



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Room 407
Denver, Colorado 80202

Secretary of Labor,

Complainant,

v.

UXB International, Inc.,

Respondent.

OSHRC DOCKET NO. 08-0137

Appearances:

Dolores Wolfe, Esq., Madeline Le, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

John M. Barr, Esq., Lisa J. Chaderdon, Esq., LeClair Ryan, P.C., Richmond, Virginia
For Respondent

Before: Administrative Law Judge James R. Rucker, Jr.

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a UXB International, Inc. ("Respondent") worksite in New Mexico after a fatal accident occurred on July 14, 2007. As a result of that inspection, OSHA issued two citations to Respondent alleging two violations of the Act. Citation 1 Item 1 alleges a serious violation of Section 5(a)(1) of the Act, commonly referred to as the General Duty Clause, for exposing employees to the hazard of a trench collapse and cave-in. A penalty of \$2,800 was proposed for this violation. Citation 2 Item 1 alleges a second serious violation of Section 5(a)(1) for exposing employees to the hazard of being struck by an excavator. A second penalty of \$2,800 was proposed for that violation. Respondent timely contested the

citations and an administrative trial was held December 16-17, 2008, in Denver, Colorado. Both parties have filed post-trial briefs and this case is ready for disposition.

Jurisdiction

The parties agree that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The parties also agree that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (*Complaint and Amended Answer*)

Factual Findings

Respondent is a federal contractor engaged by the U.S. Army to locate, remove, and dispose of military ordnance (bombs, missiles, rockets, etc.) at the White Sands Missile Range in New Mexico. (Tr. 168, 175, 471). In July 2007, Respondent maintained 14 employees at White Sands Missile Range, a total of 40 employees throughout the United States, and approximately 250 employees internationally. (Tr. 147-148). Prior to this incident, Respondent had never been cited for a violation of the OSH Act. (Tr. 277).

The bomb in this instance was called an "SDB hot" (live small diameter bomb) which was dropped on the range on June 13, 2007. (Tr. 188, 199). It measured 4 feet long and 1½ feet wide. (Tr. 462-463). The bomb failed to detonate and buried itself in the ground below several sheets of plywood which were serving as the target. (Tr. 70, 189).

After the bomb test, but on the same day, Respondent sent employees to the impact site to locate and dispose of the bomb. (Tr. 188-189). After digging approximately 15 feet into the ground with a backhoe, Respondent's crew determined that the bomb was deeper than their equipment could dig and notified White Sands military personnel of the same. (Tr. 188-190, 445-446).

Subsequently, the Air Force retained another contractor, Denco Construction, to bring an excavator machine to the location which could dig more deeply into the earth in search of the bomb.¹ (Tr. 449, 473). On July 11, 2007, after nearly a month delay with no activity toward bomb retrieval, Respondent's employees returned to the bomb impact location with Denco Construction employees to continue the search. (Tr. 449-450). Respondent had no direct contractual relationship with Denco during the excavation at this site. (Tr. 278). Denco's job was to dig the excavation. (Tr. 65, 191, 451-452). Respondent's job was to monitor the digging and watch for signs that they were getting close to the bomb. (Tr. 193, 455). Once the bomb was located, it was to be lifted out of the ground by the bucket of the excavator. (Tr. 372, 497). Then Respondent's job was to secure and dispose of it. (Tr. 187-188). Respondent and Denco were joined at the location by observers from Colsa Corporation and Boeing Corporation, both of whom had an ownership interest in the bomb. (Tr. 63, 187, 437). It is noted that this was the first time that civilian contractors, as opposed to active duty military personnel, had been used to conduct this type of bomb recovery mission on White Sands Missile Range. (Tr. 167).

Over the next few days, Respondent sent several employees and supervisors to work at this location while the search for the bomb continued. This included Ralph Almodovar (the deceased), Paul Ochoa, and Joe Prather. (Tr. 453-455). There is significant disagreement between the parties over whether Mr. Almodovar was a UXO Tech II (non-supervisor) or EOD Tech III (supervisor) while working at this site. Mr. Almodovar had been hired by UXB in December of 2006 as a non-supervisory UXO Tech II. (Tr. 126). However, I find that ten days before the accident, Mr. Almodovar was orally promoted to an EOD Tech III although the related paperwork had not been processed by the time of the accident. (Ex. R-12; Tr. 127, 132, 134, 226). Joe Prather was Mr. Almodovar's supervisor and the most senior manager for Respondent at White Sands Missile Range. (Tr. 148, 164). Paul Ochoa was a Recovery Technician, whose

¹ It is unclear why Respondent's contract at this site was with the Army and Denco Construction's contract was with the Air Force. However, that issue is irrelevant for the purposes of this decision.

job consisted primarily of assisting EOD Techs. (Tr. 442-444). Mr. Ochoa and Mr. Prather testified in person at the hearing.

During Mr. Prather's last visit to the worksite on Thursday, July 12, 2007, two days before the accident, he remembered observing people working in the excavation. (Tr. 203). Mr. Prather testified that he does not remember whether any of the individuals working in the excavation were Respondent's employees, but added that there was no reason for any of Respondent's employees to have been in the excavation that day. (Tr. 205). The people he observed working in the trench were located in an area less than 20 feet deep. (Tr. 203). Mr. Prather testified that it is acceptable for employees to enter excavations to a depth of 20 feet as long as the walls are sloped at 1½ horizontal to 1 vertical (34 degrees). (Tr. 204, 206). He instructs his employees to always slope excavation walls using a 1½ to 1 ratio (34 degrees) because he believes soil-typing is too subjective.² (Tr. 484). On that day, the excavation walls were sloped and the spoils piles were approximately 50 feet from the edge. (Tr. 452, 456).

On Friday, July 13, 2007, the night before the fatal accident, Joe Prather met with Scott Pellegrin and Ralph Almodovar to discuss the continued bomb recovery efforts over the coming weekend. (Tr. 229-230). Mr. Almodovar was going to work for UXB at the site on Saturday, and if the bomb was still not recovered, Mr. Pellegrin was going to work at the site on Sunday. (Tr. 371, 375). During this meeting, Mr. Prather specifically instructed them to stay out of the excavation over the weekend and, if they located the bomb, to remove it with the scoop of the bucket. (Tr. 372, 497). He also instructed them to "stay out of the way of the equipment" and keep the spoils pile away from the edge of the excavation. (Tr. 369, 496-497). Mr. Prather was concerned about the skills of the Denco excavator operator based on comments by the operator himself earlier in the week that he had "never operated that model" before and that the controls seemed "a little backwards" to him. (Tr. 496).

² Appendices A & B of Subpart P at 29 C.F.R. §1926 allow for different excavation wall slopes depending on the type and condition of soil in the excavation.

The bomb was ultimately located the following day, July 14, 2007, approximately 40 feet below the ground. (Tr. 84, 435). Mr. Almodovar was the only employee of Respondent at the jobsite at the time. At some point in the process of trying to remove the bomb from its location, Mr. Almodovar entered the excavation and was killed as a result of being struck by the bucket of the excavator. (Tr. 64, 83).

Despite the fact that the excavation conditions and accident were observed by at least three people, none of those eye-witnesses were presented in person at the hearing. The only testimony from a witness who was actually present at the jobsite on July 14, 2007, came through deposition transcript excerpts of Karl Chavous, an employee of Colsa Corporation. (Tr. 63). Since Mr. Chavous was not present at the trial, the court did not have the opportunity to ask him questions or make an assessment as to his credibility.

Mr. Chavous was on-site every day from Wednesday, July 11, 2007 through Saturday, July 14, 2007. (Tr. 67). Mr. Chavous observed Mr. Almodovar enter and perform work in the excavation on July 14, 2007, when the excavation was 35-40 feet deep, while the excavation walls were nearly 90 degrees vertical, with no protection from cave-in or collapse, while spoils piles were located at the excavation edge. (Tr. 75, 83). Mr. Chavous's testimony regarding these conditions and events of July 14, 2007 was not contradicted by live witnesses and is accepted as fact.

Respondent had three sets of written safety and health policies which governed employees working at this location: (1) Respondent's Corporate Safety and Health Plan, (2) Respondent's White Sands Missile Range Safety and Health Plan, and (3) Respondent's Standard Operating Procedure No. 10 ("SOP-10") entitled "Excavation of Ordnance." (Ex. C-13, C-17, C-18). The Corporate Safety and Health Program, in Section 10.2.6, requires compliance with the excavation standards at Subpart P of 29 C.F.R. §1926. (Ex. C-17). The White Sands Missile Range Safety and Health Plan, at Table 3-4, requires Respondent's employees to be trained on Subpart P of 29 C.F.R. §1926. (Ex. C-18). SOP-10 specifically addresses excavation safety requirements, including varying types of protective systems with illustrations similar to those found in Subpart P of 29 C.F.R. §1926. (Ex. C-13).

There was no evidence that Mr. Almodovar, Mr. Prather, or Todd Miller, Respondent's Safety Officer at White Sands, had ever seen the Corporate Safety and Health Program. (Tr. 136, 215). Nor was there any evidence establishing that Mr. Almodovar had ever reviewed the White Sands Safety and Health Plan. (Tr. 142). However, Mr. Almodovar had seen Respondent's SOP-10. Mr. Prather personally trained Mr. Almodovar on SOP-10 and the excavation standards at Subpart P of 29 C.F.R. §1926 approximately six months before this accident. (Ex. C-13; Tr. 482-484).

SOP-10 established the procedures to be followed for this excavation. (Tr. 222-223). SOP-10 contains, *inter alia*, instructions regarding soil classification and excavation protection methods. (Ex. C-13). SOP-10 also required employees to clear the area during excavation operations. (Ex. C-13; Tr. 224). Mr. Prather testified that this rule was intended to keep employees away from excavation equipment. (Tr. 224). One provision of SOP-10 required employees to dig within 12 inches of the ordnance being recovered and then dig the remaining dirt by hand and shovel "if there is no danger of the item exploding." (Ex. C-13; Tr. 486). In this instance, Mr. Prather testified that the bomb was "inert" and could not blow up. (Tr. 221). However, Mr. Prather specifically instructed Mr. Almodovar and Mr. Pellegren the night before this accident not to enter the excavation over the weekend, to keep clear of the excavator, and scoop the bomb out using the bucket if it was located. (Tr. 372, 497).

Two OSHA officials testified at trial. Michael Rivera, an Assistant Area Director for the El Paso Area OSHA Office, testified in person about OSHA's subsequent investigation and conclusions. (Tr. 235-236). However, he did not visit the jobsite and had no personal knowledge about site conditions. (Tr. 238-243). As with Mr. Chavous, the investigating OSHA Compliance Officer, Alfredo Chavez, testified through deposition transcript and did not appear in person. Therefore, the court did not have the opportunity to ask CSHO Chavez questions or make an assessment as to his credibility.³

³ In instances in which deposition testimony of CSHO Chavez and Mr. Chavous conflicted with the testimony of live witnesses, I credit the testimony of the live witnesses. Garcia-Martinez v. City and County of Denver, 392 F.3d 1187, 1191 (10th Cir. 2004).

OSHA did not arrive at the worksite until July 17, 2007 (three days after the accident). (Tr. 98, 238-239). In addition, when OSHA did arrive, it was not permitted to take any photographs of the excavation site due to the fact that the White Sands Missile Range is a restricted military area. (Tr. 240). The photographs in the record were obtained from the White Sands Criminal Investigation Division and its Civilian Safety Office. (Tr. 240). Assistant Area Director Rivera, the only live witness from OSHA, testified that he does not know when the excavation photographs were taken. (Tr. 278). He further testified that he does not know whether the photographs presented at trial accurately represent the conditions of the excavation on July 14, 2007. (Tr. 278). CSHO Chavez, through deposition transcript, speculated that the photographs were taken "either on the day of the accident or soon after." (Tr. 299). Therefore, the record fails to establish when the photos of the excavation were taken or whether the conditions depicted in the photographs accurately reflect the condition of the excavation before or at the time of the accident.

CSHO Chavez and Assistant Area Director Rivera also agreed that there is no evidence that prior to the day of the accident, that the excavation conditions were unsafe. (Tr. 264, 420). It is obvious from the record that the conditions and dimensions of the excavation were constantly changing between July 11th and July 14th. The width of the excavation, depth of the excavation, angles of the walls of the excavation, and presence of employees were all constantly changing. With regard to the workdays prior to July 14, 2007, I find that the Secretary failed to establish that any of Respondent's employees were working in specific portions of the excavation, on specific days, under specific hazardous conditions.⁴

When CSHO Chavez visited the site three days after the accident, he used an inclinometer, a device that measures angles, to determine that the excavation walls were: 99 degrees vertical (undercut) at the northeast wall, 80 degrees at the east wall, 87 degrees at the southeast wall, and 89 degrees on the south

⁴ There was significant conflicting testimony about the possible presence of Doug Domanchuck, another employee of Respondent, at this jobsite on various days prior to the accident. (Tr. 64-65,67, 69, 194, 198, 249, 265, 430-433, 454,516, 517). I find that the record allows only one conclusion with regard to Mr. Domanchuk: that it is entirely unclear which days, or under what conditions, Mr. Domanchuk worked at this location.

wall. (Tr. 107, 292-293). However, the record fails to establish that the conditions of the excavation three days later were the same as when Mr. Almodovar was working in the excavation. Similarly, the record fails to establish the area in which Mr. Almodovar was working or the location from which his body was recovered.⁵ In addition, the accuracy of CSHO Chavez's angular measurements of the excavation walls are in doubt because he did not testify in person at the hearing and the notes recording his measurements were lost. (Tr. 410-411).

Discussion

A citation alleging a violation of Section 5(a)(1) is not appropriate when a specific standard applies to the activity at issue. Mississippi Power & Light Co., 7 BNA OSHC 2036, 1980 CCH OSHD ¶24,146 (No. 76-2044, 1979). In this case, not surprisingly, there is no specific OSHA standard which applies to the hazards associated with removing an un-detonated bomb buried in the ground on a military missile range. (Tr. 260). The activity at issue did not constitute construction activity, and therefore, was not specifically governed by the excavation standards for construction.⁶ Applying many of the same principles found in those regulations, the Secretary issued these citations as Section 5(a)(1) violations.

Section 5(a)(1) of the Act states 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." 29 U.S.C. §654(a)(1). To establish a violation of Section 5(a)(1), the Secretary must demonstrate that: (1) a condition or activity in the workplace presented a hazard to employees, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. Kokosing Constr. Co., 17 BNA OSHC 1869, 1872, 1995-96 CCH OSHD ¶31,207 (No. 92-2596, 1996). In addition, the evidence must show that the employer knew

⁵ The court will not consider the hearsay labels superimposed on the photographic exhibits as they were not admitted into evidence. (Ex. C-6; Tr. 16-20, 76).

⁶ Subpart P of 29 C.F.R. §1926

or with the exercise of reasonable diligence, should have known of the hazardous condition. Otis Elevator Company, 21 BNA OSHC 2204, 2007 CCH OSHD ¶32,920 (No. 03-1344, 2007).

Citation 1 Item 1

Citation 1 Item 1 alleges:

UXB International, Inc., P.O. Box N, White Sands Missile Range, NM 88002; for the period of time up to and including July 14, 2007 UXB International, Inc. did not furnish a place of employment free from recognized hazards. UXB International, Inc. at a site known as Slick City located in impact area at White Sands Missile Range, New Mexico employee entered and performed work inside of an excavation that did not have protection for employee from the risk potential collapse, cave-in, or predictable hazards of trenching operations. Employer did not have a trained Competent Person, a Protective System designed by a Registered Professional Engineer, and spoils pile had been placed at the edges of the excavation. Employee was exposed to the hazard of trench collapse and cave-in.

Was there a condition or activity which presented a hazard to employees?

The Secretary failed to establish that, on any day prior to July 14, 2007, there was a condition or activity which exposed Respondent's employees to a hazard. Crediting the testimony of Karl Chavous with regard to conditions on July 14, 2007, I find that the Secretary did establish that excavation conditions on that day presented a hazard to Respondent's employee, Ralph Almodovar, while he was in the excavation. Mr. Almodovar was working in a 35-40 feet deep excavation with near vertical walls, without protection from cave-in or collapse, while spoils piles were located at the excavation edge.

Did the employer or its industry recognize the hazard?

A hazard is deemed "recognized" when the potential danger of a condition or activity is either actually known by the cited employer or generally known in the employer's industry. Pepperidge Farm, Inc., 17 BNA OSHC 1993, 1995-97 CCH OSHD ¶31,301 (No. 89-265, 1997). Respondent's written policies, as well as testimony from its most senior manager at White Sands, Joe Prather, establish that it specifically recognized the hazards associated with employees entering unsafe excavations. Respondent's Corporate Safety and Health Program, its White Sands Missile Range Safety and Health Plan, and its SOP-10 all refer in detail to, and require compliance with, the excavation safety provisions found in Subpart P of 29 C.F.R. §1926.

Was the hazardous condition likely to result in death or serious physical harm?

There is little room for debate that the collapse of a 35-40 foot deep excavation, with near vertical walls and no protective system, while employees are working in the excavation, would likely result in serious physical harm or death.

Did a feasible and effective means of abating the hazard exist?

The Secretary established that there was a feasible means of abating this hazard. Pursuant to Respondent's own written policies and the testimony of the Assistant Area Director Rivera, the hazard of employees working in unsafe excavations could have been abated by implementing one of the acceptable protective systems or designs found in Subpart P of 29 C.F.R. §1926. I also find that another feasible means of abating the hazard was, as directed in this case, prohibiting employees from entering or working in the excavation.

Did the employer have actual or constructive knowledge of the hazardous condition?

The Secretary failed to establish that Respondent knew, or with the exercise of reasonable diligence should have known, of this hazardous condition. Mr. Prather and Mr. Pellegren provided detailed, undisputed testimony concerning the clear prohibition imposed by Mr. Prather on entering

the excavation for any reason over the course of the July 14-15 weekend. I find that Respondent had no basis to suspect that Mr. Almodovar would, contrary to specific instructions from Mr. Prather the night before the accident and his training on Subpart P of 29 C.F.R. §1926, enter a 35-40 foot excavation with near vertical walls and no protective system on July 14, 2007.

Knowledge of a violative condition can be imputed to the employer through a supervisor like Mr. Almodovar unless it is unreasonable to do so. Kerns Bros. Tree Service, 18 BNA OSHC 2064, 2000 CCH OSHD §32,053 (No. 96-1719, 2000); *see also* Mountain States Tel. v. OSHRC, 623 F.2d 155 (10th Cir. 1980). The participation of a supervisor may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not in and of itself, end the inquiry. Kerns Bros. supra.

I find that Mr. Almodovar's brief tenure as a supervisor, the excavation protection provisions of SOP-10, and Mr. Prather's specific instructions to Mr. Almodovar the night before the accident, make the imputation of knowledge through Mr. Almodovar to Respondent unreasonable in this instance. Mr. Almodovar had been notified of his promotion to supervisor only 10 days before the accident. The related paperwork had not even been processed yet. Second, SOP-10 specifically outlines Respondent's sloping and/or benching requirements for employee-entered excavations up to 20 feet deep and a requirement for a professional engineering report for excavations greater than 20 feet. I also note that there was no reliable evidence that any of Respondent's employees had been observed working in the excavation under unsafe conditions during Mr. Prather's visits to the location earlier in the week. The Secretary did not introduce sufficient evidence to establish that Respondent knew, or should have known, that Mr. Almodovar would ignore his training on excavation safety, as well as Mr. Prather's specific instructions the night before which prohibited any entry into the excavation.

_____It is the Secretary's burden to establish, by a preponderance of the evidence, all elements of a *prima facie* violation of the Act. Since the Secretary failed to establish actual or constructive knowledge of the hazardous condition in this instance, Citation 1 Item 1 must be vacated.

Citation 2 Item 1

Citation 2 Item 1 alleges:

UXB International, Inc., P.O. Box N, White Sands Missile Range, NM 88002; for the period of time up to and including July 14, 2007 UXB International, Inc. did not furnish a place of employment free from recognized hazards. UXB International, Inc. at a site known as Slick City located in a munitions impact area at White Sands Missile Range, New Mexico employee entered into the swing radius of excavation machinery while performing work at this site. Employer did not have a procedure in place to protect personnel from the hazard of entering the swing radius (approximately 30') of machinery being used for excavation project. Employee was exposed to the hazard of getting struck by excavator being used to extract ordnance. Employer was in daily communication with employee regarding the status of ordnance recovery. Feasible abatement may include a written procedure for trenching/excavating operations and employee training on these procedures.

Was there a condition or activity which presented a hazard to employees?

On July 14, 2007, Mr. Almodovar was working inside the swing radius of an excavator bucket at this jobsite. The excavator was operating from inside the excavation. When Mr. Almodovar entered the excavation that day, he crossed into the potential path of the excavator's moving parts. That constituted a condition which presented a hazard to Respondent's employee.

Did the employer or its industry recognize the hazard?

I find that the hazard of working within the swing radius of excavation machinery was recognized by Respondent. In this instance, Respondent's SOP-10, which addressed ordnance excavation, specifically required employees to "clear the area during excavation operations." More importantly, Mr. Prather specifically instructed Mr. Almodovar and Mr. Pellegren, the night before the accident, to stay clear of the excavator because he was concerned about the Denco operator's ability to safely maneuver this particular excavator. The written policy and Mr. Prather's job specific warnings to employees the night before the accident each demonstrate employer recognition of the hazard associated with working in the swing radius of heavy machinery. Pepperidge Farm, Inc., supra.

Was the hazardous condition likely to result in death or serious physical harm?

I find that the hazard associated with working within the swing radius of excavation equipment and being struck by its moving parts was likely to cause death or serious physical harm. Unfortunately, in this instance, it actually resulted in the fatality of Respondent's employee.

Did a feasible and effective means of abating the hazard exist?

The Secretary established that there was a feasible means of abating this hazard. OSHA explained that the employer could have erected a boundary demarcating the swing radius of the excavator which would have prevented employees from entering the hazardous area. I find this method of abatement to be reasonable and effective to abate the hazardous condition.

Did the employer have actual or constructive knowledge of the hazardous condition?

The Secretary failed to establish that Respondent knew, or with the exercise of reasonable diligence should have known, of this hazardous condition. Respondent's SOP-10, on which Mr. Almodovar was trained only a few months before the accident, specifically instructs employees to

clear the area during excavation operations. Even more persuasive was the testimony of Mr. Prather and Mr. Pellegren, concerning the specific instructions conveyed by Mr. Prather the night before the accident. He told both Mr. Almodovar and Mr. Pellegren to specifically stay clear of the excavator machine being operated by Denco because of concerns about the operator's abilities. The record contains no basis for Respondent to suspect, contrary to the provisions of SOP-10 and Mr. Prather's specific instructions the night before, that Mr. Almodovar would enter the excavation, while the excavator was in operation, within the boundary of the swing radius of the excavator bucket.

For the same reasons as discussed under Citation 1 Item 1, *supra*, I find that it would be improper in this instance to impute knowledge through Mr. Almodovar to the Respondent. I also note that there was no evidence that any of Respondent's employees had been observed working in the swing radius of the excavation equipment during either of Mr. Prather's visits to the location earlier in the week. The Secretary did not introduce sufficient evidence to establish that Respondent knew, or should have known, that Mr. Almodovar would ignore the provisions of SOP-10 and Mr. Prather's specific instructions to stay clear of the excavator machinery.

As with Citation 1 Item 1, since the Secretary failed to establish actual or constructive knowledge of the hazardous condition in this instance, Citation 2 Item 1 must be vacated.

Affirmative Defenses

Based upon the Secretary's failure to establish the elements of *prima facie* violations of the Act, it is not necessary to analyze the employer's alleged employee misconduct defense to the citations.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1 Item 1 is VACATED; and
2. Citation 2 Item 1 is VACATED.

Date: May 3, 2009
Denver, Colorado

/s/ _____
James R. Rucker, Jr.
Judge, OSHRC