UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. K.M. DAVIS CONTRACTING CO., INC., Respondent.	)	OSHRC Docket No. 20-1437

REPLY BRIEF FOR THE SECRETARY OF LABOR

SEEMA NANDA
Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor of Labor for
Occupational Safety and Health

HEATHER PHILLIPS
Counsel for Appellate Litigation

JUAN C. LOPEZ
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. S-4004
Washington, DC 20210
(202) 693-5613
lopez.juan.c@dol.gov

EMMA L. GOOLD
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. S-4004
Washington, DC 20210
(202) 693-5027
goold.emma.l@dol.gov

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INTRODUCTION

In her opening brief, the Secretary[1] showed that the ALJ erred in finding the Secretary failed to establish K.M. Davis Contracting Co., Inc. (K.M. Davis) had constructive knowledge of the trench conditions that violated 29 C.F.R. §§ 1926.651(c)(2) and 652(b)(1)(i). The record evidence establishes that work inside the trench was reasonably expected on the day of the inspection, that foreman Gustavo Ortiz, the competent person on site, oversaw the excavation and knew of the physical conditions of the trench that violated OSHA's standards, and that K.M. Davis did not exercise reasonable diligence when it failed to adequately detect and enforce violations of its safety manual. The Secretary therefore proved that K.M. Davis had constructive knowledge of the violations. Additionally, K.M. Davis failed to establish the affirmative defense of unpreventable employee misconduct because the company failed to show that it adequately communicated safety requirements to its employees or implemented procedures for detecting and disciplining safety violations.

K.M. Davis argues that work inside the trench was not reasonably expected, and that reasonable diligence does not require the employer to detect every instance of violative conduct. K.M. Davis also urges the Commission to uphold the ALJ's credibility determinations, even though the Secretary does not

[1] As of July 14, 2023, the Acting Secretary of the Department of Labor is Julie Su.

challenge those determinations. And K.M. Davis asserts that it was not required to present evidence on the affirmative defense of unpreventable employee misconduct before the ALJ, and that this issue should be remanded. As discussed below, none of these arguments have merit. The Commission accordingly should reverse the ALJ and affirm Items 2 and 3 of the citation.

ARGUMENT

I. K.M. Davis Had Constructive Knowledge of the Violative Conditions Because the Company's Onsite Foreman Knew of the Dangerous Physical Condition of the Trench and, with the Exercise of Reasonable Diligence, Should Have Anticipated that Workers Would Enter the Trench.

As explained in the Secretary's opening brief, *see* Sec'y Br. 12–19, a supervisor has constructive knowledge of a violation where, "with the exercise of reasonable diligence, [they] should have known of the conditions constituting the violation." *Jacobs Field Servs. N. Am.*, No. 10-2659, 2015 WL 1022393, at *3 (OSHRC Mar. 4, 2015). "Reasonable diligence implies effort, attention, and action, not mere reliance upon the action of another." *Stein, Inc.*, No. 94-810, 1995 WL 431486, at *8 (OSHRC May 8, 1995) (*citing Carlisle Equip. Co. v. Sec'y of Lab.*, 24 F.3d 790, 794 (6th Cir. 1994)). "It is well-settled that an employer has an obligation to ascertain the hazards to which its employees may be exposed." *S. Scrap Materials Co.*, No. 94-3393, 2011 WL 4634275, at *31 (OSHRC Sept. 28, 2011); *see also Hamilton Fixture*, No. 88-1720, 1993 WL 127949, at *16 (OSHRC Apr. 20, 1993) ("[A]n employer has a general obligation

to inspect its workplace for hazards."). A supervisor's constructive knowledge of a violation is imputed to the employer for purposes of establishing a violation of an OSHA standard. *ComTran Grp., Inc. v. U.S. Dep't of Lab.*, 722 F.3d 1304, 1307–08 (11th Cir. 2013).

Here, the record clearly establishes that, with reasonable diligence, Ortiz should have anticipated that workers would enter the trench in the course of their work on June 12, 2020. First, K.M. Davis made a binding pretrial stipulation that "[o]n June 12, 2020, K.M. Davis was installing a water mount on an existing pipe at the Worksite." Doc. 34, Attach. C. Performing this installation necessarily required work within the trench, as the pipe was located approximately eight feet underground. *See* Tr. 91:4. The ALJ erred in reaching a conclusion—that work within the trench was not anticipated on June 12—directly contradicted by K.M. Davis's binding stipulation. *See* Sec'y Br. 15–17; *Cent. Fla. Equip. Rentals*, No. 08- 1656, 2016 WL 4088876, at *6 n.11 (OSHRC July 26, 2016) ("Stipulations of fact bind the court and parties. This is their very purpose.") (*citing Christian Legal Society v. Martinez*, 561 U.S. 661, 677–78 (2010)) (view of Commissioner).

In response, K.M. Davis concedes, consistent with its stipulation, that "work would have to be performed inside the trench." Resp. Br. 11. But K.M. Davis's argument that work within the trench *could have* been performed in a safe manner had it taken place, for example, after the installation of the two trench

boxes, is irrelevant since that is not how the work proceeded under Ortiz's direction and supervision. *See* Tr. 96:17–21, 148:4–6. At bottom, K.M. Davis does not, and cannot, dispute that the work of "installing a water mount on an existing pipe at the Worksite" on June 12 necessarily included work within the trench. The ALJ's conclusion to the contrary is therefore legal error.

In addition to K.M. Davis's stipulation, other undisputed record evidence establishes that the planned work for the day included tasks that could require an employee to enter the trench, such that a reasonably diligent supervisor would have taken steps to prevent employees from entering an unprotected trench. Ortiz, the foreman and supervisor on site, explained during the hearing, "Mr. Perez attached the sleeve on [the excavator]. We suppose to leave there because it was Friday and said somebody can steal it and we better put it in there and then we go home." Tr. 96:17–21. The worker in the trench, Jerland Stephens, testified that he entered the trench because "[w]e were putting the sleeve inside for the next Monday. For Monday. We have to prepare for Monday or – so it won't get stolen." Tr. 148:4–6. In other words, Ortiz had directed the crew to store the sleeve inside the trench for safekeeping before leaving for the day, and by the time CO Johnson arrived at the excavation site, Stephens was inside the trench doing just that—disconnecting the chains from the sleeve that Perez had lowered into the trench using the excavator, consistent with Ortiz's plan. Tr. 33:20–23, 96:17–21, 150:23–25.

In its brief, K.M. Davis argues that "[w]ork inside the trench was not reasonably expected" on June 12.[2] Resp. Br. 7. K.M. Davis suggests the Secretary's "assumption" to the contrary "is speculative and no evidence supports it" and that the Secretary "second guesses the foreman's plan for the site, substituting the Secretary's conjecture for the actual plans." *Id*. Ortiz's testimony quoted in the paragraph above, however, makes clear that, to the contrary, it was the foreman's plan to place the sleeve in the trench before leaving on Friday, and that is what Stephens was doing when CO Johnson witnessed him inside the trench.[3] Far from being speculative, the Secretary's position relies on K.M. Davis's binding stipulation and the uncontradicted testimony of the company's foreman and employee.

K.M. Davis attempts to cast the ALJ's erroneous conclusion that work in the trench was not anticipated as a credibility determination entitled to deference

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[2] As discussed above, K.M. Davis should not be permitted to argue a position inconsistent with its binding pretrial stipulation regarding the work to be performed on June 12. This is doubly true since K.M. Davis concedes that its stipulation acknowledges "work would have to be performed inside the trench." Resp. Br. 11.

[3] K.M. Davis quotes the ALJ's mischaracterization of Ortiz's testimony as referring to a plan to place the *trench boxes* in the trench for safekeeping, rather than the sleeve. *See* Resp. Br. 8, quoting ALJ Op. 17. Read in context, however, the transcript allows for no other conclusion than that the "it" Ortiz was concerned somebody might steal and needed to place in the trench is the sleeve, not the trench box. *See* Tr. 96:16–24.

unless contradicted by the record. This argument lacks merit because the ALJ reached a conclusion concerning the expected work on the day of the inspection without reliance on any competing testimony. His finding therefore did not require a credibility determination or any reference to the "demeanor of the witness[es] or other factors peculiarly observable by the judge" that are generally accorded deference.[4] Resp. Br. 9. Ortiz's and Stephens's testimony about the planned work for the day was consistent, and the ALJ erroneously disregarded the company's stipulation and misunderstood or overlooked the employees' testimony in concluding that work within the trench was not foreseeable on June 12. Thus, the ALJ's conclusion that work inside the trench was not expected on June 12 is directly contradicted by the record and not based on an assessment of credibility, and therefore should not be accorded any deference.

Given the record evidence, reasonable diligence required Ortiz, as the supervisor and person responsible for safety at the worksite, to anticipate workers could enter the nonconforming trench, and he therefore should have taken some

[4] K.M. Davis makes much of the fact that, on the issue of Ortiz's *actual* knowledge of Stephens presence in the trench, the ALJ credited Ortiz's and Stephen's testimony that Ortiz was at his truck rather than standing beside the trench. *See* Resp. Br. 18–21; ALJ Op. 16. As discussed *supra* p. 2, however, the Secretary can establish constructive knowledge of the violations without proof that Ortiz had actual knowledge that Stephens was in the nonconforming trench. The Secretary has not challenged the ALJ's credibility determination with respect to Ortiz's actual knowledge of the violations and, therefore, Ortiz's physical location at the time that CO Johnson arrived on site is not dispositive of any issue before the Commission.

action to prevent the foreseeable violation.[5] K.M. Davis downplays the persuasiveness of *Petrongolo Contractors, Inc.*, No. 20-0786, 2021 WL 5230473 (OSHRC Sept. 28, 2021) (ALJ), asserting that it is distinguishable on the facts. *See* Resp. Br. 12. On the contrary, in *Petrongolo*, the ALJ found constructive knowledge under substantially identical facts: the responsible person whose constructive knowledge was imputed to the employer was the foreman and supervisor in charge of the worksite; he was on site the entire shift and directed the excavation work; and he had actual knowledge of the nonconforming aspects of the trench, which was open and accessible to employees. *See* 2021 WL 5230473, at *14. Further, the ALJ in that case found constructive knowledge even though the foreman was *not present* when the workers entered the unprotected trench because, knowing the trench was unprotected, the supervisor "had a heightened responsibility to keep [the workers] from entering the unprotected trench in his absence" through "affirmative steps" like "admonishing the employees not to enter the unprotected trench or by re-covering the trench." *Id*.

[5] Indeed, reasonably diligent direction and supervision is critical given the well-known deadly consequences of trench collapses. *See* OSHA Alert: Trench Collapses Can Be Deadly, available at https://www.osha.gov/sites/default/files/publications/OSHA3971.pdf (last visited July 14, 2023). "As contemplated in the preamble to the Final Rule for Subpart P - Excavations, OSHA believes there is a potential for a cave-in or collapse in virtually all excavations." CPL-02-00-165, p. 6, Compliance Directive for the Excavation Standard, available at https://www.osha.gov/enforcement/directives/cpl-02-00-165 (last visited July 14, 2023).

In this case, Ortiz was the foreman who directed and supervised the crew's work at the excavation site and knew about the hazardous conditions of the trench. Even accepting the ALJ's factual determination that Ortiz was at his truck when Stephens entered the nonconforming trench, a reasonably diligent foreman in Ortiz's position would, at the very least, have reminded the employees under his supervision not to enter a trench he knew to be nonconforming, especially given that he intended the crew to place the sleeve into the trench before leaving for the day.[6]

To defend Ortiz's lack of oversight at the worksite, K.M. Davis points to the Commission's statement in *Stahl Roofing* that reasonable diligence does not require an employer to detect every instance of a hazard. Resp. Br. 10 (quoting *Stahl Roofing Inc.*, Nos. 00-1268 & 00-1637, 2003 WL 440801, at *3 (OSHRC Feb. 21, 2003)). In *Stahl Roofing*, the Commission analyzed the overall adequacy of the company's safety program with respect to fall protection and eye protection violations, not the reasonable diligence of a specific foreman in a particular set of circumstances. *See Stahl Roofing*, 2003 WL 440801, at *2–3. Given Ortiz's

[6] K.M. Davis mischaracterizes the ALJ's holding in *Petrongolo* by suggesting that the supervisor's oral instructions to employees in the unprotected trench were material to the ALJ's finding of constructive knowledge. Resp. Br. 12. In fact, the ALJ relied on this factual finding as evidence of the supervisor's *actual* knowledge of the violation. *See Petrongolo*, 2021 WL 5230473, at *13. Separately, the ALJ found the supervisor had constructive knowledge based on factors also present here. *See id.* at *14.

supervisory role, his knowledge of the trench conditions at the worksite, and the expectation that, at a minimum, the crew would place the sleeve into the trench that day, reasonable diligence required him to ascertain the potential hazard of the nonconforming trench and take steps to prevent employees' exposure.

K.M Davis's attempts to distinguish *Jacob Field Services North America*, 2015 WL 1022393, and *Stein, Inc.*, 1995 WL 431486, are similarly unpersuasive. In *Jacobs*, the Commission reversed the ALJ's finding of constructive knowledge where there was no evidence that the supervisor knew or had reason to know what the employee intended to do. *See* 2015 WL 1022393, at *3–4. By contrast, here, as discussed *supra* pp. 3–4, the company stipulated that the work for the day was a task that necessarily required entering the trench, and foreman Ortiz testified that he expected to have his crew store the sleeve in the trench over the weekend. And in *Stein*, the ALJ found constructive knowledge where the onsite supervisor had actual knowledge of the potentially hazardous condition and failed to exercise reasonable diligence in not preventing employee exposure to the hazards. *See* 1995 WL 431486, at *8. As explained *supra* p. 7, K.M. Davis's onsite supervisor, Ortiz, also was keenly aware of the violative condition of the trench yet failed to ensure no employees entered the hazardous trench.

The record is clear that work was reasonably expected in the trench on June 12, 2020, and a reasonably diligent foreman in Ortiz's position should have anticipated the exposure of the crew to the known hazards in the trench and taken

steps to prevent the exposure of employees to those hazards. K.M. Davis therefore had constructive knowledge of the violations, and Items 2 and 3 of the citation should be affirmed.

II. K.M. Davis Also had Constructive Knowledge Because It Was Not Reasonably Diligent in Enforcing its Safety Program.

The Secretary also demonstrated K.M. Davis's constructive knowledge by showing that the company failed to implement an adequate safety program. *See ComTran Grp.*, 722 F.3d at 1308 ("[T]he Secretary can show knowledge based upon the employer's failure to implement an adequate safety program."). "The adequacy of the employer's safety program depends on whether the employer: (1) had work rules designed to prevent the violation; (2) adequately communicated those rules to its employees; (3) took steps to discover violations; and (4) effectively enforced the rules when it discovered violations." *Dana Container, Inc.*, No. 09-1184, 2015 WL 7459426, at *3 n.9 (OSHRC Nov. 19, 2015).

As explained in the Secretary's opening brief, *see* Sec'y Br. 20–25, the record makes clear that K.M. Davis has no formal policy or procedure for reporting safety violations up the chain of command, and Michael Davis, the company's Secretary/Treasurer and co-owner, acknowledged the likelihood that the foremen may not report violations "because, you know, everybody don't report everything." Tr. 198:1–3; *see generally* Tr. 197–198. And when violations happen to be reported, both Michael Davis's testimony and the company's

disciplinary records make clear that K.M. Davis does not follow the progressive discipline procedures required by its safety manual. Rather, the company issues multiple verbal warnings and only imposes a monetary penalty when a K.M. Davis executive deems that a violation has happened "too many times." Tr. 184:22–23. Michael Davis and the other co-owners of the company decide "what [they] feel like the discipline should be" for the violative instances reported to them. Tr. 178:24–25.

K.M. Davis defends this practice as "[s]ubjective judgment and experience based practical decisions," necessary "in a challenging labor market." Resp. Br. 17. But the company's calculated decision not to enforce its safety program as written cannot be considered adequate enforcement under the law. The company's written records reflect only one instance of an employee being suspended prior to the incident at issue here. Contrary to K.M. Davis's assertion, *see* Resp. Br. 17–18, the Secretary does not ask the Commission to require a specific number of disciplinary records or strict adherence to the written policy. But Michael Davis's description of the company's lax reporting and enforcement practices, which is inconsistent with the written procedures, and the handful of disciplinary records in this case fall far short of the evidence the Commission has found to preclude a showing of constructive knowledge. *See e.g.*, *Shelly & Sands, Inc.*, No. 17-0190, 2021 WL 488127, at *4 (OSHRC Feb. 1, 2021) (affirming dismissal of citation for lack of constructive knowledge based on failure to enforce adequate safety

program where company had a progressive disciplinary policy in place, documented more than 100 verbal and written warnings in preceding years, and disciplined employees pursuant to the written policy); *Stahl Roofing*, 2003 WL 440801, at *3 (vacating citation for lack of constructive knowledge where record showed, among other things, that company followed its progressive discipline policy).

K.M. Davis also contends the Secretary is relying on "the very fact the violations occurred" to establish the inadequacy of the safety program. Resp. Br. 10. This argument ignores the extensive testimony in the record illustrating K.M. Davis's arbitrary and inconsistent implementation of the company's safety rules both because there is no formal policy or procedure for onsite supervisors to report violations and because the company owners determine what discipline is appropriate on a case-by-case basis for reported violations. The company's admitted laissez-faire approach to implementing and enforcing its own safety rules, as evidenced by the paucity of disciplinary records, underscores the inadequacy of K.M. Davis's safety program and establishes K.M. Davis's constructive knowledge.

III. K.M. Davis Cannot Establish the Defense of Unpreventable Employee Misconduct.

As explained above, the Secretary has established a prima facie case for the violations in Items 2 and 3 of the citation, and K.M. Davis has the burden to

prove the affirmative defense of unpreventable employee misconduct by showing it has: (1) established work rules designed to prevent the violation, (2) adequately communicated these work rules to its employees, including supervisors, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered.[7] *Am. Sterilizer Co.*, No. 91-2494, 1997 WL 694094, at *5 (OSHRC Nov. 5, 1997). "An employer that relies on the presence of an effective safety program to establish that it could not have reasonably foreseen the aberrant behavior of its employee must demonstrate the program's effectiveness in practice as well as theory." *Structural Bldg. Sys., Inc.*, No. 03-0757, 2004 WL 513691, at *4 (OSHRC Mar. 8, 2004) (ALJ). Effective implementation of a safety program requires "a diligent effort to discover and discourage violations of safety rules by employees." *Am. Sterilizer Co.*, 1997 WL 694094, at *5. This includes the burden on the employer to prove that it "uniformly and effectively enforced its work rules prior to the misconduct." *Cooper/T. Smith Corp.*, No. 16-1533, 2020 WL 1692541, at *2 (OSHRC Apr. 1, 2020).

For the reasons discussed *supra* in Section II and in the Secretary's opening brief, *see* Sec'y Br. 25–27, K.M. Davis fails to meet this burden and cannot show that the citation items here were the result of unpreventable

[7] The affirmative defense of unpreventable employee misconduct has the same elements as those needed to establish constructive knowledge via a lax safety program. *See Buford's Tree, Inc.*, No. 07-1899, 2010 WL 151385, at *4 (OSHRC Jan. 8, 2010).

employee misconduct. Although K.M. Davis did have work rules that mirror the requirements of the cited standards, these rules were not adequately communicated to its employees. The most obvious illustration of this lack of communication is that Ortiz—the employee tasked with enforcing the employer's safety rules on the worksite—incorrectly believes that a staircase made from benched dirt is a safe means of egress from a trench in Type C soil. *See* Tr. 26:22–27:1, 100:16–18; Ex. C-6.[8] K.M. Davis cannot establish that its work rules were adequately communicated to employees where its foreman and competent person did not understand what was required either by OSHA's standards or by the company's rules.

Furthermore, K.M. Davis cannot show that it takes adequate steps to monitor and discipline violations of the rules. As discussed *supra* pp. 10–11, there is no procedure for detecting and reporting work rule violations, nor does Michael Davis, the company's part-owner, indicate that violations are consistently reported back to company leadership. Both his testimony and the company's

[8] K.M. Davis mischaracterizes the Secretary's position by claiming the Secretary does not challenge the adequacy of the company's communication of its work rules. Resp. Br. 15. In fact, the Secretary explicitly challenged this element of the unpreventable employee misconduct defense in her opening brief, pointing out that Ortiz's lack of knowledge of how to place the ladder to provide for safe egress from the trench box should be considered evidence that K.M. Davis failed to adequately communicate its work rules regarding trench safety. *See* Sec'y Br. 26–27 (*citing Diamond Installations, Inc.*, No. 02-2080, 2006 WL 2831128, at *4 (OSHRC Sept. 27, 2006)).

disciplinary records show the progressive discipline in the written policy is not enforced. K.M. Davis has therefore failed to show that it was effectively or consistently communicating and enforcing its written rules regarding trench safety, and its affirmative defense of employee misconduct should be rejected.

K.M. Davis argues that it did not have to present evidence as to its affirmative defense at trial because the Secretary failed to make a prima facie case, and it is entitled to a remand to "perfect" the record now. Resp. Br. 13–14. This is incorrect. The cases the company cites for this proposition, *New York State Electric & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 106–08 (2d Cir. 1996), and *ComTran Group, Inc.*, 722 F.3d at 1308, clarify that the affirmative defense of unpreventable employee misconduct does not change the Secretary's initial burden to make a prima facie case. The cases do not stand for the proposition that an employer need not even present such a defense unless the ALJ rules the Secretary has met her burden. In fact, had K.M. Davis failed to present evidence and argue its affirmative defense below, the defense would be treated as waived. *See e.g.*, *Eustis Cable Enters., Ltd.*, No. 20-1006, 2022 WL 17884893, at *39 (OSHRC Nov. 10, 2022) (ALJ) ("Affirmative defenses not raised at the hearing are deemed waived and abandoned by Respondent."); *Revolution Erecting, LLC*, No. 21-0142, 2022 WL 16691969, at *24 (OSHRC Sept. 26, 2022) (ALJ) (same); *Petroplex Pipe & Constr. Inc.*, No. 19-1498, 2022 WL 4015164, at *2 n.4 (OSHRC Aug. 26, 2022) (ALJ) (same); *Tessier's, Inc.*, No. 18-0859, 2020 WL

2507772, at *19 (OSHRC Mar. 30, 2020) (ALJ) (same). K.M. Davis knew it needed to argue its affirmative defense to the ALJ and did so. The company is not entitled to a remand to present additional evidence to bolster its defense now.

Nor is a remand appropriate to revisit the ALJ's evidentiary rulings. K.M. Davis obliquely challenges the ALJ's rulings excluding as irrelevant some of the employer's proffered evidence. *See* Resp. Br. 14. This excluded material included safety training documents for classes regarding pipe saws, fall protection, confined space, traffic safety, hearing protection, housekeeping, lifting and carrying, power saws and silica, and night work. *See* Exhs. R-11, R-12, R-13, R-18–R-24. First, K.M. Davis filed no petition for discretionary review challenging any aspect of the ALJ's evidentiary ruling, and any such challenge is now untimely. Furthermore, the ALJ correctly excluded these exhibits as irrelevant, holding the exhibits are not "probative to whether or not [the company has] a proper plan – safety plan in effect regarding the items that [it was] cited for"—namely, trench safety. Tr. 170–173, 175. Only aspects of the safety program related to the safety violations at issue in the citation—here, trench safety—are relevant to the adequacy of the employer's safety program. *See Daniel Int'l Corp. v. OSHA*, 683 F.2d 361, 364 (11th Cir. 1982) (assessing adequacy of employer's safety program with reference only to rules, training, monitoring, and enforcement directly related to the hazard for which the employer was cited); *Thomas Indus. Coatings, Inc.*, No. 06-1542, 2012 WL 1777086, at *6–7 (OSHRC

Feb. 28, 2012) (same). The ALJ correctly excluded exhibits addressing aspects of K.M. Davis's safety program that had nothing to do with the citation items at issue and that were therefore irrelevant to the adequacy of the program as to trench safety. In sum, K.M. Davis has failed to support the affirmative defense of unpreventable employee misconduct, and citation items 2 and 3 should be affirmed without remand.

CONCLUSION

For the foregoing reasons, the Commission should reverse the ALJ's determination that the Secretary failed to establish K.M. Davis's constructive knowledge of the two excavation violations and reject K.M. Davis's affirmative defense of unpreventable employee misconduct. Accordingly, the Commission should affirm Items 2 and 3 of the citation and the associated the penalty of $13,474.00.

Respectfully submitted,

SEEMA NANDA
Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor of Labor for
Occupational Safety and Health

HEATHER PHILLIPS
Counsel for Appellate Litigation

JUAN C. LOPEZ
Senior Attorney
200 Constitution Ave., N.W., Rm. S-4004

Washington, DC 20210
(202) 693-5613
lopez.juan.c@dol.gov

/s/ Emma L. Goold
Emma L. Goold
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. S-4004
Washington, DC 20210
(202) 693-0279
goold.emma.l@dol.gov

CERTIFICATE OF SERVICE

I certify that on the 14th day of July, 2023, the following counsel of record for Respondent K.M. Davis Contracting Co., Inc., was served with a copy of the foregoing Secretary of Labor's Brief to the Commission via the Commission's E-File system and e-mail:

Andrew N. Gross
400 Colony Square, Suite 100
1201 Peachtree Steet, NE
Atlanta, Georgia 30361
agross@skglaw.com

/s/ Emma L. Goold
EMMA L. GOOLD
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. S-4004
Washington, DC 20210
(202) 93-0260
goold.emma.l@dol.gov