addition, Dirt Merchant has failed to establish the affirmative defense of employee misconduct. Therefore, the violations of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) **are AFFIRMED.**

In addition, the Department has established that the violations were Serious, but not Willful. Finally, the Department has established that the penalties for the Serious violations were properly calculated and the abatement periods included in the Citation and Notification of Penalty issued to the company on November 10, 2014 are reasonable.

Based on these conclusions, the Administrative Law Judge **AFFIRMS** the Citation and Notification of Penalty as originally issued on November 10, 2014. The Department's amendment of the violations from Serious to Willful on November 5, 2015 is not affirmed. The violations remain classified as Serious, as originally issued.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Dirt Merchant Company Background

1. Dirt Merchant is in the business of excavation, dirt moving, grading, site development, and sewer and water pipe inspection and repair.⁴ Dirt Merchant, Inc. was established in 2003.⁵

2. Dirt Merchant is owned by Bryan Bode and Kevin Depuydt.⁶

3. Bryan Bode is the president of the company.⁷ Mr. Bode also does some limited project management.⁸

4. Kevin Depuydt, the other owner, does most of the project management, field supervising, and inspecting. Mr. Depuydt has over 30 years of experience in the sewer and water business.⁹

5. In October 2014, at the time of the alleged violations of the Minnesota Occupational Safety and Health Act (OSHA), Dirt Merchant had approximately 30 employees.¹⁰

6. Prior to November 2014, Dirt Merchant had never been cited for a violation of OSHA.¹¹

7. Dirt Merchant has had one “lost work” injury since it was started in 2003. In that instance, an employee was working at a commercial building and fell from a catwalk. The individual hurt his knee. He lost only approximately a day of work, but had to have reconstructive knee surgery in the winter.¹²

8. Dirt Merchant has not had any injuries or lost work related to work in trenches.¹³

⁴ Hearing Transcript (Tr.) at 90 (Joshua Halvorson).

⁵ *Id.* at 170 (Bode).

⁶ *Id.* at 93 (Halvorson).

⁷ *Id.* at 170 (Bode).

⁸ *Id.*

⁹ *Id.* at 172, 183, 196 (Bode).

¹⁰ *Id.* at 170 (Bode).

¹¹ *Id.* at 170 (Bode).

¹² *Id.* at 170-171 (Bode)

¹³ *Id.* at 171 (Bode).

Dirt Merchant Safety Policy and Training

9. Dirt Merchant has a written safety policy.¹⁴ The safety policy is designed “to provide a safe and healthy work environment for all employees and to abide by all federal, state, and local regulations....”¹⁵ The written safety policy does not cover discipline.¹⁶

10. Every employee is given a copy of the policy. Each employee is expected to read the policy, and then sign and date his or her copy.¹⁷

11. The policy includes: A Workplace Accident and Injury Reduction (AWAIR) program; information on OSHA and OSHA inspections; a confined space entry procedures; an excavation and trenching program; general safety guidelines; a heavy equipment/mobile earth moving safety program; and a hazard communication/right to know program.¹⁸

12. The safety policy provides specific responsibilities for management and supervisors, including foremen. The policy also includes responsibilities for all employees.¹⁹

13. The excavation and trenching program that is part of the safety policy is designed to protect employees from safety hazards during work in trenches and excavations. The program provides that all employees who work in excavations shall be trained so that they can recognize and avoid hazards. The program also provides the work practices that must be followed while digging in or working in or around an excavation.²⁰

14. The program provides that management shall ensure that all employees are trained and are provided with the equipment needed to do their jobs safely.²¹

15. Among other requirements, the excavation and trenching portion provides that “[s]tairs, ladders, or ramps shall be provided when employees enter excavations over 4 feet deep.”²²

16. In addition, the safety policy specifically provides employees in an excavation shall be protected from cave-ins by: sloping or sloping and benching the

¹⁴ *Id.* at 171-172 (Bode); Ex. 117.

¹⁵ Ex. 117 at 1.

¹⁶ *See generally* Ex. 117.

¹⁷ Tr. at 172 (Bode).

¹⁸ Ex. 117.

¹⁹ *Id.* at 2-4.

²⁰ *Id.* at 18.

²¹ *Id.* at 18.

²² *Id.* at 20.

sides of the excavation according to soil type and conditions; use of trench shields; and construction of trench supports.²³

17. Dirt Merchant also has safety training for its employees. In the beginning of the construction season, the company has a spring start-up meeting. At that meeting, the company has various guest speakers address safety issues. The owners also address the company employees about safety at the spring meeting.²⁴

18. At the 2014 spring meeting, the use of trench boxes, sloping, and OSHA requirements were discussed.²⁵

19. Dirt Merchant also has a “Toolbox Talk” program. Every Friday the company provides a Toolbox Talk to the foremen. The foremen then present the Toolbox Talk to the employees on Monday mornings.²⁶ The Toolbox Talks focus on different safety issues, including but not limited to trenching and excavation.²⁷

20. The company’s owners, who are also the project managers, make periodic unannounced visits to job sites to make sure employees are working safely.²⁸ Most visits are conducted by Kevin Depuydt rather than Bryan Bode.²⁹ Bryan Bode works in the office but tries to get out to visit job sites once or twice per week.³⁰ Kevin Depuydt gets out in the field more often, but does not visit each and every job site on a daily basis.³¹

21. If Mr. Bode sees something unsafe on a site visit, he stops the work and makes sure corrective measures are taken to make the job site safe for the employees.³² The company’s owners want “all [their] employees to go home every night to their families without injury.”³³

22. Dirt Merchant does not have a written discipline policy.³⁴ Nor does it have a formal, unwritten discipline policy.³⁵

²³ Ex. 117 at 23.

²⁴ Tr. at 173, 180 (Bode); Ex. 126.

²⁵ Ex. 179-180; Ex. 126.

²⁶ Tr. at 173, 180; Ex. 126.

²⁷ Tr. at 116 (Halvorson), 177-179, 181 (Bode); Exs. 123-124, 127.

²⁸ Tr. at 110-111 (Halvorson), 196 (Bode).

²⁹ *Id.* at 94, 110-111 (Halvorson), 183, 195-196 (Bode).

³⁰ *Id.* at 196 (Bode).

³¹ *Id.* at 110 (Halvorson) (noting that his supervisors “sometimes” check the job site on a daily basis), at 183 (Bode).

³² *Id.* at 186 (Bode).

³³ *Id.*; *see also* Ex. 123.

³⁴ Tr. at 106-107, 111 (Halvorson), 199-200 (Bode).

³⁵ *Id.* at 112 (Halvorson), 199-200 (Bode).

23. The company uses verbal warnings if an employee fails to adhere to the safety program. Dirt Merchant has terminated an employee for unsafe driving and issued a reprimand to Mr. Halvorson.³⁶

Dirt Merchant Employee Joshua Halvorson

24. Joshua Halvorson has worked for Dirt Merchant since approximately 2007.³⁷ Mr. Halvorson began working as a general laborer for Dirt Merchant. Since approximately 2012, he has worked as a foreman with Dirt Merchant.³⁸

25. Mr. Halvorson reports to the owners, Bryan Bode and Kevin Depuydt. He has no other supervisors.³⁹

26. Mr. Halvorson works only for Dirt Merchant. He does not have a separate business as an independent contractor.⁴⁰

27. Mr. Halvorson's supervisors determine which jobs he works on as a foreman.⁴¹

28. As a foreman, Mr. Halvorson is responsible for scheduling, overseeing the work of employees who report to him, overseeing the safety of employees that he is working with, and ordering materials.⁴² He also is responsible for inspecting and repairing pipes on Dirt Merchant jobs, as well as overseeing the repair of pipes done by other Dirt Merchant employees on jobs where he is the foreman.⁴³

29. Mr. Halvorson has attended the annual safety meetings and weekly Toolbox Talks.⁴⁴ Trench safety and the requirements of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) were discussed during at least one Toolbox Talk that Mr. Halvorson conducted.⁴⁵

30. In 2010, Mr. Halvorson successfully completed a 10-hour OSHA training course.⁴⁶

31. In 2013, Mr. Halvorson received "competent person" training particular to trenching and excavation. The training provided him with knowledge of the OSHA rules applicable to trenching and excavating. Based on that training, Mr. Halvorson has the

³⁶ *Id.* at 186-187 (Bode).

³⁷ Tr. at 90 (Halvorson).

³⁸ *Id.* at 90-91 (Halvorson).

³⁹ *Id.* at 93 (Halvorson).

⁴⁰ *Id.* at 92 (Halvorson).

⁴¹ *Id.* at 116-117 (Halvorson), 184 (Bode).

⁴² *Id.* at 91 (Halvorson).

⁴³ *Id.* (Halvorson).

⁴⁴ *Id.* at 116 (Halvorson); *See also, e.g.*, Exs. 118-120, 122, 128-130; Tr. at 174-183 (Bode).

⁴⁵ *Id.* at 178-179 (Bode); Ex. 124 (noting that "Josh" conducted the meeting).

⁴⁶ Ex. 131; Tr. at 193 (Bode).

knowledge necessary to identify hazards at the work site and the ability to remove those hazards.⁴⁷

32. As a competent person and as a foreman, Mr. Halvorson has the responsibility to identify hazards for employees at Dirt Merchant jobs.⁴⁸ As a foreman, Mr. Halvorson is also responsible for reporting any unsafe conditions to his supervisors, ensuring that unsafe conditions are corrected, and is “completely responsible for on-site safety.”⁴⁹

October 31, 2014 Trench Incident Involving Joshua Halvorson

33. On Friday October 31, 2014, Mr. Halvorson was assigned to work at a job that Dirt Merchant was doing for the City of Mankato on Energy Drive near the FedEx distribution center.⁵⁰ Mr. Halvorson was working with two other Dirt Merchant employees on that job.⁵¹

34. While at the City of Mankato job site, Mr. Halvorson received a call on his cell phone from Leon Depuydt, the owner of Leon’s Custom Backhoe. Leon Depuydt is the sole owner and the only employee of Leon’s Custom backhoe. Leon Depuydt is also the brother of Kevin Depuydt, one of the two owners of Dirt Merchant.⁵²

35. Leon explained to Mr. Halvorson that he was digging up a leaky water main at 1960 Adams Street in Mankato, near Gordman’s Department Store. He requested that Mr. Halvorson come inspect and repair the leaky pipe.⁵³ The location where Leon’s Custom Backhoe was working near Gordman’s Department Store is approximately one mile from the job site where Mr. Halvorson was working.⁵⁴

36. Mr. Halvorson told Leon Depuydt that he would come help him with his project.⁵⁵

37. Mr. Halvorson and the two other Dirt Merchant employees who were working with him at the city of Mankato job site went to 1960 Adams Street where Leon’s Custom Backhoe was working. Mr. Halvorson drove himself in a Dirt Merchant vehicle, and the two other employees followed in their own personal vehicles.⁵⁶

⁴⁷ Tr. at 92, 103 (Halvorson); Ex. 121; Tr. at 166-167 (Arnold Kraft).

⁴⁸ Tr. at 92 (Halvorson).

⁴⁹ Ex. 117 at 2; Tr. at 114-115 (Halvorson).

⁵⁰ Tr. at 184 (Bode).

⁵¹ *Id.* at 100 (Halvorson).

⁵² *Id.* at 95-97 (Halvorson).

⁵³ *Id.* at 95-96 (Halvorson), 183-184 (Bode).

⁵⁴ *Id.* at 112 (Halvorson).

⁵⁵ *Id.* at 113 (Halvorson).

⁵⁶ *Id.* at 100 (Halvorson).

38. Mr. Halvorson did not contact either Bryan Bode or Kevin Depuydt, the owners of Dirt Merchant, before going to assist Leon Depuydt with the leaky water main at 1960 Adams Street in Mankato.⁵⁷

39. Leon Depuydt had called Mr. Halvorson on a number of other occasions prior to October 31, 2014 and asked for assistance with a job. In each of those instances, Mr. Halvorson had contacted one of the Dirt Merchant owners prior to assisting Leon's Custom Backhoe with a project.⁵⁸

40. According to Bryan Bode, if a foreman is asked by someone from another company to work on a project, the foreman must get approval from one of the owners before working on the project.⁵⁹ Dirt Merchant does not have a written policy to this effect, but Mr. Bode believes that the foremen know they receive their job assignments from the owners of Dirt Merchant.⁶⁰

41. When Mr. Halvorson arrived at 1960 Adams Street, Leon had already dug a trench and exposed the leaking water main.⁶¹

42. The trench was: 7 feet, 6 inches deep; 13 feet long; 7 feet, 8 inches wide at the top; and 4 feet wide at the bottom.⁶² The trench had nearly vertical dirt walls, without any shoring or other protective system. There was also no method of egress.⁶³

43. Shortly after arriving, Mr. Halvorson jumped into the trench to check the size of the bolts that had rusted out on the water main so that he could get new bolts to repair the leak.⁶⁴ Mr. Halvorson measured the bolts with a tape measure and then got out.⁶⁵

44. Mr. Halvorson was in a rush because he had to finish the other job and it was Friday.⁶⁶ Mr. Halvorson thought he would jump in the trench, check the size of the bolts, and get out.⁶⁷

45. Prior to entering the trench, Mr. Halvorson was aware of the OSHA standards pertaining to proper egress from a trench and the requirement for an adequate protective system.⁶⁸ Mr. Halvorson was also aware that the trench did not

⁵⁷ *Id.* at 112-113 (Halvorson).

⁵⁸ *Id.* at 98, 112 (Halvorson), 197 (Bode).

⁵⁹ *Id.* at 185 (Bode).

⁶⁰ *Id.* at 184-185, 198 (Bode).

⁶¹ *Id.* at 101 (Halvorson); Ex. 1; Tr. at 40 (Stevens).

⁶² Ex. 1 at OSHA 012; Tr. at 101 (Halvorson).

⁶³ Ex. 1.

⁶⁴ Tr. at 102 (Halvorson).

⁶⁵ *Id.* at 113 (Halvorson).

⁶⁶ *Id.* at 103-104, 113 (Halvorson).

⁶⁷ *Id.* at 104 (Halvorson).

⁶⁸ *Id.* at 102 (Halvorson).

have a ladder or other proper egress and that the trench was more than five feet deep.⁶⁹

46. Mr. Halvorson explained that he was not thinking about the OSHA standards when he jumped into the trench because he was in a hurry and wanted to check the size of the bolts.⁷⁰

47. One of the two Dirt Merchant employees at the site and Leon Depuydt watched Mr. Halvorson from the edge of the trench while he was in the trench.⁷¹

48. Mr. Halvorson did not expect that either of the two Dirt Merchant employees at the site would inform Dirt Merchant's owners, Kevin Depuydt or Bryan Bode that Mr. Halvorson had gone into the trench without an adequate protection system or proper egress.⁷² Nor did Mr. Halvorson expect that Leon Depuydt would inform his brother, Kevin Depuydt, or Bryan Bode that he went into the trench without adequate safety systems.⁷³

OSHA Inspection of Site on October 31, 2014

49. While Mr. Halvorson was briefly in the trench, Justin Stevens, a Safety Investigator with Minnesota Occupational Safety and Health Administration (MN-OSHA),⁷⁴ arrived at the work site at 1960 Adams Street in Mankato.⁷⁵ Investigator Stevens conducted an inspection of the site as part of the National Emphasis program for trenching and excavation safety.⁷⁶

50. When Investigator Stevens arrived, he saw Mr. Halvorson working in the trench without the proper protective systems or an appropriate means of egress.⁷⁷ No sloping, shoring or shielding was in place. Nor was there a ladder for egress. Mr. Stevens observed Mr. Halvorson crawl out of the trench.⁷⁸

51. With assistance from Mr. Halvorson and Leon Depuydt, Mr. Stevens measured the dimensions of the trench.⁷⁹ Investigator Stevens also made a visual inspection of the trench and did a thumb-penetration test of the soil in the trench.⁸⁰

52. As part of the visual inspection, Mr. Stevens looked for signs of a lack of cohesiveness. He looked at the condition of the dirt in the trench, whether there were

⁶⁹ *Id.* at 103-104 (Halvorson).

⁷⁰ *Id.* at 118 (Halvorson).

⁷¹ *Id.* at 35-36 (Stevens), Ex. 1 at OSHA 021-022.

⁷² Tr. at 105 (Halvorson).

⁷³ *Id.* at 104-105 (Halvorson).

⁷⁴ MN-OSHA is part of the Department of Labor and Industry.

⁷⁵ Tr. at 18, 31-32, 36-37 (Stevens).

⁷⁶ *Id.* at 33 (Stevens).

⁷⁷ *Id.* at 36 (Stevens); Ex. 1 at OSHA 009, 012.

⁷⁸ Ex. 1 at OSHA 009, OSHA 012.

⁷⁹ Tr. at 41 (Stevens); Ex. 1 at OSHA 012.

⁸⁰ Tr. at 42 (Stevens).

any cracks or fissures, and whether there was any sloughing of the trench. The thumb penetration test also helped to determine the cohesiveness of the soil.⁸¹

53. As a result of those tests, Investigator Stevens determined that the soil in the trench was Class B soil.⁸² Mr. Halvorson agreed with Investigator Stevens that the soil was Class B.⁸³

54. As part of his inspection, Mr. Stevens also took photographs of the site and spoke to the Mr. Halvorson and Leon Depuydt about the work that was underway.⁸⁴

55. Mr. Halvorson identified himself as the foreman and competent person for Dirt Merchant.⁸⁵ Leon Depuydt identified himself as the owner of Leon's Custom Backhoe.⁸⁶

56. According to Mr. Stevens' Inspection Report, both Mr. Halvorson and Leon Depuydt told Mr. Stevens that Leon's Custom Backhoe had "contracted" with Dirt Merchant to perform work in the trench.⁸⁷ Leon's Custom Backhoe was the general contractor and was overseeing the work of Dirt Merchant.⁸⁸

57. Both Mr. Halvorson and Leon Depuydt agreed with Inspector Stevens that the trench was not adequately protected and a safe means of egress was not provided.⁸⁹

58. Mr. Halvorson told Investigator Stevens that he "just needed to jump in the trench for a couple of minutes to check the size of the bolts and was going to put a ladder in at a later time when the actual work was taking place."⁹⁰ Mr. Halvorson also told Inspector Stevens that "after he determined the bolt size, they were going to install a trench box in the trench while the actual work was being performed."⁹¹ Investigator Stevens noted that there was no trench box on site.⁹²

Completion of the Project at 1960 Adams Street

59. Sometime later in the day on October 31, 2014 after Inspector Stevens left the work site, Dirt Merchant completed the repair of the leaky water main at the work site. According to Mr. Halvorson, proper safety precautions were taken when the work

⁸¹ *Id.* (Stevens).

⁸² *Id.* at 43 (Stevens); Ex. 1 at OSHA 012. Contact 1 referred to in Ex. 1 is Mr. Halvorson. See Tr. at 38-40.

⁸³ Ex. 1 at OSHA 12.

⁸⁴ Tr. at 32 (Stevens); Ex. 1 at OSHA 003.

⁸⁵ Ex. 1 at OSHA 009, OSHA 012.

⁸⁶ *Id.* at OSHA 003.

⁸⁷ *Id.* at OSHA 2 and OSHA 009; Tr. at 38-39 (Stevens).

⁸⁸ Ex. 1 at OSHA 002.

⁸⁹ *Id.* at OSHA 009.

⁹⁰ *Id.*

⁹¹ *Id.* at OSHA 012.

⁹² *Id.*

was completed including the use of a trench box and a safe means of egress. Leon's Custom Backhoe provided the trench box.⁹³

60. Mr. Halvorson was paid by Dirt Merchant for a full day of work on October 31, 2014.⁹⁴

OSHA Citation Issued on November 10, 2014

61. Inspector Stevens prepared an Inspection Report and worksheets, which recommended issuance of a citation for the following two violations to Dirt Merchant:⁹⁵

Citation 01, Item 001 – Type of Violation: **Serious**

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

An employee working in an unprotected trench, greater than 5 feet in depth, did not have a safe means of egress.

The proposed penalty for this Item was \$500.00.⁹⁶ The proposed abatement date was November 14, 2014.⁹⁷

Citation 01, Item 002 – Type of Violation: **Serious**

29 C.F.R. 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by sloping at an angle of not greater than 1:1 (45 degrees measured from the horizontal) or an adequate protective system designed in accordance with paragraph (b) or (c) of this section:

An employee was working in an unprotected trench, greater than 5 feet in depth, that was not protected against cave-ins.

The proposed penalty for this violation was \$1,100.⁹⁸ The proposed abatement date was November 14, 2014.⁹⁹

62. Investigator Stevens calculated the proposed penalty amounts using the instructions in the MN-OSHA Field Compliance Manual (Manual).¹⁰⁰ Mr. Stevens'

⁹³ Tr. at 115 (Halvorson); see also Ex. 1 at OSHA 009.

⁹⁴ Tr. at 106 (Halvorson). While Bryan Bode testified that Mr. Halvorson did not contact either Dirt Merchant owner on October 31, 2014 prior starting work for Leon's Custom Backhoe on that day, Dirt Merchant does not assert that Mr. Halvorson was not working for Dirt Merchant at the time he was in the trench at 1960 Adams Street.

⁹⁵ Ex. 1 at OSHA 006-14; Tr. at 45 (Stevens).

⁹⁶ Ex. 1 at OSHA 007.

⁹⁷ *Id.*

⁹⁸ *Id.* at OSHA 008.

⁹⁹ *Id.*

¹⁰⁰ Tr. at 45-47 (Stevens); Ex. 1 at OSHA 011, 014; Ex. 5.

proposed penalty amounts take into account the gravity of the violations, and also include adjustments in accordance with the Manual and Minn. Stat. § 182.666, subd. 6.¹⁰¹

63. Mr. Stevens determined the gravity of the violations based on a combined assessment of the severity and probability of injury that would most likely occur as a result of the violations.¹⁰² Based on the Manual, Mr. Stevens concluded that the violation of 29 C.F.R. § 1926.651(c)(2) had a severity factor of “D” because Mr. Halvorson was in an unsafe trench without proper sloping.¹⁰³ He concluded that the violation of 29 C.F.R. § 1926.652(a)(1) had a severity factor of “F” because the trench was greater than six feet deep and had major cave-in potential, with a substantial probability of full body buried, crushing and asphyxiation.¹⁰⁴ Mr. Stevens also assigned a probability factor of 3 to both violations, based on an evaluation of the number of employees exposed, proximity to the hazard, the duration of the exposure, and the work conditions present at the time of the work as specified in the Manual.¹⁰⁵

64. The combined severity/probability rating for the violation of 29 C.F.R. § 1926.651(c)(2) recommended by Mr. Stevens was a D3, and the combined severity and probability rating for the violation of 29 C.F.R. § 1926.652(a)(1) recommended by Mr. Stevens was a F3.¹⁰⁶

65. Based on the severity/probability rating for each violation, Mr. Stevens next calculated the unadjusted penalty for each violation using the guidelines in the OSHA Field Compliance Manual.¹⁰⁷ Mr. Stevens then made adjustments.¹⁰⁸ In accordance with Minn. Stat. § 182.666, subd. 6 and the Manual, Mr. Stevens gave Dirt Merchant credits for its small size, training, and history of no prior OSHA violations.¹⁰⁹

66. After making all the adjustments, Mr. Stevens arrived at the recommended penalty amounts set forth above: \$500 for Item 1 (29 C.F.R. § 1926.651(c)(2)) and \$1,100 for Item 2 (29 C.F.R. § 1926.652(a)(1)).

67. Mr. Stevens also recommended classifying both violations as Serious. Mr. Stevens reached this conclusion based on his evaluation of the severity factors discussed above, the guidance in the Manual, and the definition in Minn. Stat. § 182.651, subd. 12 (2014).¹¹⁰

¹⁰¹ Tr. at 47-63 (Stevens); Ex. 1 at OSHA 011, 014; Ex. 5.

¹⁰² Tr. at 48 (Stevens); Ex. 6 at OSHA 217.

¹⁰³ Tr. at 49-50 (Stevens); Ex. 1 at OSHA 11; Ex. 5 at OSHA 217-18, 287.

¹⁰⁴ Tr. at 51-52 (Stevens); Ex. 1 at OSHA 14; Ex. 5 at OSHA 217-18, 287.

¹⁰⁵ Tr. 52-56, 61; Ex. 5 at OSHA 219-221; Ex. 1 at OSHA 011, 014.

¹⁰⁶ Tr. 56, 61 (Stevens); Ex. 1 at OSHA 011, 014.

¹⁰⁷ Tr. 56-57, 62; Ex. 5 at OSHA 235.

¹⁰⁸ Tr. at 57 (Stevens); Ex. 5 at OSHA 222-224; *see also* Minn. Stat. § 182.666, subd. 6.

¹⁰⁹ Tr. at 57-63 (Stevens).

¹¹⁰ *Id.* at 45-62 (Stevens); Ex. 5 at OSHA 218; Minn. Stat. § 182.651.

68. For the abatement period, Mr. Stevens suggested that both violations be abated by November 14, 2014, two weeks after the inspection.¹¹¹ At the closing conference, however, Dirt Merchant agreed the violations could be abated in one day.¹¹²

69. On November 10, 2014, the Department issued the Citation and Notification of Penalty to Dirt Merchant.¹¹³ The Citation and Notification of Penalty includes two items: a violation of 29 C.F.R. § 1926.651(c)(2); and a violation of 29 CFR § 1926.652(a)(1). Both items were classified as Serious and included the penalty amounts, and abatement dates proposed by Investigator Stevens.¹¹⁴

Discipline of Mr. Halvorson by Dirt Merchant

70. Upon receiving the OSHA Citation in November 2014, Dirt Merchant did not immediately investigate the circumstances surrounding the citations or issue any discipline to Mr. Halvorson.¹¹⁵

71. On August 3, 2015, Mr. Halvorson was disciplined by Dirt Merchant for being in the unprotected trench without proper egress.¹¹⁶ On that date, Mr. Halvorson received a warning from Bryan Bode informing him that his conduct violated Dirt Merchant safety policies.¹¹⁷ Bode issued the warning to Mr. Halvorson after seeing pictures of the trench taken by Inspector Stevens.¹¹⁸ These pictures were sent by counsel for the Department to counsel for Dirt Merchant on June 29, 2015 in response to a discovery request in this case.¹¹⁹

Procedural History

72. On November 26, 2014, Dirt Merchant filed a Notice of Contest to the Citation. Dirt Merchant challenged both items in all regards: the violations, classifications as Serious, the penalty amounts, and abatement dates.¹²⁰

73. On January 30, 2015, MN-OSHA served a Summons and Complaint on Dirt Merchant.¹²¹

74. On February 16, 2015, Dirt Merchant answered the Complaint.¹²²

¹¹¹ Ex. 1 at OSHA 007, 008.

¹¹² Ex. 1 at OSHA 010, 013.

¹¹³ Ex. 7.

¹¹⁴ Compare Ex. 1 at OSHA 007-008 with Ex. 7 at OSHA 083-084.

¹¹⁵ See Tr. at 200-202 (Bode); Tr. at 107-08 (Halvorson).

¹¹⁶ Tr. at 107-08 (Halvorson); Tr. 200-202; Ex. 12.

¹¹⁷ Ex. 12.

¹¹⁸ Tr. at 200-202; Ex. 12.

¹¹⁹ Tr. at 187-89; Ex. 1; Ex. 135.

¹²⁰ Ex. 8.

¹²¹ Ex. 9

¹²² Ex. 10.

75. On May 7, 2015, the Department issued its Notice and Order for Hearing and Prehearing Conference in this matter.¹²³

76. On November 4, 2015, the Department issued an Amended Notice and Order for Hearing. On that same date, the Department filed and served an Amended Complaint.¹²⁴

77. The Amended Complaint reclassified Item 1 from Serious to Willful and increased the penalty amount from \$500 to \$10,500, and reclassified Item 2 from Serious to Willful and increased the penalty amount from \$1,100 to \$23,100.¹²⁵ Thus, the total penalty amount increased from \$1,600 to \$33,600.

78. According to the Manual, a “willful violation” may exist where the evidence shows that the employer:

- a. Committed an intentional and knowing violation of the Act;
- b. Was aware that a hazardous condition existed and did not make a reasonable effort to eliminate the condition; and
- c. Was aware that the condition violated a standard or other obligation of the Act, and was aware of the requirements of the standard or other obligation violated.¹²⁶

According to the Manual, “it is not necessary that the violation be committed with a bad purpose or an evil intent to be deemed willful. It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.”¹²⁷

79. The amendment of Items 1 and 2 from Serious to Willful was based solely on the deposition testimony of Mr. Halvorson taken on September 10, 2015.¹²⁸ The Department concluded, based on that testimony, that Mr. Halvorson “knowingly and intentionally went into the trench and violated the OSHA standards.”¹²⁹

80. The amended penalties were calculated by James Krueger, the MN-OSHA Enforcement Director, in accordance with the Manual.¹³⁰

81. The decision to amend the Complaint was made by Mr. Krueger, in consultation with counsel from the Attorney General’s Office. Investigator Stevens was not consulted.¹³¹

¹²³ Ex. 104.

¹²⁴ Exs. 13-14.

¹²⁵ Ex. 14.

¹²⁶ Ex. 5 at OSHA 205.

¹²⁷ *Id.*

¹²⁸ Ex. 14 at 2; Tr. at 127-128 (Krueger).

¹²⁹ Tr. at 127-28 (Krueger).

¹³⁰ *Id.* at 123, 128-133 (Krueger).

¹³¹ *Id.* at 136, 154 (Krueger).

82. On November 6, 2015, Dirt Merchant filed and served its Amended Answer.¹³²

83. Any Conclusion of Law more properly characterized as a Finding of Fact is hereby adopted as such and incorporated by reference.

84. Any Findings of Fact included in the Memorandum and not set forth above are hereby adopted as such and incorporated by reference.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3 and 182.664 (2014).

2. The Department gave proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements.

3. Dirt Merchant is an employer as defined by Minn. Stat. § 182.651, subd. 7 (2014).

4. Minn. Stat. § 182.653, subd. 2 (2014) requires each employer to “furnish to each of its employees conditions of employment and place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to its employees.”

5. Minn. Stat. § 182.653, subd. 3 (2014), requires each employer to comply with occupational safety and health standards and rules adopted pursuant to Minn. Stat. Ch. 182 (2014).

6. The Commissioner has adopted by reference the federal OSHA standards found in 29 C.F.R. Part 1926 (2015).¹³³

Violations of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1)

7. 29 C.F.R. § 1926.651(c)(2) requires that:

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

8. 29 C.F.R. §1926.652 (a)(1) requires that:

¹³² Ex. 105.

¹³³ Minn. R. 5205.0010, subps. 1, 6 (2015).

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 potential cave-ins.

9. The Department has the burden of establishing a violation of the OSHA standards by a preponderance of the evidence.¹³⁴

10. To establish that an employer has violated an OSHA standard, the Department must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the requirements of the cited standard were not met; (3) an employee had access to or was exposed to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition.¹³⁵

11. The Department has proven by a preponderance of the evidence that the egress and trench protection requirements of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) are applicable to the trench at 1960 Adams Street, Mankato, Minnesota, and that the trench did not have a proper means of egress or adequate protective systems on October 31, 2014.¹³⁶

12. The Department has proven by a preponderance of the evidence that a Dirt Merchant employee was exposed to a hazard in violation of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) when its foreman, Josh Halvorson, worked in the unprotected trench without an adequate means of egress on October 31, 2014.¹³⁷

13. The Department has proven by a preponderance of the evidence that Dirt Merchant knew or, with the exercise of reasonable diligence, Dirt Merchant could have known of the violations of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1). Because Dirt Merchant had an inadequate safety program as evidenced by the lack of a written discipline policy and lack of effective enforcement of trenching and excavating standards, Mr. Halvorson's conduct was foreseeable and Dirt Merchant is charged with constructive knowledge of Mr. Halvorson's conduct.

¹³⁴ Minn. R. 1400.7300, subp. 5 (2015).

¹³⁵ *Sec'y of Labor v. Dun-Par Engineered Form Co.*, 1986 WL 53522 at *4 (O.S.H.R.C. July 30, 1986), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988); Minn. R. 1400.7300, subp. 5 (2015); *see also Gary W. Bastian, Comm'r, State of Minn., Dep't of Labor & Indus. V. Indus. Containers & Dumpbox Mfg., Inc.*, FINDINGS OF FACT, CONCLUSIONS, AND ORDER, OAH Docket No. 8-1901-112200-2, 1997 WL 706203 at *12 (Minn. Off. Admin. Hrgs).

¹³⁶ Tr. at 16 (Volz Opening); Tr. at 41-45 (Stevens); Tr. at 103-104 (Halvorson)

¹³⁷ Tr. at 36-38 (Stevens); Tr. at 101, 103-04 (Halvorson); Ex. 1.

Affirmative Defense of Employee Misconduct

14. The employer carries the burden of proof as to affirmative defenses excusing liability of a violation of an OSHA standard under Minn. R. 1400.7300, subp. 5.

15. Courts and MN-OSHA have recognized the affirmative defense of unpreventable or unforeseeable employee misconduct in OSHA cases. An employer is shielded from liability for workplace safety violations under the affirmative defense of “unpreventable employee misconduct” if the employer:

- (a) Established a work rule to prevent the reckless behavior or unsafe condition from occurring;
- (b) Adequately communicated the rule to its employees;
- (c) Took steps to discover incidents of noncompliance; and
- (d) Effectively enforced the rules whenever employees transgressed them.¹³⁸

16. In applying the four factors of the employee misconduct defense, courts have held that “the proper focus in employee misconduct cases is on the effectiveness of the employer’s implementation of its safety program.”¹³⁹

17. Dirt Merchant has failed to establish the fourth factor of the defense -- effectively enforcing the rules whenever employees transgressed them -- because the evidence shows Dirt Merchant did not discipline Mr. Halvorson until more than nine months after his misconduct and also did not have a formal discipline policy.

18. Therefore, Dirt Merchant has failed to establish the affirmative defense of employee misconduct, and the MnOSHA citation for violations of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) is **AFFIRMED**.

Classification of the Violations

19. On November 4, 2015, eight days prior to the evidentiary hearing in this matter, the Department reclassified the violations from Serious to Willful.¹⁴⁰

¹³⁸ *Modern Continental Construction Company, Inc. v. Occupational Safety and Health Review Commission*, 305 F.3d 43, 51 (1st Cir. 2002) (citing *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Commission*, 115 F.3d 100, 109 (1st Cir. 1997)); see also, *Valdak Corporation v. Occupational Safety and Health Review Commission*, 73 F.3d 1466, 1469 (8th Cir. 1996) (“To establish the defense of unforeseeable employee misconduct, [the employer] must prove that it had a work rule in place which implemented the standard, and that it communicated and enforced the rule.”).

¹³⁹ *Valdak*, 73 F.3d at 1469, citing *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270 (6th Cir. 1987), cert. denied *L.E. Myers Co., High Voltage Div. v. Secretary of Labor*, 108 S. Ct. 479 (1987)).

¹⁴⁰ Ex. 14.

20. Minnesota Statutes section 182.651, subdivision 12, defines a “serious violation” of state work safety standards as:

[A] violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

21. The term “willful” is not defined in Minnesota OSHA statutes. The federal courts, however, have held that a willful violation is “an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act’s requirements.”¹⁴¹ In addition, the Eighth Circuit has held that to establish a willful violation of an OSHA standard, “[t]here must be evidence of aggravating circumstances, apart from mere lack of diligence or adequate care, in order to satisfy the standard. In other words, simply failing to address a recognized hazard will not support a willful violation.”¹⁴²

22. The Department has proven by a preponderance of the evidence that the violations of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) are serious, but not willful.

23. The Department has established that Dirt Merchant’s violations of 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) were “serious violations” because there was a substantial probability that death or serious physical harm could result from the violations. In addition, the Department has established by a preponderance of the evidence that Mr. Halvorson’s conduct was foreseeable and therefore Dirt Merchant had constructive knowledge of the violations.

24. The Department has not established by a preponderance of the evidence that the violations were “willful” because the Department has not demonstrated aggravating circumstances or a heightened awareness of the illegality, apart from a mere lack of adequate care or diligence.

Appropriateness of the Penalty Amounts

25. An employer who has received a citation for a serious violation of its duties under Minn. Stat. § 182.653, or any standard, rule, or order adopted under the authority of the Commissioner as provided in Minn. Stat. ch. 182, shall be assessed a fine not to exceed \$7,000 for each violation.¹⁴³

¹⁴¹ *Western Waterproofing Inc. v. Marshall*, 576 F.2d 139,142 (8th Cir. 1978) (citations omitted); *Valdak Corp. v. O.S.H.R.C.*, 73 F.3d 1466, 1469 (8th Cir. 1996); *McKie Ford, Inc. v. Secretary of Labor*, 191 F.3d 853, 856 (8th Cir. 1999).

¹⁴² *McKie Ford*, 191 at 856; see also, *Sec’y of Labor v. B&B Plumbing, Inc.*, 19 O.S.H.C. 1047, 2000 WL 781361 at *4 (No. 99-0401, 2000) (stating that [t]here must be evidence of aggravating circumstances apart from a mere lack of diligence or adequate care).

¹⁴³ Minn. Stat. § 182.666, subd. 2.

26. Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines giving due consideration to the appropriateness of the fine with respect to the size of the business and the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.

27. The Department has established that the penalty amounts of \$500 for Citation 1, Item 1 (the violation of 29 C.F.R. § 1926.651(c)(2)) and \$1,100 for Citation 1, Item 2 (the violation of 29 C.F.R. 1926.652(a)(1)) are appropriate based on the factors set forth in Minn. Stat. § 182.666, subd. 6. The penalty calculations and application of various credits for these violations were in done in accordance with the Manual.

Appropriateness of the Abatement Periods

28. Under Minn. Stat. § 182.66, subd. 1 (2014), the Commissioner has authority “fix a reasonable time for abatement of the violation.”

29. The Department has demonstrated by a preponderance of the evidence that the fourteen day abatement period for the two violations set forth in the Citation is reasonable. The violations were abated the day they were discovered.

Other Conclusions

30. Any Finding of Fact more properly characterized as a Conclusion of Law is hereby adopted as such and incorporated by reference.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, which is hereby incorporated by reference, the Administrative Law Judge makes the following:

ORDER

Based upon these Findings of Fact and Conclusions of Law, the Administrative Law Judge hereby **ORDERS**:

1. Citation 1, Item 1 and Citation 1, Item 2 in the Citation and Notification of Penalty issued to Dirt Merchant, Inc. on November 10, 2014 are **AFFIRMED** as issued.
2. The amendments to the November 10, 2014 Citation set forth in the Amended Complaint dated November 4, 2015 are **REVERSED**.

Dated: March 3, 2016


JEANNE M. COCHRAN
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3; .664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

Minnesota law requires each employer to comply with occupational safety and health standards adopted by the Department.¹⁴⁴ The Department has adopted by reference, 29 C.F.R. § 1926.651(c)(2) and 29 C.F.R. § 1926.652(a)(1), as state occupational safety and health standards.¹⁴⁵ These provisions govern work in excavated trenches and include requirements for adequate protective systems to prevent cave-ins and proper egress.¹⁴⁶

The Department alleges that Dirt Merchant violated these safety standards when its foreman, Josh Halvorson, jumped into an unprotected trench without the proper means of egress on October 31, 2014. The Department bears the burden of proving these alleged OSHA violations.¹⁴⁷

If the Department establishes a prima facie violation of the applicable OSHA standards, Dirt Merchant can raise the affirmative defense of employee misconduct. The employer has the burden to prove the affirmative defense.¹⁴⁸

The dispute in this case centers on whether Dirt Merchant can be held to have violated these OSHA standards based on the actions of its foreman, Josh Halvorson. The parties also disagree as to whether Dirt Merchant has established the defense of employee misconduct if the Department has demonstrated that Dirt Merchant violated the OSHA standards. The final disputed issue is whether any violations are properly classified as Serious or Willful. These issues will be addressed in turn.

I. OSHA Violations

To establish that Dirt Merchant has violated an OSHA standard, the Department must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the requirements of the cited standard were not met; (3) an employee had access to or was exposed to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition.¹⁴⁹

In this case, there is no dispute that 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) apply to the trench at 1960 Adams Street in Mankato, or that the cited standards were not met.¹⁵⁰ Nor is there any dispute that when Josh Halvorson jumped into the unprotected trench to check the bolt sizes on the leaking water main, he was

¹⁴⁴ Minn. Stat. § 182.653.

¹⁴⁵ See Minn. R. 5205.0010, subps. 1, 6.

¹⁴⁶ 29 C.F.R. § 1926.651(c)(2) and 29 C.F.R. § 1926.652(a)(1).

¹⁴⁷ Minn. R. 1400.7300, subp. 5.

¹⁴⁸ *Id.*

¹⁴⁹ *Sec'y of Labor v. Dun-Par Engineered Form Co.*, 1986 WL 53522 at *4 (O.S.H.R.C. July 30, 1986), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988); Minn. R. 1400.7300, subp. 5; see also *Bastian*, 1997 WL 706203 at *12.

¹⁵⁰ Respondent's Post Hearing Memorandum Supporting Vacation of the Citation and Dismissal of all Penalties (Dirt Merchant's Initial Brief) at 16; Tr. at 16 (Volz Opening); Complainant's Post-Hearing Brief (Department's Initial Br.) at 6.

exposed to the cited conditions.¹⁵¹ Dirt Merchant's own foreman, Mr. Halvorson, acknowledged that the trench did not have an adequate protective system and lacked proper egress in violation of these OSHA standards.¹⁵² The parties disagree, however, on whether the Department has shown by a preponderance of the evidence that Dirt Merchant knew, or with the exercise of reasonable diligence, could have known of the violative conditions.

A. Department's Position

The Department maintains it has shown that Dirt Merchant had knowledge of the violative conditions (lack of egress and lack of proper trench protection) by virtue of Mr. Halvorson's knowledge. The Department argues that Mr. Halvorson's knowledge of the violative conditions is properly imputed to Dirt Merchant because Mr. Halvorson is a Dirt Merchant foreman.¹⁵³ In support of its position, the Department cites a decision by the federal Occupational Safety Health Review Commission (Commission), where the Commission imputed a supervisor's own misconduct to his employer.¹⁵⁴ The Department also cites a decision of the Sixth Circuit Court of Appeals stating that "knowledge of a supervisor may be imputed to the employer."¹⁵⁵ Based on the imputation of Mr. Halvorson's knowledge, the Department maintains it has established that Dirt Merchant had actual knowledge of the violative conditions.¹⁵⁶

The Department argues that the only way Dirt Merchant can avoid imputation of Mr. Halvorson's knowledge is by proving the affirmative defense of employee misconduct.¹⁵⁷ To establish this defense, the employer is required to show that: (a) it had an established work rule requiring employees to comply with the applicable OSHA standards; (b) it adequately communicated the rule to its employees; (c) it took steps to discover incidents of noncompliance; and (d) it effectively enforced the safety rule whenever violations were discovered.¹⁵⁸ The Department further argues that Dirt Merchant has failed to establish this defense.¹⁵⁹

¹⁵¹ Dirt Merchant's Initial Br. at 16; Tr. at 16 (Volz Opening); Department's Initial Br. at 6; Tr. at 36-38 (Stevens).

¹⁵² Tr. at 103-04 (Halvorson); Ex. 1 at OSHA 009, 012.

¹⁵³ Department's Initial Br. at 6-7.

¹⁵⁴ *Id.* at 7 (citing *Sec'y Labor v. Quandel Construction Group, Inc.*, 2015 WL 1597966 at *5 (O.S.H.R.C. Feb. 23, 2015)).

¹⁵⁵ Complainant's Response to Respondent's Post-Hearing Memorandum (Department's Reply Br.) at 4 (citing *Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003)).

¹⁵⁶ Department's Initial Br. at 7; Department's Reply Br. at 6-7.

¹⁵⁷ Department's Reply Br. at 7; Department Initial Br. at 17-19.

¹⁵⁸ See *Horne Plumbing & Heating Co.*, 528 F.2d 564, 568-71 (5th Cir. 1976); *Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.3d 840, 845 (D.C. Cir. 2004); *Valdak Corporation v. Occupational Safety and Health Review Commission*, 73 F.3d 1466, 1469 (8th Cir. 1996); *Peterson v. Midwest Steeplejacks, Inc.*, OAH Docket No. 11-1901-30876, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER at 24 (November 6, 2014).

¹⁵⁹ Department's Initial Br. at 19-22; Department Reply Br. at 6-7, 14.

B. Dirt Merchant's Position

Dirt Merchant argues that the Department has failed to show that it knew, or with the exercise of reasonable diligence, could have known of the violative conditions. Dirt Merchant asserts that the Department has applied the wrong legal standard in imputing Mr. Halvorson's knowledge to Dirt Merchant.¹⁶⁰ Dirt Merchant maintains that Mr. Halvorson's knowledge can be imputed to his employer **only** if the Department shows that Mr. Halvorson's conduct was foreseeable, based on a showing that Dirt Merchant did not have an effective safety program or did not properly train Mr. Halvorson.¹⁶¹ Dirt Merchant asserts the Department has failed to make such a showing, and that the Department is improperly seeking to shift the burden to Dirt Merchant to show that it had an effective safety program.¹⁶²

In support of its position, Dirt Merchant states that the majority of the federal courts of appeal have held that that a "supervisor's knowledge of his own malfeasance ... is not imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable."¹⁶³ Dirt Merchant also highlights that these courts have held that it is the government's burden to prove the employer knowledge element, and merely demonstrating a supervisor engaged in misconduct is not sufficient to show employer knowledge.¹⁶⁴ Dirt Merchant acknowledges that a showing that the conduct was foreseeable can be made by demonstrating that an employer had an inadequate safety program, but argues that the Department has failed to make such a showing and therefore has not demonstrated that Mr. Halvorson's conduct was foreseeable.¹⁶⁵ Instead, Dirt Merchant maintains that the record shows that Mr. Halvorson's conduct was idiosyncratic and unforeseeable, given his training and knowledge of OSHA requirements.¹⁶⁶

C. Legal Analysis

The question of whether a supervisory employee's misconduct can be imputed to the employer for purposes of showing that the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition appears an issue of first impression under Minnesota law.¹⁶⁷ This issue has been addressed by both the

¹⁶⁰ Dirt Merchant's Reply Br. at 6-8.

¹⁶¹ Dirt Merchant's Initial Br. at 16-18; Dirt Merchant's Reply Br. at 8.

¹⁶² Dirt Merchant's Initial Br. at 17-18; Dirt Merchant's Reply Br. at 8.

¹⁶³ Dirt Merchant's Initial Br. at 18.

¹⁶⁴ Dirt Merchant's Initial Br. at 19-23 (citing *Horne Plumbing & Heating Co. v. O.S.H.R.C.*, 528 F.2d 564 (5th Cir. 1976); *Ocean Electric Co. v. Sec'y of Labor*, 594 F.2d 396 (4th Cir. 1979); *Mountain States Telephone & Telegraph Co. v. O.S.H.R.C.*, 623 F.2d 155 (10th Cir. 1980); *Pennsylvania Power & Light Co. v. O.S.H.R.C.*, 737 F.2d 350 (3rd Cir. 1984); *W.G. Yates Sons Construction Co. v. O.S.H.R.C.*, 459 F.3d 604 (5th Cir. 2006); *ComTran Group v. U.S. Dep't of Labor*, 722 F.3d 1304, 1317 (11th Cir. 2013)).

¹⁶⁵ Dirt Merchant's Initial Brief at 16-17, 23-25.

¹⁶⁶ *Id.* at 24-25.

¹⁶⁷ Neither party cites any Minnesota state case law and the Administrative Law Judge's research failed to identify any applicable Minnesota case law.

federal courts and the federal Occupational Safety Health Review Commission (Commission). However, because this case involves violations of the Minnesota OSHA, the federal court and administrative decisions are not precedential.¹⁶⁸ These decisions, however, are helpful in examining the issue.

In *Secretary of Labor v. Quandrel Construction Group*, the federal Administrative Law Judge noted that “the [federal] courts and Commission are divided over the issue of whether a supervisor’s knowledge of his or her own malfeasance is imputable to the employer.”¹⁶⁹ “The clear majority of circuits have held a supervisor’s knowledge of his own misconduct is not imputable to the employer (i.e., the Second, Third, Fourth, Fifth, Tenth and Eleventh Circuits).”¹⁷⁰ The federal Commission and the Sixth Circuit Court of Appeals, on the other hand, are of the view that a supervisor’s misconduct is imputable to the employer and then the employer has the burden to prove the affirmative defense of employee misconduct.¹⁷¹ The Eighth Circuit Court of Appeals does not appear to have expressly addressed the issue.¹⁷² Because the courts and the federal Commission are divided on the issue, the federal Commission defers to the holding in the applicable circuit court of appeals when it addresses the question in a contest of a federal OSHA citation.¹⁷³ In the *Quandrel* decision, the federal Administrative Law Judge noted that the issue was most recently addressed by the Eleventh Circuit Court of Appeals in the case of *ComTran Group Inc. v. U.S. Dep’t of Labor*, 722 F.3d 1304 (11th Cir. 2013).¹⁷⁴

In *ComTran*, the employer challenged a final decision of the federal Commission in which the Commission held that the employer violated the OSHA trenching and excavating standards when one of its supervisors was “caught digging a six-foot deep trench with an unprotected five-foot high ‘spoil pile’ at the edge of the excavation.”¹⁷⁵ The Eleventh Circuit noted that the government has the burden to show that the employer “knowingly” disregarded the Act’s requirements.¹⁷⁶ The Eleventh Circuit stated that the showing of knowledge can be actual or constructive.¹⁷⁷

¹⁶⁸ *Hinckley Square Assocs. V. Cervene*, 871 N.W.2d 426, 430 (Minn. Ct. App. 2015) (stating that Minnesota courts are not bound by federal case law); Notice and Order for Hearing and Prehearing Conference (May 7, 2015).

¹⁶⁹ *Sec’y of Labor v. Quandel Constr. Group.*, 25 BNA OSHC 1433, 2015 WL 1597966 at *7 (No. 14-1434, 2015) (ALJ).

¹⁷⁰ *Id.* at n. 6.

¹⁷¹ *See id.* at *7 (citing *Danis-Shook Joint Venture XXV*, 319 F.3d 805 (6th Cir. 2003)).

¹⁷² *See Quandrel*, 2015 WL 1597966 at 7 & n.6 (listing circuit courts that have addressed the issue but not including the 8th Circuit Court of Appeals); *see also*, Department Reply Br. at 5. Both parties cite to the case *Western Waterproofing Co., Inc. v. Sec’y of Labor*, 576 F.2d 139 (8th Cir. 1978) to suggest that the 8th Circuit would support their position on the question. *See* Dirt Merchant Initial Br. at 23-24; Department Reply Br. at 6. However, this case discusses the affirmative defense of employee misconduct but not the question of imputation of knowledge of a supervisor. 576 F.2d at 144-45.

¹⁷³ *Quandrel* at *7.

¹⁷⁴ *Id.* at n. 6.

¹⁷⁵ *ComTran*, 722 F.3d at 1306.

¹⁷⁶ *Id.* at 1307.

¹⁷⁷ *Id.* at 1307-08.

On the specific question of imputation of knowledge, the Eleventh Circuit differentiated between the situation where a supervisor sees subordinates engaging in misconduct and the situation where the supervisor himself engages in the misconduct conduct. The Eleventh Circuit stated that it is reasonable to charge the employer with a supervisor's knowledge of *a subordinate's misconduct* because the supervisor acts as the employer's eyes and ears on the job site.¹⁷⁸ Where a *supervisor's own misconduct* is involved, however, the Eleventh Circuit reasoned that the analysis is different because the employer has no eyes and ears in that situation, and therefore, it would be "fundamentally unfair" to impute the supervisor's knowledge of his own misconduct to the employer.¹⁷⁹ "Specifically, if the Secretary is permitted to establish employer knowledge solely with proof of the supervisor's misconduct – notwithstanding that the employer did not know, or could not have known, of that misconduct – then the Secretary would not really have to establish knowledge at all."¹⁸⁰

Based on this analysis, the Eleventh Circuit held that to establish an employer had constructive knowledge of the violative condition based on a supervisor's misconduct, the government "must do more than merely point to the misconduct itself."¹⁸¹ The government must put forth evidence independent of the supervisor's misconduct to establish the knowledge element.¹⁸² According to the Eleventh Circuit, constructive knowledge of the supervisor's actions could be established "based upon the employer's failure to implement an adequate safety program ... with the rationale being that – in the absence of such a program – the misconduct was reasonably foreseeable."¹⁸³

In reaching this conclusion, the Eleventh Circuit examined in detail the decisions of other circuits that have examined this same issue.¹⁸⁴ The Eleventh Circuit highlighted that the Third, Fourth, Fifth, and Tenth Circuit Courts of Appeal have all held that it is an error to impute knowledge of a supervisor's misconduct and then require the employer to defend by showing that the violation was unpreventable and therefore unforeseeable.¹⁸⁵ Instead, these courts have held that is the Secretary's burden to prove that the violation by the supervisor was reasonably foreseeable, and have further held that evidence of a supervisor's misconduct alone is not sufficient to demonstrate

¹⁷⁸ *Id.* 1317.

¹⁷⁹ *Id.*; see also *Mountain States Telephone & Telegraph Co. v. Occupational Safety Health Review Council (O.S.H.R.C.)*, 623 F.2d 155, 158 (10th Cir. 1980); *Pennsylvania Power & Light Co. v. O.S.H.R.C.* 737 F.2d 350, 357-58 & n.9 (3rd Cir. 1984).

¹⁸⁰ *ComTran* at 1317.

¹⁸¹ *Id.* at 1318.

¹⁸² *Id.* at 1317-1318.

¹⁸³ *Id.* at 1307-08; see also *id.* at 1318.

¹⁸⁴ *Id.* at 1311-15.

¹⁸⁵ *Id.*(citing *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 401 (4th Cir. 1979); *Mountain States Telephone & Telegraph Co. v. O.S.H.R.C.*, 623 F.2d 155, 158 (10th Cir. 1980); *Pennsylvania Power & Light v. O.S.H.R.C.*, 737 F.2d 350, 355, 357-358 (3rd Cir. 1984); *W.G. Yates & Sons Const. Co. v. O.S.H.R.C.*, 459 F.3d 604, 607-09 (5th Cir. 2006)).

knowledge on the part of the employer.¹⁸⁶ These courts reasoned that to impute knowledge of the supervisor's misconduct would improperly shift the burden of proof from the government to the employer on the question of knowledge.¹⁸⁷

For example, in *W.G. Yates & Sons*, the Fifth Circuit examined whether the O.S.H.R.C. properly imputed a foreman's knowledge of a violative condition to the company, *W.G. Yates & Sons*.¹⁸⁸ The Fifth Circuit held that the employer can be charged with knowledge of a supervisor's misconduct *only if* the supervisor's actions were foreseeable.¹⁸⁹ The court reasoned that to allow the government to impute knowledge of the misconduct "without any inquiry as to whether the misconduct should have been foreseen," effectively relieves the government of its burden of proof to establish knowledge and places on the employer the burden of defending a violation that has not been established.¹⁹⁰ On this basis, the Fifth Circuit vacated the O.S.H.R.C. decision because the O.S.H.R.C. improperly imputed knowledge to the company based solely on the foreman's misconduct and then shifted the burden to the company to defend "a violation that had not been established."¹⁹¹

The only federal circuit court of appeals to reach a different conclusion is the Sixth Circuit. The Sixth Circuit stated in *Danis-Shook Joint Venture XXV v. Secretary of Labor*¹⁹² that a supervisor's knowledge of his own misconduct may be imputed to the employer.¹⁹³ As noted by the Eleventh Circuit in *ComTran*, however, the "Sixth Circuit did not draw a distinction, as the other circuits have, between a supervisor's knowledge of misconduct by subordinate employees and knowledge of his own misconduct."¹⁹⁴

¹⁸⁶ *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 401-02 (4th Cir. 1979); *Mountain States Telephone & Telegraph Co. v. O.S.H.R.C.*, 623 F.2d 155, 158 (10th Cir. 1980); *Pennsylvania Power & Light v. O.S.H.R.C.*, 737 F.2d 350, 355, 357-358 (3rd Cir. 1984); *W.G. Yates & Sons Const. Co. v. O.S.H.R.C.*, 459 F.3d 604, 09 (5th Cir. 2006)).

¹⁸⁷ *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 401 (4th Cir. 1979); *Mountain States Telephone & Telegraph Co. v. O.S.H.R.C.*, 623 F.2d 155, 158 (10th Cir. 1980); *Pennsylvania Power & Light v. O.S.H.R.C.*, 737 F.2d 350, 355, 357-358 (3rd Cir. 1984); *W.G. Yates & Sons Const. Co. v. O.S.H.R.C.*, 459 F.3d 604, 607-09 (5th Cir. 2006)); *see also Horne Plumbing & Heating Co. v. O.S.H.R.C.*, 528 F.2d 564 (5th Cir. 1976) (holding that it would be inconsistent with the federal OSHA to hold the owner of a small company responsible for the misconduct of two foremen where the owner had no actual knowledge of the misconduct, could not have foreseen the misconduct, and took elaborate measure to prevent such misconduct).

¹⁸⁸ 459 F.3d at 605-609.

¹⁸⁹ *Id.* at 608-09.

¹⁹⁰ *Id.* at 609.

¹⁹¹ *Id.* at 609.

¹⁹² 319 F.3d 805 (6th Cir. 2003).

¹⁹³ *Id.* at 812 ("Because Wagner was a foreman and knew of his own failure to wear person protective equipment, this failure may be imputed to Danis-Shook"). The Sixth Circuit then noted that there were also two other foreman on the job site and that there was evidence showing that the company did not have an adequate safety program. *Id.* at 812-13.

¹⁹⁴ *Id.* at 1316.

Having carefully reviewed decisions of the federal circuit courts of appeals as well as several federal Commission decisions¹⁹⁵ addressing the issue, the Administrative Law Judge finds the reasoning of the majority of the circuit courts persuasive.¹⁹⁶ Specifically, the Administrative Law Judge agrees that a supervisor's knowledge of his or her own misconduct cannot be imputed to the employer for purposes of establishing the knowledge element of an OSHA violation because the supervisor's knowledge *by itself* is not legally sufficient to demonstrate knowledge on the part of the employer.¹⁹⁷ Instead, the Department must demonstrate that the supervisor's misconduct was foreseeable to establish constructive knowledge on the part of the employer.¹⁹⁸ The Department can show that the supervisor's misconduct was foreseeable by demonstrating that the employer failed to implement an adequate safety program.¹⁹⁹

D. The Department has established that foreman Halvorson's conduct was foreseeable and, therefore, met its burden to show that Dirt Merchant violated the MN-OSHA standards in question.

While Mr. Halvorson's knowledge of his own misconduct is not sufficient by itself to establish knowledge on the part of Dirt Merchant, as noted above, Dirt Merchant's knowledge can be established by evidence of an inadequate safety program.²⁰⁰ In considering the adequacy of the safety program, courts focus on the employer's safety policy, training, and discipline.²⁰¹

The Department maintains that the record shows that Dirt Merchant did not have an adequate safety program at the time of the violations and therefore Mr. Halvorson's conduct was foreseeable.²⁰² The Department asserts that Dirt Merchant's safety program was inadequate because: Dirt Merchant did not have a formal discipline policy;

¹⁹⁵ See *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 401 (4th Cir. 1979); *Mountain States Telephone & Telegraph Co. v. O.S.H.R.C.*, 623 F.2d 155, 158 (10th Cir. 1980); *Pennsylvania Power & Light v. O.S.H.R.C.*, 737 F.2d 350, 355, 357-358 (3rd Cir. 1984); *W.G. Yates & Sons Const. Co. v. O.S.H.R.C.*, 459 F.3d 604, 607-09 (5th Cir. 2006)); *Horne Plumbing & Heating Co. v. O.S.H.R.C.*, 528 F.2d 564 (5th Cir. 1976); *Quandel*, 2015 WL 1598966 at *7; *Sec'y of Labor v. Deep South Crane & Rigging Co.*, 23 BNA O.S.H.C. 2099, 2012 WL 3875596 at *4 (No. 09-0240, 2012); *Sec'y of Labor v. Marine Terminals Corp.*, 2005 CCH O.S.H.D. 32903, 2007 WL 2127303 (No. 05-1031, 2007) (ALJ).

¹⁹⁶ See *State v. McClenton*, 781 N.W.2d 181, 191 (Minn. Ct. App. 2010), *review denied* (Minn. June 29, 2010) (noting that although federal case law is not precedential, it may be persuasive).

¹⁹⁷ See *ComTran*, 722 F.3d at 1316-18.

¹⁹⁸ See *W.G. Yates*, 459 F.3d at 608-09. Alternatively, the Department could demonstrate that the employer had actual knowledge of the supervisor's misconduct. In this case, however, the record is clear that Mr. Halvorson's bosses, the owners of the company, did not have actual knowledge of his misconduct.

¹⁹⁹ See *ComTran*, 722 F.3d at 1307-08, 1318.

²⁰⁰ *Id.*

²⁰¹ See *W.G. Yates*, 459 F.3d at 608 (stating that "a supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable"; citing *Horne*, 528 F.2d at 571); see also, *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir.), *cert. denied*, 484 U.S. 989, 108 S. Ct. 479, 98 L.Ed.2d 509 (1987) ("[T]he proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program....").

²⁰² Department Reply Br. at 7.

it did not conduct surprise visits; Mr. Halvorson did not expect anyone at the worksite to report his violation; and Mr. Halvorson was not disciplined by Dirt Merchant until “nearly one year after the violation occurred.”²⁰³ For these reasons, the Department argues that Mr. Halvorson’s misconduct was foreseeable.²⁰⁴

Conversely, Dirt Merchant maintains that its safety program was adequate and Mr. Halvorson’s conduct was unforeseeable. Dirt Merchant notes that: it has a written safety program that specifically includes trenching and excavation standards; it has an annual spring safety training session and weekly safety meetings; foreman Mr. Halvorson had competent person training for excavation and trenching as well as a ten-hour OSHA training; Dirt Merchant’s owners make unannounced visits to job sites; and Dirt Merchant has disciplined employees for violating work place rules.²⁰⁵ Dirt Merchant also notes that it has only had one lost-time work accident in its history.²⁰⁶ Dirt Merchant argues that because Mr. Halvorson was thoroughly trained in trench safety, it could not have foreseen that Mr. Halvorson would jump into the trench.²⁰⁷ Dirt Merchant maintains that his conduct was an isolated, idiosyncratic event.²⁰⁸

After carefully reviewing the record, the Administrative Law Judge concludes that a preponderance of the evidence in the record shows that Dirt Merchant did not have an adequate safety program.²⁰⁹ As noted above, in analyzing whether a safety program is adequate, the focus is on the employer’s safety policy, training, and discipline. Dirt Merchant’s safety program was inadequate because Dirt Merchant did not have a formal discipline policy and it failed to effectively enforce its trenching rules when violated.

Discipline is an essential component of an adequate safety program.²¹⁰ In fact, state law requires Dirt Merchant to have a written discipline policy as part of its safety program.²¹¹ Yet, Dirt Merchant did not have a written discipline policy.²¹² In fact, Dirt Merchant did not have a formal discipline policy, written or unwritten, when Mr. Halvorson jumped into the unprotected trench on October 31, 2014.²¹³

²⁰³ *Id.* at 8.

²⁰⁴ *Id.* at 7-8.

²⁰⁵ Dirt Merchant Initial Br. at 9-11.

²⁰⁶ *Id.* at 12.

²⁰⁷ *Id.* at 17-18.

²⁰⁸ *Id.*

²⁰⁹ *City of Lake Elmo v. Metropolitan Council*, 658 N.W.2d 1, 4 (Minn. 2004) (“The preponderance of the evidence standard requires that to establish a fact, it must be more probable that the fact exists than the contrary exists.”).

²¹⁰ See Minn. Stat. § 182.653, subd. 8 (requiring employers in Minnesota to have a *written* work place accident and injury reduction program (AWAIR) that includes a description of “how safe work practices and rules will be enforced.”); see also *Sec’y of Labor v. Reynolds*, 19 O.S.H.C. 1653, 2001 WL 987460 at *5 (No. 00-0982, 2001) (ALJ) (finding that waiting several months after the violation occurs to discipline an employee “greatly diminishes the effectiveness of the discipline”).

²¹¹ Minn. Stat. § 182.653, subd. 8.

²¹² Ex. 117; Tr. at 106, 111 (Halvorson); Tr. at 200 (Bode).

²¹³ Ex. 117; Tr. at 106, 111 (Halvorson); Tr. at 200 (Bode).

In addition, Dirt Merchant did not effectively enforce the OSHA trenching rules when they were violated by Mr. Halvorson. Dirt Merchant did not discipline Mr. Halvorson for his misconduct until August 3, 2015, over 9 months after the OSHA violations occurred.²¹⁴ Dirt Merchant owner, Bryan Bode, claims he did not realize how deep the trench at issue was until he received the Department's investigative file in late June 2015, which contained photographs of the trench.²¹⁵ However, Dirt Merchant received the OSHA Citation in November 2014.²¹⁶ Bode could have easily discovered in November 2014 that the trench was more than five feet deep and learned of the seriousness of the situation simply by talking to his employees who were at the site or by talking to Leon Depuydt. Instead, he waited until his lawyer requested the Department's investigative file months later to look into the nature of the misconduct.²¹⁷ The long delay by Dirt Merchant in investigating the incident and disciplining Mr. Halvorson adds support to the conclusion that Dirt Merchant had an inadequate safety program.²¹⁸

Dirt Merchant maintains that it disciplines employees through a variety of methods such as verbal reprimands, written reprimands, and even termination.²¹⁹ However, Dirt Merchant's unstructured and untimely discipline system is insufficient to ensure employees have an incentive to follow work place rules because there are no clear, timely consequences for violations of safety rules.

Similarly, while establishing work place safety rules and training of employees are important components of a safety program, they are not sufficient to establish an adequate safety program. A written discipline policy and timely discipline are critical to ensuring that employees take work place rules seriously.²²⁰ Without a formal discipline policy and effective enforcement, a safety program is not adequate to ensure compliance by employees.

Given the evidence of no formal, written discipline policy and ineffective enforcement of trenching standards, the Department has demonstrated by a preponderance of the evidence that Dirt Merchant had an inadequate safety program in October 2014.²²¹ Therefore, the Department has demonstrated that Mr. Halvorson's misconduct was foreseeable and Dirt Merchant is charged with knowledge of Mr. Halvorson's misconduct.

²¹⁴ See Ex. 12; Tr. at 108 (Halvorson); Tr. at 201-02 (Bode).

²¹⁵ Tr. at 187-89, 201-202 (Bode).

²¹⁶ Ex. 7.

²¹⁷ Tr. at 201-202 (Bode).

²¹⁸ See *Sec'y of Labor v. Reynolds*, 2001 WL 987460 at *5.

²¹⁹ Dirt Merchant Initial Br. at 11.

²²⁰ See Minn. Stat. § 182.653, subd. 8 (requiring that a safety program include a written description of "how safe work practices and rules will be enforced."); see also *Sec'y of Labor v. Reynolds*, 2001 WL 987460 at *5.

²²¹ This conclusion is confirmed by the fact that foreman Halvorson did not expect the other Dirt Merchant employees at the job site to report his violations of the OSHA standards and that he did not expect to get in trouble for his violations. Tr. at 104-105 (Halvorson).

As noted above, the only element of the OSHA violations that Dirt Merchant has disputed is the knowledge element.²²² By satisfying the knowledge requirement, the Department has made a prima facie showing that Dirt Merchant violated 29 C.F.R. § 1926.651(c)(2) and 29 C.F.R. § 1926.652(a)(1) when its foreman, Josh Halvorson, jumped into the trench on October 31, 2014 without adequate egress or protection.

E. Dirt Merchant has failed to establish the affirmative defense of employee misconduct.

Dirt Merchant argues that, even if the Department establishes that it violated 29 C.F.R. § 1926.651(c)(2) and 29 C.F.R. § 1926.652(a)(1), it should be absolved of liability due to unforeseeable employee misconduct on the part of Mr. Halvorson.²²³

Courts and MN-OSHA have recognized the affirmative defense of unpreventable or unforeseeable employee misconduct in OSHA cases. An employer is shielded from liability for workplace safety violations if the employer: (a) had an established work rule requiring employees to comply with the trench protection and egress requirements of 29 C.F.R. § 1926.651(c)(2) and 29 C.F.R. § 1926.652(a)(1); (b) adequately communicated the rule to its employees; (c) took steps to discover incidents of noncompliance; and (d) effectively enforced the safety rule whenever violations were discovered.²²⁴ “[W]here a supervisory employee is involved [in a violation], the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish” because it is the supervisor’s duty to protect the safety of employees on the worksite.²²⁵

As discussed above, a preponderance of the evidence in the record demonstrates that Dirt Merchant failed to effectively enforce its safety rules. Dirt Merchant did not discipline Mr. Halvorson until more than 9 months after the October 31, 2014 misconduct, and did not have a written discipline policy.²²⁶ Because Dirt Merchant must establish every element of the affirmative misconduct defense and it has failed to establish the last prong – effective enforcement of safety rules, Dirt Merchant cannot prevail on its defense of employee misconduct.²²⁷ For these reasons, the Administrative Law Judge concludes that Dirt Merchant is not shielded from liability due to the affirmative defense of unforeseeable employee misconduct and the violations of 29 C.F.R. § 1926.651(c)(2) and 29 C.F.R. § 1926.652(a)(1) are **AFFIRMED**.

²²² See *supra* at 21-22.

²²³ Dirt Merchant Initial Br. at 25-26; Dirt Merchant Reply Br. at 12-13.

²²⁴ See *Horne Plumbing & Heating Co.*, 528 F.2d 564, 568-71 (5th Cir. 1976); *Frank Lill & Son, Inc. v. Sec’y of Labor*, 362 F.3d 840, 845 (D.C. Cir. 2004); *Valdak Corporation v. Occupational Safety and Health Review Commission*, 73 F.3d 1466, 1469 (8th Cir. 1996); *Peterson v. Midwest Steeplejacks, Inc.*, OAH Docket No. 11-1901-30876, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER at 24 (November 6, 2014).

²²⁵ *Archer-Western Contractors Ltd.*, 1991 WL 81020 at *5 (O.S.H.R.C. No. 87-1067).

²²⁶ Ex. 117; Tr. at 106-07, 111 (Halvorson); Tr. at 199-200 (Bode); Ex. 12; see *Sec’y of Labor v. Reynolds*, 2001 WL 987460 at *5 (finding that waiting several months after the violation occurs to discipline an employee “greatly diminishes the effectiveness of the discipline”).

²²⁷ Therefore, it is unnecessary to examine whether Dirt Merchant has demonstrated the other prongs of the defense.

F. Classification of the Violations

The Department initially classified the violations of 29 C.F.R. § 1926.651(c)(2) and 29 C.F.R. § 1926.652(a)(1) as “Serious” when it issued the Citation and Notification of Penalty on November 10, 2014.²²⁸ On November 4, 2015, the Department filed and served an Amended Complaint, which reclassified the violations as “Willful,” and increased the penalties to reflect the change in classification.²²⁹ The reclassification was based on the deposition testimony of Mr. Halvorson taken on September 10, 2015.²³⁰

A. Applicable Legal Standard

The Minnesota OSHA statutes define a “serious violation” to include “a violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.”²³¹

The term “willful violation” is not defined in the Minnesota OSHA statutes.²³² The federal courts and the federal Commission, however, have held that a willful violation is “an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act’s requirements.”²³³ In addition, the Eighth Circuit has held that to establish a willful violation of an OSHA standard, “[t]here must be evidence of aggravating circumstances, apart from mere lack of diligence or adequate care, in order to satisfy the standard. In other words, simply failing to address a recognized hazard will not support a willful violation.”²³⁴

B. Department’s Position

The Department argues that the violations are properly classified as willful because Mr. Halvorson was aware of the OSHA standards requiring an adequate protective system and proper egress, when he jumped into the unprotected trench.²³⁵ According to the Department, Mr. Halvorson either intentionally disregarded or was plainly indifferent to these OSHA standards because he knew of the standards, and still

²²⁸ Ex. 7 at OSHA 083-084.

²²⁹ Ex. 14.

²³⁰ *Id.* at 2.

²³¹ Minn. Stat. § 182.651, subd. 12.

²³² See generally Minn. Stat. § 182.651.

²³³ *Western Waterproofing Inc. v. Marshall*, 576 F.2d 139,142 (8th Cir. 1978) (citations omitted); *Valdak Corp. v. O.S.H.R.C.*, 73 F.3d 1466, 1469 (8th Cir. 1996); *McKie Ford, Inc. v. Secretary of Labor*, 191 F.3d 853, 856 (8th Cir. 1999); *Reynolds*, 2001 WL 987460 at *6; see also, Ex. 5 at OSHA 206 (MN OSHA Field Compliance Manual).

²³⁴ *McKie Ford*, 191 at 856; see also, *Sec’y of Labor v. B&B Plumbing, Inc.*, 19 O.S.H.C. 1047, 2000 WL 781361 at *4 (No. 99-0401, 2000) (stating that [t]here must be evidence of aggravating circumstances apart from a mere lack of diligence or adequate care).

²³⁵ Department Initial Br. at 8-9.

went into the unprotected trench. The Department maintains that his conduct can be imputed to Dirt Merchant because Mr. Halvorson is a supervisory employee.²³⁶

In support of its position, the Department cites to *Sec'y of Labor v. Fiore Construction*,²³⁷ where the federal O.S.H.R.C. held that a supervisor's knowing failure to comply with OSHA trenching standards constituted a willful violation by the employer.²³⁸ The Department noted that the supervisory employee in *Fiore*, like in this case, had significant excavation work experience, completed OSHA and excavation training, and was aware of the OSHA standards at the time of the violation.²³⁹

C. Dirt Merchant's Position

Dirt Merchant, on the other hand, argues that if violations are found, the violations were not willful. Dirt Merchant maintains that no evidence exists demonstrating that Dirt Merchant intentionally disregarded OSHA's trench safety requirements or was indifferent to the standards.²⁴⁰ Dirt Merchant points to Mr. Halvorson's testimony that he was not thinking when he jumped into the trench, because he was in a hurry.²⁴¹

Dirt Merchant argues that a willful violation is a much more severe sanction than a serious violation, and argues there must be aggravating circumstances to find a willful violation.²⁴² Dirt Merchant maintains that the Department has failed to establish any aggravating circumstances in this case,²⁴³ Dirt Merchant points out that the Department did not consider whether Dirt Merchant had any prior violations, the duration of exposure, safety training or other factors.²⁴⁴

In support of its position, Dirt Merchant cites to the federal Commission decision in *B&B Plumbing*.²⁴⁵ In that case, the federal administrative law judge noted that a willful violation is "differentiated by a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference."²⁴⁶ The federal judge reduced *B&B Plumbing's* OSHA citation from willful to serious, even though the supervisor knew employees were working in an unprotected trench. The judge reduced the classification because the federal agency failed to demonstrate any aggravating circumstances.²⁴⁷

²³⁶ *Id.* at 9-10.

²³⁷ 19 O.S.H.C. 1408, 2001 WL 460944 at *2.

²³⁸ Department Initial Br. at 9.

²³⁹ *Id.*

²⁴⁰ Dirt Merchant Initial Br. at 26.

²⁴¹ *Id.* at 26.

²⁴² Dirt Merchant Reply Br. at 27-28.

²⁴³ *Id.*

²⁴⁴ *Id.* at 28.

²⁴⁵ *Id.* at 28, n.123.

²⁴⁶ *B&B*, 2000 WL 781361 at *4.

²⁴⁷ *Id.*

D. Analysis

Because the Minnesota legislature has not defined the phrase “willful violation,” the Administrative Law Judge will apply the standard adopted by the federal courts. Namely, a willful violation is one where the employer intentionally disregarded or was plainly indifferent to the requirements of OSHA.²⁴⁸ Further, to make such a showing there must be evidence of aggravating circumstances, apart from the mere lack of diligence or adequate care.²⁴⁹ Such evidence is necessary to demonstrate the “heighted awareness” of illegality that is an element of a willful violation.²⁵⁰

Based on the record in this case, the Administrative Law Judge concludes that the Department has not shown that the violations are properly classified as willful. While there is no dispute that Mr. Halvorson was trained in the applicable OSHA standards and was familiar with the standards on October 31, 2014,²⁵¹ the record shows that at the time Mr. Halvorson jumped into the trench, he was not thinking about the OSHA standards because he was in a rush.²⁵² As a result, the Department has not demonstrated that Mr. Halvorson intended to disregard the standards or that he was plainly indifferent to the standards. Rather, the record shows he simply was not thinking about the standards at the time of the violations.²⁵³ Moreover, there is no evidence that Dirt Merchant as a company intentionally disregarded these OSHA standards or was plainly indifferent. Instead, the record shows that Dirt Merchant had established trenching and excavation safety rules and training on these OSHA standards.²⁵⁴ While Dirt Merchant did not have the disciplinary policy and enforcement necessary to ensure an adequate safety program, that does not equate to a plain indifference or intentional disregard given Dirt Merchant’s work place rules and training. In addition, there is no evidence that Dirt Merchant had been cited for violating these trenching rules in the past. In sum, just as in *B&B Plumbing*, the Administrative Law Judge in this case concludes that a supervisor’s knowledge of the OSHA standard which is violated is not sufficient by itself to establish a willful violation by the employer. The Department has failed to present evidence of aggravating circumstances demonstrating that Dirt Merchant intentionally disregarded or was plainly indifferent to the applicable OSHA standards. Therefore, the Administrative Law Judge concludes that the Department has not demonstrated that the violations were willful.

While the Department has not established that the violations were willful, the Administrative Law Judge concludes that the Department has demonstrated by a preponderance of the evidence that the violations were serious. In order to establish a serious violation, the Department must show that the violation created a substantial probability that death or serious physical harm could result, unless the employer did not or could not, with the exercise of reasonable diligence, have known of the presence of

²⁴⁸ *McKie Ford*, 191 F.3d at 856; *Valdek Corp. v. O.S.H.R.C.*, 73 F.3d 1466, 1468 (8th Cir. 1996).

²⁴⁹ *McKie Ford*, 191 F.3d at 856.

²⁵⁰ See *B&B*, 2000 WL 781361 at *4.

²⁵¹ Tr. at 92, 114 (Halvorson); Ex. 116-117; Ex. 124.

²⁵² Tr. at 106, 118 (Halvorson).

²⁵³ *Id.* at 118 (Halvorson) (stating “I wasn’t thinking about those rules then”).

²⁵⁴ Ex. 117-120; Ex. 124; Tr. at 176-178 (Bode).

the harm.²⁵⁵ The federal courts have interpreted similar language to mean that “when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm possible, the employer has committed a serious violation of the regulation.”²⁵⁶ In other words, the government does not need to show that an accident was likely, only that there was a substantial probability that the result of an accident would be death or serious physical harm.²⁵⁷

The record in this case supports the conclusion that the violations were serious because there was a substantial probability that any accident resulting from the violations would result in death or serious physical harm. MN-OSHA Investigator Steven testified that hazards associated with trenching and excavation include cave-ins, asphyxiation, being buried, and death.²⁵⁸ In addition, there is no dispute that the violation of 29 C.F.R. § 1926.651(c)(2) has a severity factor of D and that the violation of 29 C.F.R. § 1926.652(a)(1) has a severity factor of F, both of which are classified as serious according to the Manual.²⁵⁹ In addition, for the reasons discussed above, the Department has established that Dirt Merchant knew or, with the exercise of reasonable diligence, could have known of the violative conditions. Therefore, the Department has established serious violations of 29 C.F.R. § 1926.651(c)(2) and 29 C.F.R. § 1926.652(a)(1).

E. Penalties and Abatement Periods

In its Notice of Contest, Dirt Merchant also challenged the penalties and abatement periods for the violations.²⁶⁰ However, at the hearing and in its brief, Dirt Merchant did not challenge either the penalty calculations or the abatement periods for Items 1 and 2 of the Citation.²⁶¹ Therefore, the Administrative Law Judge considers these challenges withdrawn.

To the extent that Dirt Merchant is still challenging the penalty amounts and abatement periods, the Administrative Law Judge concludes that the penalty amounts are fully supported by the record and the abatement periods are reasonable. The penalties were calculated in accordance with Minn. Stat. § 182.666 and the MN-OSHA Field Compliance Manual. And, the abatement period of two weeks for each item was reasonable as demonstrated by the fact that the hazards were abated on October 31, 2014, after the OSHA inspection.

F. Conclusion

For the reasons set forth above, the Administrative Law Judge concludes that the Department has demonstrated by a preponderance of the evidence that Dirt Merchant

²⁵⁵ Minn. Stat. § 182.651, subd. 12.

²⁵⁶ *Bethlehem Steel Corp. v. Occupational Safety and Health Review Comm’n*, 607 F.2d 1069, 1074 (3rd Cir. 1979).

²⁵⁷ *Id.*

²⁵⁸ Tr. at 25 (Stevens).

²⁵⁹ Ex. 1 at OSHA 011-15; Ex. 6.

²⁶⁰ Ex. 8 at OSHA 075.

²⁶¹ See Dirt Merchant’s Initial Br. at 26-28; Department’s Reply Br. at 10.

violated 29 C.F.R. §§ 1926.651(c)(2) and 1926.652(a)(1) on October 31, 2014 when its foreman, Josh Halvorson, jumped into an unprotected trench. The Administrative Law Judge further concludes that the violations are properly classified as serious but not willful. Finally, the Administrative Law Judge determines that the penalty amounts and abatement dates included in the Citation and Notification of Penalty issued on November 10, 2014 are appropriate and supported by the record. For these reasons, Items 1 and 2 in the Citation issued on November 10, 2014 to Dirt Merchant are **AFFIRMED as issued**, but not as amended.

J. M. C.