No. 22-60610

In the United States Court of Appeals for the Fifth Circuit

J.D. Abrams, L.P.,

Petitioner,

v.

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION; MARTIN WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondents.

PETITION FOR REVIEW OF A FINAL ORDER OF THE OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

BRIEF ON BEHALF OF PETITIONER J.D. ABRAMS L.P.

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ATTORNEYS FOR PETITIONER J.D. ABRAMS L.P.

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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J.D. Abrams, L.P.	Petitioner
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Judge Christopher D. Helms	Administrative Judge of the United States Occupational Safety and Health Review Commission, presiding below

/s/ Steven R. McCown
Steven R. McCown
Kelli Fuqua

ATTORNEYS FOR PETITIONER

STATEMENT REGARDING ORAL ARGUMENT

J.D. Abrams, L.P. ("Petitioner" or "J.D. Abrams") submits that oral argument should be granted. The employee misconduct defense to a violation of the Occupational Safety and Health Act of 1970 ("OSH Act") is a vital mechanism for employers to take advantage of Congress' stated intent for the OSH Act to ensure worker safety only "so far as possible." 29 U.S.C. § 651(b) (1982). Although this Court has weighed in on the application of the defense in various circumstances in the past years, the factual and procedural history of this case is unique such that oral argument would assist the Court in understanding why the defense applies here—and why the ALJ erred by finding it did not apply below—as these specific errors have not arisen in the Court's recent jurisprudence on the defense.

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I.
STATEMENT OF JURISDICTION

Agency jurisdiction. The Occupational Safety and Health Administration ("OSHA") issued Petitioner a Citation and Notification of Penalty ("Citation") on February 20, 2020, alleging two serious violations. Vol. 3, Item 1.[1] Petitioner filed a Notice of Contest on March 12, 2020. Vol. 3, Item 2. At that time, the Commission obtained jurisdiction pursuant to section 10(c) of the OSH Act, 29 U.S.C. § 659(c).

Appellate jurisdiction. This Court has jurisdiction pursuant to section 11(a) of the OSH Act, 29 U.S.C. § 660(a). On October 3, 2022, the ALJ's decision became a final order. Vol. 3, Item 54. Petitioner filed its Petition for Review with this Court on November 14, 2022, within the 60-

[1] Pursuant to Rule 17, Federal Rules of Appellate Procedure, the Occupational Safety and Health Review Commission ("OSHRC" or "Commission") filed a Certified List of relevant docket entries in lieu of the record. When citing the record in this Brief, Petitioner will reference the Volume and Page Number corresponding to those documents described in the Certified List of relevant docket entries. For example, the Stenographic Transcript of Testimony will be cited as "Vol. 1, page: lines"; Exhibits of the Secretary of Labor will be cited as "Vol. 2, C-__"; Petitioner's Exhibits will be cited as "Vol. 2, R-___"; and the pleadings will be cited as "Vol. 3, Item ___." Pursuant to Fifth Circuit Rule 30.2(a), Petitioner will file a copy of the portions of the record relied upon by the parties in their respective briefs within 21 days of the filing of Respondent's brief.

day time frame prescribed by Section 11(a). In addition, pursuant to Section 11(a), Petitioner appropriately sought review in this Court because this is the circuit in which the violations are alleged to have occurred.

II.
STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the ALJ's analysis of the employee misconduct defense eviscerates the purpose of the defense, rendering it impossible for any employer to successfully claim it, contrary to the purpose of the OSH Act.

2. Whether the ALJ's Decision violated the Administrative Procedure Act ("APA") and the OSH Act by failing to consider the entire record, including testimony elicited by the ALJ himself that demonstrated Petitioner's robust safety program, as well as extensive pre-inspection disciplinary records incorporated into the Secretary's trial exhibits.

3. Whether the ALJ erred by concluding that Petitioner failed to demonstrate it took steps to discover safety violations, despite the fact that Petitioner maintains and enforces a robust safety program, including an extensive handbook, a vigorous safety audit mechanism, on-site training, and routine safety meetings.

4. Whether the ALJ erred by concluding in his Decision that Petitioner failed to demonstrate it effectively enforced its safety rules when violations have been discovered, despite the fact that the relevant crew members were disciplined and Petitioner produced an array of prior disciplinary actions taken against its employees for violating safety rules.

5. Whether the ALJ erroneously concluded that both Citation items are properly classified as serious and that the proposed penalties are appropriate, where the issuing officer admitted various mistakes with his assessment that necessarily change the outcome.

III.
STATEMENT OF THE CASE

Petitioner is a 100% employee-owned company focused on highway and bridge construction and headquartered in Austin, Texas. *See* Vol. 2, R-1 at 00045, 48-49; Vol. 1, 119:25-126:2. On every road or bridge it builds, at every project, *working safely* is who Petitioner is and how Petitioner gets things done. *See id.* Stated differently: the safety and wellbeing of Petitioner's employees are key components – if not *the* key component – of the company's Core Purpose. *Id.* Petitioner's goal is to ensure each and every one of its employees get home safely to their families each and every day. *Id.*

To accomplish this goal, among other things, Petitioner maintains and enforces a robust Employee Safety Handbook. *See generally* Vol. 2, R-1, R-2.[2] Relevant to this matter, the Handbook describes, at length, policies regarding trench and excavation training, as well as ladder usage. *See* Vol. 2, R-1 at 00057, 61-62, 190. Petitioner is also committed to the comprehensive development of its employees through continuous

[2] R-1 is the English version of Petitioner's Employee Safety Handbook, while R-2 is the same Employee Safety Handbook in Spanish. Vol. 1, 66:12-20.

training, including specifically regarding trench and ladder safety. *See* Vol. 2, R-3; Vol. 1, 119:25-126:2; 131:23-132:10; 134:1-135:12; 135:22-139:24; 33:25-41:6. This includes pre-task planning, hazard recognition, a safety audit process, accident investigation, near miss reporting, alcohol and substance abuse prevention, and recognition of its employees' contributions. *See* Vol. 2, R-1 at 00048-51; Vol. 1, 119:25-126:2; 131:23-132:10; 134:1-135:12; 135:22-139:24.

The Citation that resulted in the trial of this matter stemmed from an inspection OSHA conducted of a worksite on the morning of December 3, 2019. *See* Vol. 2, R-4, R-5, R-6, R-10, R-12; Vol. 1, 41:7-61:25. Early that morning, Petitioner's crew – supervised by Ramon Reyes and comprised of Orlando Gracia and Pedro Contreras – opened a trench on the side of the access road to interstate highway I-35 in Austin near Highway 183. *See id.* Each member of this crew had received training from their supervisors regarding trenching and excavations on multiple occasions and understood their life-saving commitment to excavation safety. *See* Vol. 2, R-3; 33:25-41:6.

The trench the crew opened was part of a larger trenching project, which means Petitioner had dug and closed other trenches in the area on

days prior. Vol. 1, 42:2-43:25. Indeed, the day before, a water pipe in a different, previously opened trench burst, causing a safety issue. *Id.* At trial, Mr. Reyes testified that one of the potential causes of this water pipe breaking was due to the trench box—a cave-in protection device—he had selected in accordance with his training placing too much pressure on the water pipe. *Id.* Fortunately, no crew members were in the trench when the pipe burst the day before. *Id.* Nonetheless, Mr. Reyes testified, he made his supervisor aware of the incident.

When the crew dug a different trench opening the next morning – on December 3, 2019 – Mr. Reyes was hyperaware of the water pipe at the bottom of this trench, as he did not want the pipe to burst or for anyone on the team to be harmed. *See id.* Given his extensive training by Petitioner, Mr. Reyes knew that if the pipe burst while someone was inside the trench, serious injuries could occur, including death. *Id.*

Mr. Reyes also knew that at least one foot below the ground level was either solid asphalt or concrete, depending on the side of the trench referred to, and there was also rocky material at the bottom of the trench. Vol. 1, 44:1-50:19. The solid areas in the trench wall did not factor into his calculation of the trench depth, since his understanding was that the

trench would not collapse in those areas as it remained supported by the other dirt, largely made up of large stones or other dense materials. *See* Vol. 1, 47:20-48:4. In other words, the overall depth of the soil that was Type B soil – rather than Type A soil – was less than five feet.[3] *See id.*

Trench sloping was not an option for cave-in protection given the proximity to the highway frontage road and the defined space the crew had to dig in, so Mr. Reyes had to decide whether to install a trench box instead. Vol. 1, 67:10-18. In light of his experience with the trench box the day prior, as well as the largely solid composure of the trench walls, Mr. Reyes chose – despite his training – *not to use a trench box*. *See* Vol. 1, 47:20-48:4. Significantly, however, Mr. Reyes repeatedly acknowledged at trial, "That was [his] mistake." Vol. 1, 47:20-48:4.

After a few hours of digging the trench, OSHA Area Director Casey Perkins coincidentally drove by the worksite, as it was located off a busy road. Vol. 1, 78:12-79:6; 98:17-99:5; 112:16-114:6. Apparently not

[3] OSHA classifies soils into three main groups: Type A, Type B, and Type C. Type A is the most stable and Type C is the least stable soil. United States Department of Labor, OSHA, Soil Classification / Transcript, available at https://www.osha.gov/vtools/construction/soil-testing-fnl-eng-web-transcript#:~:text=OSHA%20classifies%20soils%20into%20three,a%20competent%20person%20can%20use (last accessed March 10, 2023).

deeming the purported safety violations dangerous enough to stop himself when he spotted it, he called on two other OSHA inspectors to come out to the worksite themselves. *See id.* OSHA Compliance Safety and Health Officer ("CSHO") Robert Ray was assigned to this inspection, but he was accompanied by his colleague, Darren Beck,[4] since it was one of Mr. Ray's first inspections as a CSHO. *See id.*

Mr. Ray's inspection apparently revealed that the subject trench varied in depth throughout, with certain parts being deeper than others and, more specifically, deeper than 5 feet below ground level (though some areas were shallower), thus triggering cave-in protection obligations. *See* Vol. 1, 90:23-92:4. Since Mr. Reyes mistakenly chose not to implement any cave-in protections, such as a trench box, CSHO Ray cited Petitioner for not having any sort of protective systems in place in the event the trench collapsed. *See id.; see also* Vol. 2, R-5, R-6.

CSHO Ray also cited Petitioner because a ladder in the trench was only extending above the ground by, purportedly, 2 feet instead of the required 3 feet. *See* Vol. 2, R-5, R-6. However, the evidence demonstrated, that there were 3 ladder rungs out of the trench, which is a standard field

[4] Mr. Beck was not called to testify at trial.

measurement used to ensure the proper ladder extension, and there was no evidence that anyone used the ladder when it was positioned precisely as it was when the CSHO came. *See* Vol. 2, R-13 at 00007-9; Vol. 1, 55:21-56:6, 141:9-142:9. In any event, like excavations and trenching, JD Abrams had policies in place for this scenario. *See* Vol. 2, R-1 at 00057, 61-62, 190; R-3; Vol. 1, 119:25-126:2; 131:23-132:10; 134:1-135:12; 135:22-139:24; 33:25-41:6. The crew just did not follow them. Vol. 1, 54:4-6.

Significantly, CSHO Ray admitted at trial – in response to questions from Complainant's counsel and the ALJ himself – to making several mistakes with regards to the Citation. *See* Vol. 1, 95:2-3 ("I probably should not have put that as a -- in the justification."); 95:10-12 ("I probably should not have put death in there as a -- as a severity or as a -- as a justification."); 95:23-96:2 ("That was probably a typo.").

Petitioner disciplined the crew members for failing to follow proper safety protocol with regards to the trench box and the ladder. Vol. 1, 53:24-55:10; 61:19-62:7; Vol. 2, R-12. The discipline included write ups, as well as the more severe consequence of suspension-without-pay. *Id.*; *see also* Vol. 1, 109:12-14; 127:25-128:7. One of the crew members, Mr.

Gracia, never returned to work after being suspended, but Mr. Reyes returned to work and has maintained a clean safety record since the day of the subject incident through the time of trial. *Id.* Recognizing his grave error, Mr. Reyes repeatedly and humbly testified at trial, "I made a mistake, a big mistake." Vol. 1, 43:8-18; 47:20-48:4; 54:4-6.

Notably, due to its comprehensive commitment to safety and training its employees, Petitioner did not have any other violations on its record prior to the Citation at issue. *See generally* OSHA Establishment Search Results for J.D. Abrams;[5] *compare* Vol. 1 126:3-127:14 *with* 101:17-103:20.[6]

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[5] Available as of the date of this filing at: https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=j.d.+abrams&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=02&startday=28&startyear=2017&endmonth=02&endday=28&endyear=2022

[6] Despite this fact, at trial, the Secretary attempted to elicit misleading testimony to the contrary, convincing the CSHO to testify on the record that Petitioner had a history of violations that negatively impacted the CSHO's penalty assessment. Vol. 1, 88:11-90:22. On cross examination, the CSHO admitted he did not actually know Petitioner's discipline history, and that his prior evaluation of Petitioner's history was erroneous. *See generally* OSHA Establishment Search Results for J.D. Abrams; *compare* Vol. 1, 126:3-127:14 *with* 101:17-103:20. This is only one example of the CSHO's mistakes and the Secretary's misleading attempts to bolster them.

Petitioner timely contested the two items of the Citation and asserted the employee misconduct defense regarding both items. Vol. 3, Items 2, 6. A one-day trial was held on December 9, 2021, in San Antonio, Texas, before ALJ Christopher D. Helms. Vol. 3, Items 37, 45. ALJ Helms' Decision following trial was docketed with the Commission on September 1, 2022. Vol. 3, Item 52. In his Decision, the ALJ affirmed Citation 1, Items 1 and 2. Vol. 3, Item 51.

To reach this conclusion, the ALJ first properly concluded that Petitioner established the first two prongs of the employee misconduct defense: Petitioner's work rules were adequate to implement the requirements of the cited standards, pp. 19-20, and Petitioner effectively communicated the work rules to its employees, pp. 20-22. Vol. 3, Item 51. However, the ALJ erroneously concluded that Petitioner failed to demonstrate the third and fourth prongs of the defense—that "Petitioner had a meaningful program to detect and to discourage safety violations," pp. 22-23, and that Petitioner "had effective and consistent discipline for safety rule violations," pp. 23-25. *Id.*

On September 14, 2022, Petitioner requested that the Occupational Safety and Health Review Commission ("OSHRC") order discretionary

review of the Decision, on the basis that the ALJ's analysis of the third and fourth prongs of the asserted employee misconduct defense was in error. Vol. 3, Item 53. OSHRC did not grant discretionary review, so Petitioner timely appealed to this Court on November 14, 2022.

IV.
SUMMARY OF THE ARGUMENT

The ALJ failed to consider reliable, probative, and substantial evidence regarding Petitioner's demonstration of the third and fourth prongs of the employee misconduct defense—that Petitioner took steps to discover safety violations and that Petitioner effectively enforced its safety rules. In doing so, the ALJ not only propounded an erroneous Decision—the ALJ also violated the APA's requirement to consider the complete record in propounding said Decision.

Specifically, the ALJ imposed a heightened evidentiary burden on Petitioner to prove the third prong of the employee misconduct defense. The ALJ retroactively required Petitioner to call *certain* witnesses and introduce *specific* evidence to prove Petitioner's safety program was adequate—neither of which is required by the law. To be sure, the substantial testimony and evidence adduced at trial more than sufficiently demonstrate that Petitioner's safety program was adequate.

The ALJ himself elicited substantial testimony from Petitioner's Vice President about Petitioner's safety program, including its safety audit process, and there is no regulatory requirement that Petitioner call specific, other employees to prove the sufficiency of its safety program. Instead, the ALJ appears to have retroactively penalized Petitioner for unknowingly failing to comply with imaginary legal standards manufactured by the ALJ to strip Petitioner of its ability to claim the third prong of the employee misconduct defense, of which this case is the quintessential example.

In making each of these errors, the ALJ violated section 556(d) of the APA, which mandates that an order may not be issued "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." Relatedly, per section 660 of the Act, since the ALJ's findings on this prong are contradicted by the substantial evidence, the Decision must be reversed.

Regarding the fourth prong of the defense, the ALJ also disregarded evidence regarding pre-inspection disciplinary actions taken by Petitioner for safety violations. This procedural error resulted when the Secretary

conducted a misleading cross-examination of Mr. Zbranek, convincing Mr. Zbranek—a lay witness, not an attorney—to testify that Petitioner failed to produce any pre-inspection disciplinary actions. When Petitioner objected that this misstated Petitioner's discovery responses, which were included by the Secretary as one of his trial exhibits and which included numerous examples of pre-inspection disciplinary actions, the ALJ sustained the objection.

Nonetheless, the ALJ failed to consider the additional pre-inspection disciplinary actions, erroneously concluding—based on the Secretary's misleading cross-examination of Mr. Zbranek and failure to include the records in the evidence—that Petitioner did not produce any such documents, resulting in an incomplete piece of evidence. Specifically, the pre-inspection disciplinary records are directly referenced in Petitioner's response to the Secretary's Request for Production 12, which was introduced along with the rest of Petitioner's discovery responses as the Secretary's trial exhibit 16. If the Secretary *had* provided the full copy of Petitioner's discovery responses in its trial exhibit containing Petitioner's discovery responses, though, the ALJ would have necessarily

reached a different conclusion regarding the application of the fourth prong.

Even despite the erroneous absence of the pre-inspection disciplinary records, though, both the CSHO and Mr. Zbranek testified at trial that Petitioner did discipline its employees prior to the subject inspection. As such, the ALJ's decision that Petitioner failed to establish the fourth prong was both arbitrary and capricious, and he again violated the APA by failing to consider the complete disciplinary records.

For each of these reasons, as well as various related reasons discussed below, the ALJ's Decision should be reversed and the Citation should be vacated in full.

V.
ARGUMENTS AND AUTHORITIES

A. Standard of Review

This Court affirms an ALJ's findings of fact only where they are supported by substantial evidence in the record taken as a whole. *Echo Powerline, L.L.C. v. Occupational Safety & Health Review Comm'n*, 968 F.3d 471, 476 (5th Cir. 2020) (citing *Southern Hens, Inc. v. OSHRC*, 930 F.3d 667, 674 (5th Cir. 2019) (quoting 29 U.S.C. § 660(a))). Substantial evidence means such relevant evidence as a reasonable mind might accept

as adequate to support a conclusion." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951). Substantial evidence is determined by evaluating the entire record. *See Asarco, Inc. v. N.L.R.B.*, 86 F.3d 1401, 1406 (5th Cir. 1996). Reviewing the whole record, the Court is obligated to consider evidence that detracts from the ALJ's findings. *See id.*

This Court accepts the ALJ's legal conclusions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or where they are made "without observance of procedure required by law." *Id.* (citing *Southern Hens*, 930 F.3d at 675 (quoting 5 U.S.C. § 706(2)(A))).

B. The ALJ's Decision eviscerates the purpose of Section 5(b) of the Act, as well as the employee misconduct defense.

Section 5(b) of the Occupational Safety and Health ("OSH") Act provides:

> Each *employee shall comply* with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

29 U.S.C. § 654. Relatedly, Congress's stated intent for the OSH Act was to ensure worker safety only "*so far as possible*." 29 U.S.C. § 651(b) (1982)

(emphasis added). As this Court described in *W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 606–07 (5th Cir. 2006), when drafting the Occupational Safety and Health Act "Congress quite clearly did not intend ... to impose strict liability: The duty was to be an achievable one.... Congress intended to require elimination only of preventable hazards." 459 F.3d 604, 606 (citing *Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 564, 568 (5th Cir. 1976) (quoting *Nat'l Realty & Const. Co., Inc. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973))). "The Act itself provides the basis for [this] reasoning [as] the statement of congressional purpose contained in the Act evidences an intent to ensure worker safety only 'so far as possible'." *Id.* (citing *Penn. Power & Light Co.,* 737 F.2d at 354 (quoting 29 U.S.C. § 651(b)). "Nothing in the Act ... makes an employer an insurer or guarantor of employee compliance [with the Act] at all times." *Id.* (citing *Horne Plumbing,* 528 F.2d at 570 (quoting *Brennan v. OSHRC,* 511 F.2d 1139, 1144 (9th Cir.1975)); *Ocean Elec. Corp. v. Secretary of Labor,* 594 F.2d 396, 399 (4th Cir. 1979) (holding that Congress never intended "the employer to be an insurer of employee

safety")). Instead, the Act seeks to require employers to protect against preventable and foreseeable dangers to employees in the workplace. *Id.* (citing *Horne Plumbing,* 528 F.2d at 571; *Penn. Power & Light Co.,* 737 F.2d at 354 ("the purposes of the Act are best served by limiting citations for serious violations to conduct that could have been foreseen and prevented by employers with the exercise of reasonable diligence and care")).

Bearing in mind these purposes, to establish the affirmative defense of employee misconduct with regards to a citation under the OSH Act, an employer has the burden to prove that it: "1) has established work rules designed to prevent the violation, 2) has adequately communicated these rules to its employees, 3) has taken steps to discover violations, and 4) has effectively enforced the rules when violations have been discovered." *Angel Bros. Enterprises, Ltd. v. Walsh*, 18 F.4th 827, 832 (5th Cir. 2021).

In this case, the ALJ found that Petitioner satisfied the first two elements: Petitioner had established work rules designed to prevent the violations and Petitioner adequately communicated these rules to its employees. Vol. 3, Item 51. But the ALJ rejected the application of the

employee misconduct defense because he found Petitioner failed to prove the final two requirements: that Petitioner took steps to discover violations or that Petitioner effectively enforced its rules when violations were discovered. *Id.* The ALJ's Decision regarding the final two elements of the defense is erroneous because the ALJ created imaginary, heightened legal standards as to the evidence required to prove the final two elements of the defense; ignored uncontroverted evidence and key testimony that did prove the final two elements of the defense; and relied on a misleading cross-examination by the Secretary to conclude that Petitioner failed to produce key evidence which, in fact, was introduced by the Secretary. *Id.*

In light of these errors, the OSH Act itself provides the basis for reversing the ALJ's Decision regarding the final two elements: ignoring Congress' intent, the ALJ held Petitioner at fault for the result of an unpreventable, unrecognized, and explicitly admitted act of unforeseeable employee misconduct in the face of overwhelming evidence regarding Petitioner's safety program and history. *See Nat'l Realty*, 489 F.2d at 1266 ("Congress did not intend unpreventable hazards to be considered 'recognized' under the clause.") If the evidence produced at

this specifical trial does not satisfy the employee misconduct defense, employers—including employers with impeccable safety histories like Petitioner—are forced to confront an unfair and illegitimate reality: that the employee misconduct defense is a unicorn rather than a reliable harbor for safe employers to avoid harsh monetary penalties and business-altering consequences due to the unanticipated acts of employees who have been extensively trained to act otherwise.

Stated differently, in addition to improperly holding a large employer with an impeccable safety record and widely respected safety program improperly liable for the mistakes made by a single employee, the ALJ's decision eviscerates the OSH Act's purpose insofar as employee misconduct is concerned and renders the employee misconduct defense unattainable, at best, or utterly meaningless, at worst. To avoid the non-sensical ramifications of the ALJ's logic on employee-misconduct jurisprudence, the Court should consider the public policy effects of the ALJ's errors against the backdrop of the OSH Act and its stated purposes. The OSH Act is more than just a mechanism to discipline employers for safety violations, it is a mechanism to hold their *employees* accountable for being safe as well—and not by jumping over imaginary or endless

evidentiary hoops. The OSH Act is not strict liability in the sense suggested by the ALJ's Decision here.

The ALJ's Decision that Petitioner committed a serious violation of the cited standards based on the admitted mistake of a single employee cannot stand in light of the plain language of Section 5(b) and Congress' stated intent with regards to enacting the same.

C. Substantial evidence demonstrates that Petitioner effectively took steps to detect violations of safety rules at its worksites through a robust safety program, which includes routine safety audits.

The ALJ erred by finding Petitioner failed to prove it effectively took steps to detect violations of safety rules at its worksites, because substantial evidence and testimony adduced at trial—including by the ALJ himself—sufficiently demonstrated Petitioner had a robust safety program, which included the employ of safety coordinators who conducted routine audits of its work sites and performed investigations of near misses.

1. The ALJ ignored his own extensive examination of Petitioner's Vice President, who testified comprehensively regarding Petitioner's safety coordinators, their audits, and their investigations of near misses—which processes are also explained in other documentary trial evidence.

In his Decision, the ALJ first recognized the extensive testimony from Petitioner's Vice President of Operations that Petitioner employs safety coordinators who focus "solely on safety matters and routinely audited all the worksites for compliance with safety rules" and that "worksite audits were documented, compiled, and presented monthly by the area safety coordinators to the management team." Vol. 3, Item 51 at 22-23. However, the ALJ erroneously took issue with the fact that no paper evidence of any audits were provided, ultimately concluding that despite Mr. Zbranek's extensive testimony, the ALJ wanted more paper evidence of audits or investigations. *Id.*

The fact of the matter is that no safety audit or safety investigation documentation was produced regarding this specific site, because the site was new (the trench had just been opened the same morning the OSHA inspection occurred). Vol. 1, 42:2-43:25. In any event, Petitioner's safety audit process is specifically mentioned in Petitioner's Safety Handbook,

which comprised Petitioner's Exhibit 1 (English) and 2 (Spanish), and discussed extensively over several pages. *See* Vol. 2, R-1 at 000049-51.

Moreover, extensive testimony was elicited at trial, including at Judge Helms' direction, about this portion of the Handbook, which describes the duties of the safety coordinators and superintendents, and about safety meetings conducted at the start of each new job and weekly onsite. *See* Vol. 1, 131:5-135:13. For example, the ALJ asked Petitioner's Vice President, Steven Zbranek, questions about how a safety audit works, how many safety coordinators there are, what the safety coordinators' work entails, how often safety audits are conducted, and related questions. *Id.*

This testimony and evidence comprise substantial evidence that Petitioner effectively took steps to detect safety violations. The ALJ's decision to the contrary violates the OSH Act and the APA.

2. The ALJ arbitrarily and capriciously misinterpreted the single case he relied on for the proposition that Petitioner was required to produce documentary evidence of actual audits conducted by Petitioner to avail itself of the employee misconduct defense.

The ALJ cited *Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997) for the proposition that, "It is not enough that an employer

has developed an exemplary safety program on paper," because "the proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program." Vol. 3, Item 51 at 22. This case appears to be the crux of the ALJ's findings and conclusions regarding the third prong.

The ALJ interpreted the cited portion of *Am. Sterilizer* to mean that Petitioner should have produced more documentation regarding safety audits it actually conducted. *Id.* The ALJ concluded that since Petitioner did not produce more safety audit or investigation documentation regarding audits or investigations actually conducted, Petitioner did not prove it effectively took steps to detect violations of safety rules at its worksites.

In this respect, the ALJ's Decision plainly misreads *Am. Sterilizer* by requiring *more* paper—namely, more safety audit documentation—to demonstrate the effectiveness of Petitioner's safety program. But *Am Sterilizer* said exactly the opposite: that paper does not demonstrate the actual effectiveness of an employer's safety program. To this end, Mr. Zbranek, testified extensively at trial—including in response to the ALJ's own examination—that Petitioner maintains an exemplary safety audit

program and process. Under the very case law cited by the ALJ, Petitioner should be rewarded for this testimony and the extensiveness of its audit program as described, not penalized for a failure to produce additional documentation regarding the process.

To be sure, as explained above, no audits had been conducted of the specific worksite at issue because the trench was only opened the morning the Citation was issued. The ALJ's misinterpretation of this single authority resulted in a manufactured, heightened legal standard to establish the employee misconduct defense where no OSHA regulation so requires.

3. The ALJ ignored significant and substantial testimony from Mr. Reyes that he appropriately reported the issue with the water pipe exploding at a different worksite the day prior to the inspection at issue.

The ALJ also erroneously took issue with the fact that "no one came" to a separate worksite on December 2—the day prior the inspection at issue—after a crushed pipe flooded a separate trench. Vol. 3, Item 51 at 23. The ALJ stated that "this lack of response suggests the safety coordinators did not consistently respond to near misses."[7] *Id.* But this

[7] Moreover, the issue the prior day occurred precisely because Mr. Reyes decided to use trench protection, which was what Petitioner was cited for

testimony is nowhere in the record; no one testified that a safety coordinator was not called. *See generally* Vol. 1. Instead, Mr. Reyes affirmatively testified that (1) he called the responsible subcontractor immediately upon the incident occurring on December 2 at an entirely different site (Vol. 1, 42:12-14); (2) both Mr. Reyes' direct supervisor, Mr. Matute, and the superintendent, Mr. Clementino, were also made aware of the incident the day before (Vol. 1, 71:2-5); and (3) as soon as the relevant incident occurred on December 3, Mr. Reyes immediately called his local safety coordinator, Kevin Vannier, who, in turn, called the appropriate safety superintendent, Mr. Clementino, to inform them (Vol. 1, 72:4-19). In sum, Mr. Reyes did report the issue with the water pipe exploding the prior day, and the issue was handled appropriately.

Regardless, nothing in the OSH Act or the cited standards requires that someone be constantly monitoring employees to satisfy this prong of the defense. To be sure, the Commission has recognized that "reasonable diligence" in terms of discovering safety violations does not impose a

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not doing on December 3. Vol. 1, 42:4-23. As such, it is speculative, at best, that a physical visit from Mr. Matute or Mr. Clementino (versus a verbal conversation) would have changed Mr. Reyes' mistaken decision not to use trench protection on December 3—or that there was even a safety issue or near miss to investigate anyway.

requirement for continuous, full-time monitoring. *Sec'y of Labor v. Stark Excavation, Inc.*, 22 O.S.H. Cas. (BNA) ¶ 1455, 2006 WL 305302 at *4 (O.S.H.R.C.A.L.J. Nov. 18, 2008) (citing *Stanley Roofing Co.*, 21 BNA OSHC 1462, 1464 (No. 03-0997, 2006)); *see also Sec'y of Labor v. Aquatek Sys., Inc.*, 21 O.S.H. Cas. (BNA) ¶ 1400, 2008 WL 5452425 at *2 (O.S.H.R.C. Feb. 2, 2006) (where employees were normally monitored for compliance with safety rules by routine visits to worksites, that monitor did not visit one day to a relatively simple job was reasonable under the circumstances).

Here, the record establishes without challenge that Petitioner had an excellent safety history and commitment to safety. *See generally* Vol. 2, R-1, R-2; R-3; Vol. 1, 33:25-41:6; 119:25-126:2; 131:23-132:10; 134:1-135:12; 135:22-139:24. Notably, due to its comprehensive commitment to safety and training its employees, Petitioner did not have any other violations on its record prior to the Citation at issue, despite the Secretary's attempted testimony to the contrary.[8] *See generally* OSHA

[8] As described in footnote 4, the Secretary attempted to erroneously suggest at trial that Petitioner had been cited by OSHA prior to the instant incident. Vol. 1, 88:11-90:22. On cross examination, though, the CSHO admitted he did not actually know Petitioner's discipline history, and that his prior evaluation of Petitioner's history was erroneous. *See*

Establishment Search Results for J.D. Abrams;[9] *compare* Vol 1., 126:3-127:14 *with* 101:17-103:20.

Moreover, the discipline of Mr. Reyes and Mr. Garcia "after discovering that [they] had violated the [trench] protection rule demonstrates that [Petitioner] enforced its safety rules." *Aquatek*, 21 O.S.H. Cas. (BNA) ¶ 1400, 2008 WL 5452425 at *2 (O.S.H.R.C. Feb. 2, 2006) (citing *Stahl*, 19 BNA OSHC at 2183, 2002-04 CCH OSHD at pp. 51,219-20 (consolidated) (enforcement adequate where employees disciplined on the few occasions they were found to have violated safety rules)). Similarly, the numerous pre-inspection disciplinary forms issued by Petitioner to its employees for safety infractions, which were produced in discovery and incorporated in the Secretary's trial exhibits despite the Secretary's misleading cross-examination at trial, support the conclusion

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generally OSHA Establishment Search Results for J.D. Abrams; *compare* Vol. 1, 126:3-127:14 *with* 101:17-103:20. Petitioner had never received a citation from OSHA prior to the Citation at issue here.

[9] Available as of the date of this filing at: https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=j.d.+abrams&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=02&startday=28&startyear=2017&endmonth=02&endday=28&endyear=2022

that Petitioner's degree of monitoring its worksites is adequate to detect unsafe work practices. *See* Vol. 2, C-16; Vol. 3, Item 53 at Exhibit A.

On these facts, there can simply be no basis to conclude that there were any circumstances that should have reasonably placed Petitioner on notice that more intensive monitoring was necessary.

4. The ALJ arbitrarily and capriciously manufactured a requirement that a lower-level safety coordinator needed to testify to prove the effectiveness of Petitioner's violation-detection program instead of Petitioner's Vice President and misapplied other case law to do so.

The ALJ erroneously penalized Petitioner for having its Vice President testify at trial in lieu of a lower-level safety coordinator. Vol. 3, Item 51 at 23. In support of the ALJ's fabricated witness-specific requirements for testimony to support the third prong, the ALJ cited an entirely inapposite case, *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1968, 2003).

The cited portion of *Capeway* provides that "when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party." *Id.* But the applicable history in *Capeway* bears zero resemblance, in the relevant

respect, to the trial at issue here. *See id*. The issue in *Capeway* was that a rebuttal witness sat in the courtroom during trial, but Capeway failed to call that witness to rebut an issue that had specifically arisen at trial and which only that rebuttal witness could rebut. *Id.*

In this case, Petitioner's safety coordinator for the worksite at issue no longer worked for the company at the time of trial and certainly was not sitting in the courtroom during trial. Moreover, unlike the facts in *Capeway*, where the only appropriate rebuttal witness was literally sitting in the courtroom, there was nothing for a separate safety coordinator to rebut here. Mr. Steven Zbranek, the Vice President of Operations (a position higher in the hierarchy than the safety coordinator and with extensive knowledge of safety company-wide) testified instead and fully answered all questions asked of him. None of the Secretary's witnesses raised any point Mr. Zbranek failed (or was not qualified) to rebut. Vol. 1, 119:2-158:8. Significantly, the ALJ himself even engaged in extensive questioning of the witness on this point, as described above.

Because Mr. Zbranek testified fully regarding the issue of safety coordination, safety audits, and safety at the Company generally, including to the satisfaction of the ALJ himself, the ALJ's reliance on

Capeway is misplaced and his Decision, to the extent it relies on *Capeway*, should be reversed given *Capeway* is inapposite.

Moreover, there is no legal requirement that a safety coordinator, specifically, must testify to prove the third prong of the employee misconduct defense. To be sure, even if the safety coordinator was available, his testimony would have been entirely duplicative of that given by Mr. Zbranek and, thus, in violation of the Rules of Evidence. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence."). The safety coordinator would not have had any unique knowledge that Mr. Zbranek did not also have (or testify regarding).

Notably, this is likely the same reason the Secretary did not call both assigned CSHOs to testify at trial; but, of course, the ALJ did not hold this choice against the Secretary, even though the Secretary opted to call the less experienced CSHO. Again, the ALJ arbitrarily and capriciously manufactured invisible legal standards reviewing the evidence after the fact to conclude that Petitioner did not sufficiently

prove the third prong. This was in error and, significantly, in violation of the APA.

In sum, the ALJ's decision that Petitioner failed to establish this third prong of the employee misconduct defense is entirely in error because the ALJ (1) manufactured heightened legal requirements regarding ostensibly required testimony or documentation; (2) relied on inapposite case law; and (3) ignored certain evidence and testimony in favor of the Secretary. This Court should reverse the ALJ's decision.

D. Substantial evidence proves that Petitioner had effective and consistent discipline for safety rule violations and the ALJ's decision to the contrary was arbitrary and capricious.

The ALJ erred by concluding that Petitioner's "proof that it had effective and consistent discipline for safety rule violations [wa]s also insufficient," because substantial evidence incorporated into one of the Secretary's own trial exhibits memorializes the disciplinary files the ALJ says were missing in his Decision.

1. The Secretary concealed disciplinary files produced by Petitioner despite them being incorporated into the Secretary's trial evidence and misled a lay witness (and the ALJ), over Petitioner's sustained objection, to believe Petitioner had not produced any pre-inspection disciplinary records.

In his Decision, the ALJ erroneously stated that only two examples of employee discipline – the discipline doled out to Mr. Garcia and Mr. Reyes related to the December 3, 2019, inspection – were provided. Vol. 3, Item 51 at 23-24. This is not true, however, and Petitioner's counsel consistently objected at trial to the Secretary's misleading questioning along these lines (upon which the ALJ appears to have mistakenly relied). Vol. 1, 144:23-145:20; 147:9-19. Importantly, Petitioner's objection was sustained by the ALJ.

Indeed, Petitioner produced an abundance of disciplinary documents during discovery—including pre-inspection disciplinary records—in responses to the Secretary's discovery requests. The pre- and post-inspection disciplinary records at issue were produced in response to the Secretary's Request for Production No. 12. In turn, the Secretary included Petitioner's written responses in the evidentiary record in this matter. *See* Vol. 3, Item 53 at Exhibit A. Specifically, the Secretary's

Exhibit 16 comprised "JD Discovery Responses." In relevant part, these discovery responses state:

> **Request for Production No. 12:**
>
> A copy of all documents reflecting each and every instance in which an employee was reprimanded or disciplined in any way, either orally or in writing, for violating the work rules, procedures and/or policies produced in response to Request for Production No. 9.
>
> **RESPONSE:** Abrams objects to this request because it is compound, seeking a wide variety of information in one single request. Abrams further objects to this interrogatory to the extent it seeks to invade current Abrams employees' privacy by requesting personal identifiable information for current Abrams employees without limitation to the relevant subject matter or time period.
>
> Abrams is producing records of employee warning reports.

See Vol. 2, C-16. Nonetheless, the Secretary's trial Exhibit 16—Respondent's Discovery Responses—failed to include all responsive documents referenced in the written discovery responses, including the referenced pre-inspection disciplinary records. *Id.*

At trial, the Secretary doubled down on his misleading attempt to conceal the exculpatory evidence, cross-examining Mr. Zbranek—a lay witness—to believe that Petitioner did not produce the pre-inspection disciplinary files. Petitioner's counsel repeatedly objected to the misleading line of questioning at trial, as follows:

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> 14 Q. [BY THE SECRETARY] Sure. We're on C-16, page 8, at the top.

It's Request No. 12.
A. [BY STEVEN ZBRANEK] Hold on. I was on page 12. Okay.
Q. This is a request for any discipline records regarding your safety policies, and the only things you produced were the two that we have following this incident.
A. And that was the only two for the employees involved.
MS. FUQUA [PETITIONER'S COUNSEL]: Can I just object to this line of questioning. It's misrepresenting because it's not leading in the full context of that request, but

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referred to another request, Request Production No. 9, that says it's talking about the citations at issue.
JUDGE HELMS: Well, you put this exhibit in evidence, correct? Both -- both sides have stipulated it?
MS. FUQUA: Yes. Yes, Your Honor.
JUDGE HELMS: All right. So I -- I can -- I can review the --
MR. BERNSTEIN [SECRETARY'S COUNSEL]: Sure.
JUDGE HELMS: -- the document, what it says. You, Mr. Bernstein, you're asking for responses related to request for production No. 12. It's been references to production No. 9. which relates to a copy of work rules, procedures and policies regarding the citations.
MR. BERNSTEIN: Right.
JUDGE HELMS: Okay. So I understand your objection. I'm going to overrule it. I've got the document. Thank you.

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12 Q. [SECRETARY'S COUNSEL] And then Request No. 12 says, "a copy of all
13 documents reflecting each and every instance in which
14 an employee was reprimanded or disciplined in any way
15 for violating the work rules, procedures or policies
16 produced in response to No. 9," which is the safety
17 manual. And you produced a grand total of zero
18 instances of J.D. enforcing anything, even trenching,
19 prior to the date of this inspection, correct?
20 A.[STEVEN ZBRANEK] It was my interpretation that was for the
21 employees involved. So we have -- we have numerous
22 instances where -- where other reports have been
23 issued for other violations or trenching, whatever,
24 but for violations of the safety policy. It was my
25 mistake if -- if that was meant to be employees for

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1 the whole duration of the company's existence.
2 That's not how I read it at the time.
3 Q. Request No. 11 on C-16, page 7, at the
4 bottom asks for all documents reflecting the means by
5 which Petitioner monitored compliance with the work
6 rules. And again, you produced the safety manual and
7 nothing more. Did you misunderstand that request
8 also?
9 MS. FUQUA: I'll object that it misrepresents
10 what Petitioner produced as stated on page 8 of the
11 same exhibit.
12 JUDGE HELMS: One moment.
13 BY MR. BERNSTEIN:
14 Q. What does it say at the top? You –
15 JUDGE HELMS: One moment. I'll ask the witness
16 to go ahead and review the request for production No.
17 11 and the response. Do you have time to review
18 that?
19 I'm going to sustain your objection.

Vol. 1, 144:14-147:19.

Without a full copy of the pre-inspection disciplinary records explicitly referenced in the Secretary's Exhibit 16, and ignoring the Petitioner's objection regarding the misstatement of Petitioner's discovery responses (though the ALJ sustained it), the ALJ concluded no such records were produced. Vol. 3, Item 51 at 23-25. To remedy the Secretary's incomplete Exhibit 16 and provide a complete record pursuant to its sustained objection, Petitioner attached the entirety of the employee warning reports—pre- and post-inspection—to Petitioner's Petition for Discretionary Review. Vol. 3, Item 53 at Exhibit A.

In sum, the Secretary's counsel inappropriately led a layperson witness through a series of confusing discovery-related questions toward a conclusion that the Secretary's counsel should have known was untrue: Petitioner did produce an array of disciplinary files, both pre- and post-inspection, demonstrative of its commitment to discipline employees who violate safety rules. Vol. 3, Item 53 at Exhibit A. The Secretary relied on the witness's lack of legal expertise—he is not an attorney—to convince the witness to admit he did not "produce" such files in response to a "request for production," which are words and phrases the lay witness

has no reason to understand. But this witness's mistake is belied by the evidence introduce at trial by the Secretary—namely, a file full of disciplinary actions, which the Secretary should have been aware were produced and incorporated into its trial evidence, which directly referenced the documents in question (and which documents were attached for the Commission's full consideration on Petitioner's Petition for Discretionary Review).

2. The ALJ erroneously ignored testimony from the CSHO and Mr. Zbranek regarding pre- and post-inspection employee discipline, which testimony is sufficient to prove the fourth prong of the defense.

A review of the complete disciplinary file set referenced in Petitioner's discovery responses—and, therefore, the Secretary's trial exhibits—demonstrates that the ALJ's conclusion regarding this prong is both arbitrary and capricious and contrary to substantial evidence in the record; JD Abrams did, in fact, produce evidence of a variety of other employee discipline files, including pre-inspection discipline files.

Even if the produced records are not considered, though, the CSHO acknowledged the pre- and post-disciplinary records produced by Petitioner, testifying, "I have seen the disciplinary records that were provided to us." Vol. 1, 117:1-7. The CSHO's admission is bolstered by

Mr. Zbranek's testimony that there were numerous instances of other disciplinary warnings issued to employees who have engaged in trenching violations or other violations of Petitioner's extensive safety policies. Vol. 1, 146:12-147:2.

In sum, even absent the erroneously excluded pre-inspection disciplinary records, the trial record contains substantial evidence that Petitioner maintained a safety program that involved disciplining its employees, including before the inspection at issue.

The ALJ's Decision failed to acknowledge the records, the procedural error, and the testimony resulting in an erroneous analysis of the Petitioner's fulfillment of the fourth prong of the employee misconduct defense.

3. The ALJ erroneously misinterpreted prior Commission decisions regarding whether and when post-inspection employee discipline is sufficient to prove the fourth prong of the defense.

Regarding the fourth prong of the employee misconduct defense, the ALJ also erroneously concluded that the two examples of "inspection-related discipline alone does not demonstrate Petitioner effectively enforced its work rules prior to OSHA's inspection." Decision at 24. The ALJ based this conclusion on prior decisions from the Commission

holding, generally, that "post-inspection discipline alone is not necessarily determinative of the adequacy of an employer's enforcement efforts." *Id.* (citing *AEDC*, 23 BNA OSHC at 2097; *Precast Serv., Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) aff'd, 106 F.3d 401 (6th Cir. 1997) (unpublished); *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164-65 n.3 (No. 90-1307, 1993), aff'd in unpublished opinion, 19 F.3d 643 (3d Cir. 1994)).

But the fact that "post-inspection discipline alone is *not necessarily* determinative of the adequacy of an employer's enforcement efforts" (emphasis added) means that it *can be* determinative. The ALJ's holding implies that only in situations where an employer has been required to discipline employees on prior occasions can an employer successfully claim the defense of employee misconduct.

This conclusion has no bearing in logic or the law. The ultimate impact of the ALJ's Decision in this respect means that to be eligible to assert the employee misconduct defense, an employer must have necessarily had previous non-compliance. A stellar safety program would therefore disqualify an employer—such as Petitioner—from asserting the defense. This cannot be true. (In any event, Petitioner also produced a

variety of pre-inspection disciplinary files and such files were explicitly referenced in the discovery responses introduced by the Secretary as trial evidence, as described above.)

E. The ALJ erroneously concluded that both Citation items are properly classified as serious and that the proposed penalties are appropriate.

In upholding the Secretary's classification of serious and penalty assessments of $7,711 for Item 1 and $5,783 for Item 2, the ALJ glaringly omitted any analysis of the CSHO's testimony essentially admitting both the classification and the penalty were in error. *See* Vol 3, Item 51 at 25-27.

The evidence adduced at trial demonstrates that there was little possibility, let alone substantial probability, that death or serious physical harm could have resulted from the absence of trench protection, as the contents of the trench walls were largely solid. Vol. 1, 44:1-50:19. There was a solid foot of asphalt at the top of one side of the trench, six inches of concrete at the top of the other side, and solid rock at the bottom of the trench. *Id.* Additionally, Mr. Reyes explained that his concern was actually that the use of a trench box would have caused more probability of death or serious physical harm because the box could have crushed the

water pipe in the trench and the pressure would have been injurious. Vol. 1, 42:4-43:3. Mr. Reyes experienced a similar issue just the prior day, which is the reason he chose to violate the established work rules – of which he testified he was well aware – instead of complying with them. *Id.*

With regards to the monetary penalty, the CSHO's description of the Petitioner's history is erroneous per public record, belied by the utter absence of any prior citation on Petitioner's record, but the ALJ failed to consider this fact at all in his Decision. Vol. 3, Item 51 at 26-27. Although Complainant would not stipulate to this error at trial, the fact remains that OSHA's own website reveals no prior history for Petitioner and this comports with Mr. Zbranek's testimony on this matter, which the CSHO agreed was noteworthy for such a large employer. *See generally* OSHA Establishment Search Results for J.D. Abrams;[10] *compare* Vol. 1, 126:3-127:14 *with* 101:17-103:20; *see also* Vol. 1, 102:5-12 (CSHO Ray

[10] Available as of the date of this filing at: https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=j.d.+abrams&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=02&startday=28&startyear=2017&endmonth=02&endday=28&endyear=2022

testifying: "If a -- if a company has zero violations, especially if they're a large employer, that would be a very good thing.").

Similarly, the evidence adduced at trial demonstrated that there was little possibility, let alone substantial probability, that death or serious physical harm could have resulted from the minimal time the employees spent in the trench or on the ladder extending a few inches less than three feet above ground level. Vol. 1, 86:15-21; 94:9-95:22.

Finally, the CSHO's only basis for not adjusting the penalty based on good faith is because:

> 16 A. They had an onsite supervisor who was aware
> 17 of everything that was happening and it wasn't a
> 18 one-off. It was obvious that he was aware of what
> 19 was happening and he instructed the employee to be in
> 20 the trench. They had programs that were not
> 21 implemented even though they were written very well,
> 22 and it just -- it did not apply.

Vol. 1, 90:12-22. But this belies the evidence and the ALJ's proper determination based on that evidence that Petitioner did, in fact, appropriately communicate its rules to employees. *See* Vol. 1, at 20-21.

In sum, the ALJ wholly failed to consider the majority of Petitioner's arguments and the uncontroverted evidence when he

considered whether a reduction of the classification or the penalty was warranted. His Decision should be reversed.

VI.
CONCLUSION

For the reasons discussed herein, Petitioner requests that this Court grant its Petition for Review, reverse the ALJ's Decision and Order, and vacate the Citation.

Dated: March 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 15, 2023, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

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