



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
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WASHINGTON, DC 20006-1246

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SECRETARY OF LABOR  
Complainant,  
v.  
WESTERN PLAINS CONSTRUCTION  
Respondent.

OSHRC DOCKET  
NO. 91-2258

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 February 22, 1993. The decision of the Judge will become a final order of the Commission on March 24, 1993 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 March 15, 1993 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  
1825 K St. N.W., Room 401  
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: February 22, 1993

DOCKET NO. 91-2258

NOTICE IS GIVEN TO THE FOLLOWING:

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Stanley M. Schwartz  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
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UNITED STATES OF AMERICA  
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SECRETARY OF LABOR,

Complainant,

v.

WESTERN PLAINS CONSTRUCTION,

Respondent.

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OSHRC DOCKET NO. 91-2258

APPEARANCES:

Janice L. Holmes, Esquire  
Dallas, Texas  
For the Complainant.

John C. Harrington, Jr., Esquire  
Oklahoma City, Oklahoma  
For the Respondent.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

On June 10, 1991, the Occupational Safety and Health Administration ("OSHA") inspected an excavation site at the intersection of 51st and South Yale in Tulsa, Oklahoma, where employees of Respondent were engaged in installing storm sewer piping; as a result, a citation alleging a serious violation of 29 C.F.R. § 1926.652(a)(1) was issued. Respondent contested the citation, and a hearing was held on January 17, 1992.

### Background

The record shows the job at the site involved digging a trench with a backhoe, removing the 3 to 4-foot-deep abandoned gas piping, and installing 7-foot joints of storm sewer piping. The backhoe picked up each joint of pipe, which was lowered into the trench by a cable and guided into place; the cable was then disconnected and the backhoe used to push the pipe into the previously-laid joint. An OSHA compliance officer ("CO") went to the site pursuant to a referral received the morning of June 10.<sup>1</sup> The CO arrived at the site around midday and observed it from about 50 yards away across Yale for approximately thirty minutes; he saw an employee in a red T-shirt enter the south end of the trench, and another in blue coveralls bend over and hand some equipment to the employee in the trench. The CO took C-1 and C-2, photos of these events.

It took the CO ten to fifteen minutes to drive across Yale to the site because traffic was heavy and Yale had been reduced from four to two lanes. The CO met with the job superintendent and then took photos of the trench and measured it with a 25-foot steel tape measure. The trench was about 25 feet long and 12 feet across, and the sides were vertical and unprotected, except for the north end which was inclined due to backfilling in that area; the north end was 5 to 7 feet deep, and the south end, the basis of the citation, was 9 feet 6 inches deep. C-3 and C-4 depict the south end, and C-3 shows a ladder in that area. C-5 depicts the north end of the trench, and shows employees standing on the incline.

The CO concluded the soil at the site was type B and not type A because it had been previously disturbed and was subject to vibrations from the nearby gas station and traffic on Yale and from the operation of the backhoe. The CO took a soil sample for analysis from the west side of the trench near the south end; he placed the sample in a plastic bag, sealed the bag at the site, and mailed it to OSHA's lab in Salt Lake City. C-7, the analysis results, also classifies the soil as type B.

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<sup>1</sup>The referral was made by the Wage and Hour Division of the Department of Labor, which had an office near the excavation, after an employee of that agency visited the site the morning of June 10. Respondent contends the inspection itself was improper. However, the record establishes the citation was based on the CO's inspection of the site and met all statutory and regulatory requirements.

Decision

1926.652(a)(1) provides as follows:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Table B-1 in Appendix B of the standard sets forth the following maximum allowable slopes for excavations less than 20 feet deep:

Stable Rock	Vertical (90 degrees)
Type A	3/4:1 (53 degrees)
Type B	1:1 (45 degrees)
Type C	1 1/2:1 (34 degrees)

Appendix B also provides for a maximum allowable slope of 1/2:1 (63 degrees) for short-term exposure, which applies to excavations in type A soils that are 12 feet or less in depth and are not open for more than 24 hours. *See* Appendix B Definitions and Table B-1. There are no short-term exposure provisions for excavations in type B and C soils.

Although Respondent raises a number of issues regarding the propriety of the analysis performed on the soil at the site, there is no need to reach those issues because the record clearly shows that other than the north end, the trench walls were vertical and did not conform to the standard. Moreover, Respondent itself concedes the trench violated the standard. Walter Weaver, the company vice president and project manager for Oklahoma operations, testified he went to the site on the morning of June 10 after the job superintendent advised him a Wage and Hour representative was there checking the age of an employee. Believing the site would be inspected, Weaver instructed the superintendent to slope the walls 1/2:1 based on his conclusion the soil was type A and the trench would be of short duration. He left satisfied the trench would be in compliance; however, when he returned for the inspection he saw his instructions had not been followed and that the west wall was vertical. Weaver testified the superintendent was disciplined by demotion to a backhoe operator, and indicated he would probably not be employed by the company in the future. (Tr. 58; 63-66; 81).

Respondent's primary contention is that the violation was the result of unpreventable employee misconduct. To establish this affirmative defense, Respondent must show it both established and adequately communicated to employees work rules designed to prevent the violation. It must also show it made efforts to detect violations and effectively enforced its rules when violations were discovered. *See, e.g., Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816, 1992 CCH OSHD ¶ 29,807, pp. 40,585-86 (No. 87-692, 1992); *Baytown Constr. Co.*, 15 BNA OSHC 1705, 1710, 1992 CCH OSHD ¶ 29,741, p. 40,414 (No. 88-2912, 1992); and cases cited therein.

Weaver testified he was familiar with the trenching standard, that he had attended OSHA schools in trenching safety, and that he had conducted training in this regard for company superintendents and foremen. (Tr. 79; 82-83). However, Respondent presented no evidence that it had established work rules designed to prevent trenching violations. Moreover, even assuming *arguendo* that Respondent had such rules, that the superintendent in this case felt free to disobey specific instructions from his superior at a time he believed an OSHA inspection was likely indicates the work rules were not adequately communicated. This conclusion is supported by the Commission precedent set out *supra*, which held that a supervisor's involvement in misconduct is strong evidence of a lax safety program. *Pride Oil Well* at 1815 and p. 40,585; *Baytown Constr.* at 1710 and p. 40,414. Respondent's disciplinary measures after the fact are commendable, as are Weaver's knowledge and training in the trenching regulations. These factors will be considered for penalty purposes. Nevertheless, on the basis of the record and Commission precedent, Respondent has not met its burden of showing unpreventable employee misconduct.

Respondent next contends there was no employee exposure to the unsloped trench. However, Commission precedent is well settled that the Secretary need only show that "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1976 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976). Such proof is met here, and Weaver himself admitted that employees would have been in the trench when placing pipe. (Tr. 69-70). Accordingly, employee exposure to the hazard is established.

Respondent's final contention is that the violation cannot be classified as serious because the possibility of death or serious injury was remote. Commission precedent is well settled that the issue in determining whether a violation is serious is not whether an accident is likely to occur, but rather, if an accident should occur, whether the result would likely be death or serious injury. *Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1061, 1983-84 CCH OSHD ¶ 26,372, p. 33,454 (No. 79-4945, 1982). It is apparent from the evidence that had the walls of this particular trench caved in when employees were in it, the result would likely have been death or serious injury. The violation is therefore properly characterized as serious; however, Respondent's contention does go to the gravity of the condition and will be considered in assessing an appropriate penalty.

The record shows the south end of the trench was 9 feet 6 inches deep, that the walls in that area were vertical, that the soil in the trench was previously disturbed and subject to vibrations, and that there was water in the trench.<sup>2</sup> However, there was no conclusive evidence of how the water got in the trench. Further, the record shows employees were not constantly in the trench and that work in the excavation was completed by the evening of June 11. Finally, there was no evidence of a history of previous violations, and the undersigned has already noted Weaver's knowledge and training and the company's decisive action in regard to the superintendent. On balance, I find that the gravity of the condition was low to moderate, and that, giving due consideration to this factor and to the company's size, history and good faith, a penalty of \$500.00 is appropriate for this citation item.

#### Conclusions of Law

1. Respondent, Western Plains Construction, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.
2. Respondent was in serious violation of 29 C.F.R. § 1926.652(a)(1).

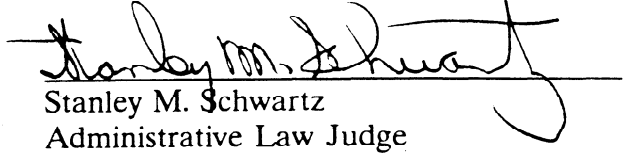
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<sup>2</sup>Although Weaver and the CO disagreed about how far away traffic was, R-1 through R-4, Respondent's own photos, indicate traffic was heavy and near enough to render the site subject to vibrations; moreover, the operation of the backhoe and the nearby gas station contributed to the likelihood of vibrations.

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of serious citation number 1 is AFFIRMED, and a penalty of \$500.00 is assessed.

  
Stanley M. Schwartz  
Administrative Law Judge

Date: **FEB 12 1993**