UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
T & S UTILITIES, INC.
Respondent.

OSHRC DOCKET
NO. 93-1015

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 7, 1994. The decision of the Judge will become a final order of the Commission on May 9, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before April 27, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: April 7, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1015

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William H. Berger
Deputy Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 339
1371 Peachtree Street, N.E.
Atlanta, GA 30309

Mr. Stephen White
T & S Utilities, Inc.
2159 Andrea Lane
Fort Myers, FL 33912

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

00109715813:04

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-011
FTS (404) 347-0113

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-1015
T & S UTILITIES, INC.,	:	
Respondent.	:	

APPEARANCES:

Stephen Alan Clark, Esquire
Office of the Solicitor
U. S. Department of Labor
Fort Lauderdale, Florida
For Complainant

Mr. Stephen White
T & S Utilities, Inc.
Fort Myers, Florida
For Respondent *Pro Se*

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest three citations issued by the Secretary of Labor (Secretary) pursuant to section 9(a) of the Act. The citations resulted from an inspection of T & S Utilities, Inc.'s (T & S) worksite at 2310 Edwards Drive, Fort Myers, Florida.

There is no dispute that T & S was a subcontractor responsible for installing new lines in a sewage pump station for the City of Fort Myers. The inspection was conducted as the result of notification that a fatality occurred at the worksite.

Alleged Violation of § 5(a)(1)

Section 5(a)(1) requires that each employer:

> . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

It is alleged in the citation that employees were exposed to the hazard of atmospheric contamination by toxic or flammable vapors or oxygen deficiency while working in manholes.

Stephen White, owner of T & S, testified employees worked in manholes at the site removing mud. The two manholes were approximately 6 feet in diameter at the bottom and 22 inches at the entry on top. They were connected by a pipe at a depth of 13¼ feet (Exh. C-3; Tr. 19-21). He also indicated employees were required to tie into existing pipe at the sewage pump station (Tr. 13).

Compliance Officer Nancy Hodenius conducted the inspection that gave rise to issuance of the citations. She testified that she observed two employees removing mud from a manhole with a five-gallon bucket. One employee was filling the container on the inside, and the other was lifting it out.

Ms. Hodenius determined that the manhole was a confined space that could expose employees to the hazard of oxygen deficiency, combustible vapors, or toxic chemicals. Employees informed her that they thought testing had been done, but there was no indication testing had actually been performed. She believed T & S should have a written program with procedures to be followed when potential hazards exist in confined spaces. Such a program should include a competent person to evaluate conditions and direct employees in the safe performance of their work (Tr. 33-34).

The question arises as to whether § 5(a)(1), the general duty clause, applies to the facts of this case. There is no evidence employees were exposed to atmospheric contamination or oxygen deficiency. Nor is it indicated that working in manholes is in itself a recognized hazard. In support of the alleged violation, Ms. Hodenius testified that after determining the manhole to be a confined space, she "asked the employees if they had had

any training or information given to them about entering into the manholes, what procedures they might be following to look for hazards or any equipment that they might have for personal protective equipment" (Tr. 31).

She recommended as a means of abatement that the employer "should have a written program with procedures to follow so that they would make sure that their employees are trained" (Tr. 34). This would include having a trained person to evaluate potentially hazardous conditions and advise employees as to safety procedures and use of emergency equipment.

The underlying conditions complained of are similar to the conditions alleged to be violative of 29 C.F.R. § 1926.21(b)(6)(i) in item 2 of the citation. The specific standard states that:

> All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required.

The citation alleges that employees working in the manholes "were not given training in potential hazards, precautions to be taken or in the use of protective and emergency equipment required prior to entering the confined space, on or about 2/8/93."

The declared purpose of the Act is to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources. 29 U.S.C. § 651(b). While the Act contemplates specific safety standards, its purposes are also effectuated by the general duty clause because it is obvious the Secretary cannot promulgate specific standards to protect employees from every conceivable hazardous condition.

Section 5(a)(1) was, therefore, intended by Congress to be used when there is no applicable specific standard. A specific standard takes precedence over the general duty clause. "[A] citation for a violation of § 5(a)(1) is invalid and will not lie, where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act." *Brisk Waterproofing Co., Inc.*, 1 BNA OSHC 1263, 1264, 1973 CCH OSHD ¶ 16,345 (No. 1046, 1973).

The Secretary charges T & S with the same allegedly hazardous condition. Such action is duplicative and against the policy of the Act. The alleged violation of § 5(a)(1) is vacated.

Alleged Violation of 29 C.F.R. § 1926.21(b)(6)(i)

Ms. Hodenius testified that during the course of her inspection, she was informed by employees they had received no information or instruction regarding entry into confined spaces. While working in enclosed spaces, they were without knowledge as to what hazards to look for or precautions to take (Tr. 40).

T & S does not directly refute the allegations. White states that he had never heard of the term "confined space." Also, he states that inspectors from the City of Fort Myers who visited the worksite regularly never spoke about their work in the manholes or mentioned any special safety procedures (Tr. 40, 89). He testified that employees are trained not to enter enclosed spaces without another employee being present. They are also instructed not to stand under the bucket which was being lifted out of the manhole in case the rope slipped or broke (Tr. 90).

T & S had not shown that instruction was provided as required by the standard. The evidence establishes the violation as alleged.

Alleged Violation of 29 C.F.R. § 1926.500(b)(6)

Section 1926.500(b)(6) requires as follows:

> Manhole floor openings shall be guarded by standard covers which need not be hinged in place. While the cover is not in place, the manhole opening shall be protected by standard railings.

Ms. Hodenius stated that the basis for the alleged violation was that she observed employees working in an open manhole. The cover was off, and there were no barricades around the manhole (Exhs. C-9, C-10; Tr. 41).

The Commission has held that to establish a violation of a standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

The evidence in this case fails to establish that the cited standard applies. T & S is charged under Subpart M, which pertains to floor and wall openings. The general provision states that it shall apply to "temporary or emergency conditions where there is danger of employees or materials falling through floor, roof or wall openings, or from stairways or runways."

There is no indication that T & S employees were in danger of falling through any floor openings, or that they were of a temporary or emergency nature. The manholes were part of the permanent construction at the worksite. Under the facts presented, the openings for the manholes cannot in anyway be considered floor openings within the context of the standard (Exhs. C-9, C-10). The standard does not apply to the facts in this case.

Alleged Violation of 29 C.F.R. § 1926.1053(b)(1)

The standard which pertains to the requirements for ladders states, in pertinent part, as follows:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access.

The citation alleges that the ladder used for access to the manhole extended only 24½ inches above the upper landing surface. Ms. Hodenius testified she measured the ladder extending from the manhole to be 24 inches (Exh. C-9; Tr. 44).

White did not deny Ms. Hodenius' findings but only stated that when he was present, the ladder was tied off (Tr. 92-93). The standard was violated as alleged.

Alleged Violation of 29 C.F.R. § 1926.1060(a)

Section 1926.1060(a) requires that:

> The employer shall provide a training program for each employee using ladders and stairways, as necessary. The program shall enable each employee to recognize hazards related to ladders and stairways, and shall train each employee in the procedures to be followed to minimize these hazards.

The citation alleges that employees used ladders in an unsafe manner for manhole access, and latches on an extension ladder for pump station access were not secured.

Ms. Hodenius testified she was told by employees using the ladder for access to work in the manhole they had not received training in the use of ladders (Tr. 44-45). White stated employees are trained to tie off ladders everytime a ladder is moved (Tr. 94). He does not deny that the ladder in the manhole was not secured at the top. Also, the evidence shows that an employee fell from an extension ladder that had slipped, resulting in a fatality. In explaining how the accident occurred, White stated that:

> When the ladder started to slip, instead of just hanging onto the ladder--and the ladder would have just fell against the wall--he tried to jump off and grab the ledge above him. He did not grab the ledge, and he fell to the bottom . . . There was nothing wrong with the ladder. The ladder is still in use. Like I say, had he just held onto the ladder, the ladder would have fallen against the inside wall, but it would have still stayed erect and he still would have stayed on it . . . .

It is noted that White did not indicate the employee failed to secure the ladder or that he acted contrary to a training program. T & S does not show there was a training program as required. The evidence establishes the violation as alleged.

Alleged Repeat Violation of 29 C.F.R. § 1926.100(a)

Section 1926.100(a) provides as follows:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The citation alleges that an employee was working inside the manhole placing mud in a five-gallon bucket which was raised overhead by a rope. Another employee at the top of the manhole was working next to and under the boom of a concrete dump truck. Neither employee was wearing head protection.

Ms. Hodenius testified she observed the foregoing conditions and explained the hazards presented by a falling bucket or failure of the overhead boom (Tr. 45-46).

The Secretary shows that a citation was previously issued T & S for violation of this standard on May 6, 1992. The citation was not contested (Exh. C-1; Tr. 10-11). White acknowledges that the employees were not wearing hard hats at the time of the inspection. He explained that the employees involved were obtained through a "personnel pool." T & S had designated this as a "hard hat job," and the employees were provided head protection by the pool and advised wearing hard hats were required (Tr. 83-84).

White stated that following the previous inspection, he was told that in the future he should have documentation showing employees were notified that the wearing of hard hats is required. This became part of the safety program (Exhs. R-1, R-2; Tr. 85-87).

The stated purpose of the Act is "to assure safe and healthful working conditions for working men and women . . . ." Section 5(a)(2) requires that each employer shall comply with occupational safety and health standards promulgated under the Act. The standard at § 1926.100(a) explicitly states that where there is possible danger of head injury, as shown in this case, employees "shall be protected by protective helmets."

Clearly, the efforts of T & S fall short of fulfilling its responsibility by the terms of this standard. The standard was violated as alleged.

Alleged Violation of 29 C.F.R. § 1904.8

This regulation requires the reporting of fatality or multiple hospitalization accidents. It states, in pertinent part, as follows:

> Within 48 hours after the occurrence of an employment accident which is fatal to one or more employees or which results in hospitalization of five or more employees, the employer of any employees so injured or killed shall report the accident either orally or in writing to the nearest office of the Area Director of the Occupational Safety and Health Administration, U. S. Department of Labor.

Ms. Hodenius testified that the fatality in this case occurred on December 29, 1992, and that her office was not notified until the first week of February 1993 (Tr. 23).

In its notice of contest, T & S states that 48 hours' notice is required only when there have been five or more fatalities or hospitalizations. White testified that he notified his insurance company and the appropriate state authorities who told him they would contact others who required notice (Tr. 19).

The standard specifically states what the employer shall report and when. There is no dispute that the requirements of the standard have not been met. The standard was violated as alleged.

Penalty Determination

Section 17(j) of the Act authorized the Commission to assess appropriate penalties after giving "due consideration" to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations. Under section 17(a), a civil penalty may be assessed of not more than $10,000.

Upon consideration of the foregoing factors, appropriate penalties have been determined for the violations in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rules of Civil Procedure 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED that the citations be disposed of as follows:

Citation for Serious Violations	Standard	Disposition	Penalty
	§ 5(a)(1)	Vacated	- 0 -
	§ 1926.21(b)(6)(i)	Affirmed	$1,000
	§ 1926.500(b)(6)	Vacated	- 0 -
	§ 1926.1053(b)(1)	Affirmed	$ 400
	§ 1926.1060(a)	Affirmed	$ 800

Citation for Repeat Violation	Standard	Disposition	Penalty
	§ 1926.100(a)	Affirmed	$2,800

Citation for "Other" Than Serious Violation			
	§ 1904.8	Affirmed	$1,000

/s/ Paul L. Brady
PAUL L. BRADY
Judge

Date: March 31, 1994