United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

LANZO CONSTRUCTION CO., INC.

Respondent.

OSHRC Docket No. 97-1821

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

This case arose out of an inspection by compliance officers of the Occupational Safety and Health Administration ("OSHA") of a Lanzo Construction Co., Inc. ("Lanzo") work site on April 3, 1997. As a result of the inspection, OSHA issued three citations to Lanzo alleging six serious, nine willful and two repeated violations. Lanzo contested the citations, and a hearing was held before Administrative Law Judge Ken S. Welsch who vacated one willful violation, affirmed the remaining willful violations as serious and affirmed all other violations. The judge assessed a total penalty of $39,000.

A preliminary issue before the Commission is whether the Secretary's trial attorney violated Model Rule 4.2 of the American Bar Association ("ABA") Model Rules of Professional Conduct and 29 C.F.R. § 2200.104(a) by contacting a Lanzo employee, without the prior consent of Lanzo's attorney, after Lanzo had filed its notice of contest ("NOC"), to discuss the matters at issue in this proceeding. For the reasons discussed below, we find that the Secretary's attorney did not violate the ABA's Model Rule 4.2. Also at issue before the Commission is the classification of two violations which the

Secretary alleges were willful – a violation of 29 C.F.R. § 1910.422(c)(1)(i) for failing to provide a two-way voice communication system for a diver and a violation of 29 C.F.R. § 1926.652(a)(1) for failing to protect an employee in an excavation with an adequate protective system. For the reasons set out below, we vacate the judge's serious classification of the violations, find both violations to be willful, and assess a penalty of $46,200 for Citation 2, Item 1 and Citation 2, Item 3.[1]

I. Background

The Miami-Dade Water and Sewer Department hired Lanzo to install approximately 3,000 to 4,000 feet of force main sewer pipeline in Opa-Locka, Florida. The pipeline consisted of 20-foot long sections of 48-inch diameter reinforced concrete pipe. The installation of the pipe required an underwater diver to insure that the subgrade for the pipe was deep enough and to assist in connecting the sections of the pipe. James Atkinson, Lanzo's diver, who wore a Jack Brown or Desco full-face mask, performed these tasks with surface supplied air from a compressor above ground. He worked with another employee, known as the tender, who was responsible for communicating with the diver during the operation. The diver did not wear a safety harness which had an attachment point for the umbilical (consisting of the air hose, communication line, and life line bundled together), as required by 29 C.F.R. § 1910.430(j)(2)(ii). In addition, the dive team did not use an operational two-way voice communication system as required by 29 C.F.R. § 1910.422(c)(1)(i). Rather, the diver and the tender used a series of pull signals with the air hose to communicate with each other.

On April 3, 1997, Lanzo employees were working at this work site when OSHA began conducting an inspection. The diver was working inside a trench that was 14 feet deep, 12 feet wide, and filled with 10 feet of grayish-brown water. The walls of the trench, which were described as being composed of "Miami oolite" or "sandy soil," were vertical with large "voids" and cracks. Utility pipes ran across the inside of the trench.

[1] Because we have decided the case on the basis of the record and submitted briefs before us, we deny Lanzo's motion for oral argument.

Although Lanzo generally utilized both a trench box and one-inch steel sheeting in areas where employees worked, there was no trench box or any other protective system installed in the trench at the time of the inspection.

Following the inspection, the Secretary issued a number of citations to Lanzo, which Lanzo contested. Following the NOC, representatives of the Secretary contacted Lanzo's diver, Atkinson, on a number of occasions. These contacts were made without the consent or prior knowledge of Lanzo's attorney. On June 1, 1998, the Secretary's attorney, Black, called Atkinson at home, and the two men had a 29-minute conversation in which they discussed issues arising out of the Opa-Locka project. The two men had another phone conversation on June 17, 1998. During that conversation, Atkinson informed Black that he had met with Lanzo's attorney the previous day to discuss the citations.

The compliance officer ("CO") also had contacts with Atkinson after the NOC had been filed. Atkinson initiated the first contact. A Lanzo supervisor had allowed Atkinson to read the Secretary's Interrogatories to the company; afterward Atkinson called OSHA with questions about water quality in the trenches in which he was diving. The CO later visited Atkinson at his home, staying for a "couple hours at least," during which they discussed the citation items. The CO provided a copy of his notes from that meeting to attorney Black. Atkinson again called the CO on June 16, 1998, after meeting with Lanzo's attorney earlier that day, but he only spoke to the CO for a few minutes. It is not clear what was discussed at that time. The CO subsequently visited Atkinson's house a second time to deliver a subpoena.

Prior to the hearing, Lanzo filed a Motion to Amend Answer and to Add the Affirmative Defense of Vindictive Prosecution based on the Secretary's contacts with Atkinson. At the hearing, and again in its Post-Hearing Brief, Lanzo moved for involuntary dismissal based on this alleged misconduct. The judge denied those motions, finding that Lanzo failed to demonstrate any prejudice resulting from the alleged misconduct. In its Cross-Petition for Discretionary Review and in its brief before the Commission, Lanzo continued to argue that sanctions should be imposed based on the

Secretary's alleged violations of ethics rules. We affirm the judge's denial of sanctions. For the reasons stated below, we find that the communications between the Secretary's attorney Black and Lanzo's employee Atkinson did not violate the ABA's Model Rules.[2]

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[2] In renewing its motion for an involuntary dismissal following the hearing, the respondent explicitly referenced Rule 41 of the Federal Rules of Civil Procedure, the counterpart to Commission Rule 41, the latter of which authorizes the entry of a default "[w]hen any party has failed to plead or otherwise proceed as provided by *these rules* or as required by the Commission or Judge" (emphasis added). In its brief to the Commission, Lanzo identifies Commission Rule 41 as the basis for its motion at trial. In directing review of the judge's decision, the Commission's briefing order posed the interrelated questions of (1) whether the Secretary's trial counsel violated Model Rule 4.2 of the ABA Model Rules of Professional Conduct, made applicable by Commission Rule 104(a), and (2) if so, what remedy would be appropriate? The latter issue implicitly put into question the availability and the appropriateness of relief under Commission Rule 41 notwithstanding the fact that Commission Rule 104 contains its own procedures for directly sanctioning an attorney or representative for ethical violations.

Our concurring colleague suggests that neither ABA Model Rule 4.2 nor Commission Rule 104, which incorporates the ABA Model Rules by reference, is in any way relevant to the issue of whether the judge properly refused to sanction the Secretary, the attorney's client and a party in this proceeding. On this point, our colleague is surely mistaken. ABA Model Rule 4.2 and Commission Rule 104 are quite germane to Commission Rule 41, and therefore our discussion is neither "gratuitous" nor "unnecessary." The ABA Rule sets the substantive standard for a client's counsel and Commission Rule 104 provides the arguable nexus to Rule 41. See Notice of Final Rule of OSHRC (Revised) Rules of Procedure, 51 Fed. Reg. 32,002 (Sept. 8, 1986)("The Commission's proposed rules included three rules relating to the subject of sanctions for failure to comply with the rules or failure to comply with orders of the Commission or its Judges. Generally speaking, § 2200.52(e) prescribed sanctions against a party for noncompliance with a discovery order, § 2200.41 prescribed sanctions against a party for noncompliance with *all other orders or rules*, and § 2200.104 prescribed sanctions against a party's representative (as opposed to the party himself." (Emphasis added.)); Notice of Proposed Rulemaking of OSHRC (Revised Rules of Procedure, 51 F.R. 23184 (June 25, 1986)("The new rule [41] has been expanded to cover the failure by a party to obey *any provision* of the Commission's Rules of Procedure." (Emphasis added.)). *Cf.* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D §2369, at 331, 340-46, 341 n.17 (dismissal under Federal Civil Rule 41(b) for failure to comply with these [Civil] rules or any order of court; omissions of attorney as grounds) (1995); *id.*, at 115-133, 131 n.17 (2003 Pocket Part). In view of the manner in which we resolved the first question of whether counsel violated the substantive standard, we find it unnecessary to

II. Discussion

A. Alleged Violation of the ABA's Model Rules of Professional Conduct

We first consider the issue involving Attorney Black's communications with Lanzo's employee. Under Commission Rule 104(a), 29 C.F.R. § 2200.104(a), "All representatives appearing before the Commission and its Judges shall comply with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association." ABA Model Rule 4.2, Communication with Person Represented by Counsel, ("Rule 4.2") provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[3]

The ABA's Comment to the 1990 version of Rule 4.2 stated that, in the case of an organization, the rule prohibited communications by a lawyer for one party concerning the matter of representation with a person:

> [1] having a managerial responsibility on behalf of the organization; [2] whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability; or [3] whose statement may constitute an admission on the part of the organization.

ABA Model Rules of Professional Conduct, Rule 4.2, Comment (1990).

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reach the second question whether involuntary dismissal of the Secretary's citation is an appropriate remedy for an alleged ethical violation by one of her trial counsel.

Our colleague also finds fault in applying the interpretative commentary to the 2002 version of the ABA Model Rule retroactively to events occurring at the time of the 1998 communication. However, we are not foreclosed from doing so in the absence of any showing that it leads to an unjust, impracticable, or infeasible result. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994).

[3] The current version of Rule 4.2, quoted above, incorporates amendments adopted by the ABA's House of Delegates through February 2002.

In February 2002, the ABA issued changes to its Model Rules, including changes to the Rule 4.2 Comment. Comment 7 to the 2002 version of Rule 4.2 states in pertinent part:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization [1] who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or [2] whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Under this change to the Rule 4.2 Comment, opposing counsel is not prohibited from having *ex parte* communications with employees merely because the employees are capable of making statements that could be introduced as admissions of their employer. In fact, the Reporter's Explanation Memo for the 2002 Comment makes clear that the ABA never intended to prohibit *ex parte* communications with all employees capable of making employer admissions. Rather, the ABA intended that the 1990 Comment have a narrower effect in prohibiting communications with such employees only in jurisdictions where the statements of those employees, once introduced into evidence, could not be controverted by the employer.[4]

1. Did Black violate Rule 4.2 by communicating with a represented person?

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[4] The Reporter's Explanation Memo for the 2002 Comment explains:

> The reference in the present Comment to any other person...whose statement may constitute an admission on the part of the organization has been deleted. It was based upon the law of evidence in a few jurisdictions, which provided that statements by certain employees of an organization are admissible against the organization and cannot thereafter be controverted by the organization. Some, however, have read the Comment as prohibiting communication with any person whose testimony would be admissible against the organization as an exception to the hearsay rule. The Comment has also been problematic because lawyers cannot know in advance whether the information they elicit will be binding on the organization. Given this confusion and the small number of jurisdictions that retain the evidence rule upon which the Comment was premised, the reference to admissions has been deleted.

We first address whether Atkinson was a person represented by counsel such that Black's communications with him violated Rule 4.2. While the Commission applies Rule 4.2 in its proceedings, it has not yet addressed when an employee is considered a represented person for purposes of that rule. The ABA's Comments are relevant to this inquiry, but the ABA's Model Rules themselves state that Comments are not intended to be authoritative, but only guides for interpretation.

Courts have devised a wide range of tests to determine whether an employee should be considered a "represented person" within the meaning of Rule 4.2. The rules governing *ex parte* contact range from total bans on such contact to the "control group" test, advocated by the Secretary in the present case; the "scope of employment" test; the "managing-speaking agent" test; the "alter-ego" test; the "case-by-case balancing" test; and various hybrid tests. *Brown v. St. Joseph County*, 148 F.R.D. 246, 253 (N.D. Ind. 1993). In developing such tests, courts generally take into account "the degree to which the employee might be said to represent, and therefore bind, the company, balanced against the need for *ex parte* contacts as creating significant economies not available through traditional discovery methods." *Terra Int'l v. Miss. Chem. Corp.*, 913 F. Supp. 1306, 1318 (N.D. Iowa 1996).

For Review Commission proceedings, Commission Rule 104(a) requires representatives to "comply with the letter *and spirit* of the Model Rules of Professional Conduct of the American Bar Association." (Emphasis added.) Although the regulatory history to Rule 104 does not explain what constitutes the "spirit" of a Model Rule, we believe Rule 104 requires us to give significant weight to the ABA's Comments in answering that question. While the ABA's Comments are only advisory, we find no significant reason to depart from the ABA's interpretation by adopting either a broader or narrower definition of "person represented by counsel." We will therefore apply the definition set forth in the ABA's 2002 Comment in this proceeding.

We note that, although a number of federal and state courts have adopted interpretations of Rule 4.2 under which employees cannot be contacted *ex parte* if they are capable of making statements that could be used as admissions, most of those courts

based their interpretations on the 1990 Comment to Rule 4.2, which the ABA has since clarified. In fact, a number of courts have recently adopted tests that allow for *ex parte* communications even broader than those permitted under the 2002 Comment. *See, e.g.*, *Palmer v. Pioneer Inn Assoc., Ltd.*, 338 F.3d 981, 987-88 (9th Cir. 2003) (approving Nevada's application of a "managing-speaking agent" test to determine if *ex parte* contacts are allowable); *Messing, Rudavsky & Weliky v. President and Fellows of Harvard Coll.*, 764 N.E.2d 825, 833 (Mass. 2002) (interpreting Rule 4.2 to ban contact only with those employees who have the authority to "commit the organization to a position regarding the subject matter of representation"); *Niesig v. Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990) (prohibiting contact only with "employees whose acts or omissions in the matter under inquiry are binding on the corporation…or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel").

Thus, under the 2002 Comment *ex parte* communications between opposing counsel and an organization's employee are prohibited only if the employee is a person "[1] who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or [2] whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Lanzo acknowledges that Atkinson is not a person with managerial responsibility, and there is no evidence that Atkinson directed or regularly consulted with Lanzo's attorneys regarding the Opa-Locka project or had the authority to obligate Lanzo with respect to that matter. The Secretary's contacts with Atkinson therefore would not be prohibited under the first part of the 2002 Comment. The remaining question is whether the Secretary's contacts were prohibited under the second part of the Comment, *i.e.*, whether Atkinson's acts or omissions may be imputed to Lanzo for liability purposes.

Lanzo argues that Atkinson's acts or omissions could have been, and in fact were, imputed to the company. In particular, Lanzo claims that the judge based his finding that it violated section 1926.651(c)(2), which requires that employers provide a safe means of

egress from excavations, on Atkinson's failure to use a ladder that was present at the Opa-Locka site but not placed in the excavation. Atkinson testified that he did not like using the ladder, and instead used a dirt ramp to exit the excavation. The judge found that the ramp, located at one end of the excavation, could not be reached from Atkinson's dive location without climbing over a large pipe, and concluded it did not provide a safe means of egress.

We conclude that the judge did not actually impute Atkinson's act – using the ramp to exit the excavation – to Lanzo in affirming a violation of the standard. Rather, the judge affirmed the violation based on Lanzo's omission – its failure to provide a safe means of egress. Nor do we find that Atkinson's acts or omissions were imputed to Lanzo in affirming violations of any of the other standards for which it was cited. The other citation items likewise allege violations based on Lanzo's omissions, such as its failure to train employees, provide diving safety equipment, and keep records.

Accordingly, under the test set forth in the ABA's 2002 Comment, Lanzo employee Atkinson was not a represented person, and Black's contacts with Atkinson were not prohibited.[5]

2. Did Black violate Rule 4.2 by inquiring into confidential communications between Lanzo's attorney and one of the company's constituents?

There is also a question whether Black violated Rule 4.2 by inquiring into Atkinson's communications with Lanzo's attorney. Comment 7 to the current Rule 4.2 provides, "In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization." Comment 1 to Rule 1.13 explains that the "constituents" of an organization include its "officers, directors, *employees*, shareholders." (Emphasis added.) Comment 2 to that same rule provides that "when one of the constituents of an organizational client communicates with the organization's lawyer in that person's

[5] Given our conclusion, we need not reach the Secretary's argument that the OSH Act authorizes post-notice of contest, *ex parte* contacts with current employees.

organizational capacity, the communication is protected by Rule 1.6 [Confidentiality of Information].” Finally, Comment 1 to Rule 4.4 prohibits “unwarranted intrusions into privileged relationships[.]” Read together, these rules and comments indicate that, even where opposing counsel is not prohibited from interviewing an employee *ex parte*, he must not inquire about the employee’s privileged communications with the organization’s attorney. *See Palmer v. Pioneer Inn Assocs., Ltd.*, 59 P.3d 1237, 1248 (Nev. 2002) (*per curiam*) (explaining in response to certified questions from the Ninth Circuit that while “the facts within [a non-managerial] employee’s knowledge are generally not protected from revelation through *ex parte* interviews by opposing counsel,” “any confidential communications between such an employee and the organization’s counsel would be protected by the attorney-client privilege”), *answers to certified questions considered in* 338 F.3d 981 (9th Cir. 2003).

During their June 17, 1998 telephone conversation, Atkinson informed Black he had met with Lanzo’s attorney the previous day to discuss the citations. At the hearing, Lanzo’s attorney questioned Atkinson regarding his June 17 conversation with Black:

> Q: During that conversation, did you inform Mr. Black that you had, in fact, met with myself?
> A: Yes, I did.
> Q: Did Mr. Black and you, in fact, discuss some of the issues that you and I had reviewed?
> A: A few, yes, a couple.
> Q: So, then, Mr. Black became aware of some of the content of our discussion; is that right?
> A: It was no different than what I told him. But, yes.
> Q: All right, now, you tried to communicate what you had said to me, and I had said to you accurately; but, nonetheless, you communicated it to Mr. Black; isn’t that true?
> A: That’s correct.

Standing alone, this testimony does raise the possibility that Black, the Secretary’s attorney, may have impermissibly crossed into territory protected by the attorney-client privilege when he questioned Atkinson regarding his conversation with Respondent’s

attorney Elder. Yet, application of Model Rule 4.2 to protect the attorney-client privilege in the instant case requires a careful parsing of what Black said and asked and what Atkinson said or relayed in response. To the extent that Atkinson in mentioning to Black his conversation with Elder focused on Atkinson's knowledge of the underlying facts, the Rule is not implicated, as the Supreme Court confirmed in *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).[6] However, if Black was seeking to elicit information beyond Atkinson's knowledge of the relevant facts (for example, if he was delving into what attorney Elder had said or asked of Atkinson), then Model Rule 4.2 may well be implicated. But to raise the possibility of a violation is not to establish the probability of a violation. *See, e.g.*, *Greenwich Collieries v. Director, Office of Workers' Compensation*, 990 F.2d 730, 736 (3d Cir. 1993)("Allowing a claimant, who bears the ultimate burden of persuasion, to prevail when the evidence is in equipoise is tantamount to allowing that claimant to prevail despite having failed to carry his burden by a preponderance of the evidence**.**"), *aff'd*, 512 U.S. 267 (1994). As the party moving for involuntary dismissal of the case as a sanction under Commission Rule 41, Respondent had the burden to establish by a preponderance of the evidence the violation of the

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[6] "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

> '[The] protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.'" (Citation omitted.)

It should be noted that *Upjohn* did not involve a disciplinary proceeding in which an attorney is alleged to have improperly sought to obtain information protected by the attorney-client privilege of a corporate employer. Thus, the decision is not an illuminating example of the proof that must be introduced to establish a violation such as that which is alleged in the instant case.

attorney-client privilege as protected by Model Rule 4.2. Respondent failed to meet its burden. On this record, we simply cannot determine with confidence what the details of the conversation were and therefore cannot determine that a violation occurred. At most, there is Atkinson's affirmative answer to a leading question posed by Elder on cross-examination that in suggesting the answer for the witness assumed the truth of a controverted fact. The question posits that Atkinson in his conversation with the Secretary's attorney "communicated what [Atkinson] had said to [Elder], and [Elder] had said to [Atkinson] accurately." However, nothing in Atkinson's preceding testimony established that Atkinson had in fact related "accurately" to Black the substance of what respondent's counsel had said to Atkinson. Without more, we think Atkinson's answer is not entitled to much weight. *See Suarez v. United States*, 309 F.2d 709, 711 (5th Cir. 1962)(jury could give whatever weight to answers to leading questions it thought was merited in the circumstances).[7] Respondent's counsel made no further effort to elicit the

[7] See also 3 C. MUELLER & L. KIRKPATRICK, FEDERAL EVIDENCE §299, at 355 (2d ed. 1994)("[J]uries are likely to have enough common sense to see at least some difference between the witness who plays along with suggestion and the one who answers from within, to know when they are hearing the witness and when they hear only an echo of the questioner, and to weigh the likely impact of the questions in assessing what the witness says."); 3 J. WIGMORE, EVIDENCE §771, at 162 (Chadbourn rev. ed. 1970)("A question which in part *assumes the truth* of a controverted fact, and inserts the assumption as a part of a question on another fact, may lead a witness to reply without taking care to specify that his answer is based on that assumption, and may thus commit him to an assertion of the assumed fact, though in fact he may not desire or be able to do so. This is obviously a danger to be prevented.").

The concurrence charges that we have overstepped our bounds by taking into account the leading nature of the questions posed by Lanzo's counsel, to which the Secretary's counsel did not object at trial. However, a counsel's failure to object does not in any respect limit the Commission in fulfilling its indisputable statutory responsibility to make findings of fact. *American Wrecking Corp.*, 19 OSHC (BNA) 1703, 1708 n.5, 2001 CCH OSHD ¶ 32,504, p. 50,401 n.5 (No. 96-1330, 2001)(consolidated), *citing Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828 (5th Cir. 1975), and *rev'd in part on other grounds*, 351 F.3d 1254 (D.C. Cir. 2003). It is clearly within our province to give the weight that we think is appropriate to witness Atkinson's answers to counsel's leading questions. Moreover, in view of the respondent's evidentiary burden to prove the existence of the

details of the conversation, by which respondent could have more clearly demonstrated whether Black was attempting improperly to discover privileged matters and whether Atkinson had conveyed privileged matters. Accordingly, we find no basis on this record for sanctioning attorney Black and therefore affirm the judge's denial of the respondent's motion to dismiss the case under Commission Rule 41.[8]

B. Classification of Violations

Also before the Commission are the classification of Lanzo's violations of 29 C.F.R. § 1910.422(c)(1)(i) and 29 C.F.R. § 1926.652(a)(1). The Secretary cited both violations as willful. The judge affirmed a serious violation of section 1910.422(c)(1)(i) based on Lanzo's failure to provide a two-way voice communication system between the diver and the tender. He found that a willful violation was not proven, but did not provide reasons for his conclusion. The judge also affirmed a serious violation of section 1926.652(a)(1) based on Lanzo's failure to protect employees from cave-ins with an adequate protective system. Again, he found that the violation was not proven to be willful, but did not explain his conclusion, other than to note that the employer had "a trench box on the work site that it had been using." We reverse the judge and affirm both violations as willful.

A willful violation is one committed "with intentional, knowing or voluntary

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violative conduct under the circumstances present here, the "gap in the record" on this point is fatal to respondent's claim.

[8] The concurrence also faults our interpretation of ABA Model Rule 4.2 because of its policy implications for the "the permissible contacts, if any, OSHA's compliance officers may have with employees of a represented organization during litigation of a citation or penalty notice." However, the issues supposedly encompassed by this "broader question" (*e.g.*, whether, as the concurrence posits, our interpretation permits the Secretary to "shoot from ambush at trial" or "sneak down a dark alley" to talk to witnesses) are matters perhaps best left to an agency rulemaking. The instant case does not involve alleged misconduct by OSHA compliance officers but rather a narrower issue of whether the Secretary's trial counsel engaged in unethical conduct. In short, this case is simply not a suitable vehicle by which to explore "broader" questions that the parties were never asked to brief.

disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). *See also Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1152 (11th Cir. 1994) (defining willful as "an intentional disregard of, or plain indifference to, OSHA requirements"); *Fluor Daniel v. OSHRC*, 295 F.3d 1232 (11th Cir. 2002). A willful violation is "differentiated by a heightened awareness – of the illegality of the conduct or conditions – and by a state of mind – conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard." *Williams Enterp.*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,589.

We find that the Secretary has established that Lanzo's violation of section 1910.422(c)(1)(i)[9] was willful. The record demonstrates that at the time this violation occurred Lanzo had a heightened awareness of the applicable standard. OSHA had previously cited Lanzo for violating the same standard in 1994 at a work site at which the supervisors at this work site were in charge. OSHA also cited Lanzo for violating this standard in 1995. *E.g.*, *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1685-86, 2001 CCH OSHD ¶ 32,497, p. 50,377 (No. 00-0315, 2001) (heightened awareness of the requirements of the standard based on four previous citations alleging violations of the same standard); *Pentecost Contrac. Corp.*, 17 BNA OSHC 1953, 1955-56, 1995-97 CCH OSHD ¶ 31,289, p. 43,965 (No. 92-3788, 1997) (prior inspections established heightened awareness of the requirements of the cited standards). In addition, according to the diver at the work site (Atkinson), Lanzo has not provided dive team members with a two-way voice communication system since 1994. We find that by intentionally failing to comply with section 1910.422(c)(1)(i) with this heightened awareness of its requirements, Lanzo

[9] 29 C.F.R. § 1910.422(c)(1) provides:

> An operational two-way voice communication system shall be used between: (i) Each surface-supplied air or mixed-gas diver and a dive team member at the dive location or bell (when provided or required).…

committed a willful violation.[10]

The Commission has held that an employer may defend against a showing of willfulness by producing evidence tending to show that it acted in good faith with respect to the requirements of the standard at issue. *E.g.*, *Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1920, 1999 CCH OSHD ¶ 31,933, p. 42,377 (No. 96-0593, 1999). *See also American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1262-63, (D.C. Cir. 2003). Lanzo argues that a finding of willfulness is not warranted here because it has demonstrated "ample evidence of good faith and concern for employee safety" by providing a pull-and-tug system for communications during diving operations. We find no merit in this argument. Lanzo's use of a pull-and-tug system is an intentional substitution by Lanzo for the explicit requirements of the standard. *See Fluor Daniel*, 19 BNA OSHC 1529, 1534-35, 2001 CCH OSHD ¶ 32,443, pp. 50,047-48 (No. 96-1729, 2001) (consolidated), *aff'd*, 295 F.3d 1232 (11th Cir. 2002). Moreover, the pull-and-tug system does not protect the employee during diving operations as well as the two-way voice communication system.[11] As such, the pull-and-tug system is not permitted nor is it evidence of good faith. We also note that the Eleventh Circuit, the jurisdiction in which this case arises, does not recognize "good faith" substitution of judgment as a defense to willfulness.[12] *See Fluor Daniel v. OSHRC*, 295 F.3d 1232 (finding employer's

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[10] We note that the failure to provide a two-way voice communication system is also contrary to Respondent's own safety manual, which requires the use of a two-way voice communication system. *See Morrison-Knudsen Co./Yonkers Contrac. Co.*, 16 BNA OSHC 1105, 1126-27, 1993-95 CCH OSHD ¶ 30,048, pp. 41,284-85 (No. 88-572, 1993) (employer's safety program establishes awareness of duties in the cited standards).

[11] The preamble to the Commercial Diving Operations standard specifically rejected pull signals as an adequate substitute for voice communication. 42 Fed. Reg. 37,650, 37,660 (1977).

[12] Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case even though that circuit's precedent may differ from the Commission's precedent. *See Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1991-93 CCH OSHD ¶ 29,770 (No. 90-998, 1992).

good faith disregard of the regulations to be irrelevant under the intentional disregard or plain indifference test); *Reich v. Trinity Indus.,* 16 F.3d 1149 (finding an employer's good faith belief that its alternative program was superior to OSHA's requirement to be irrelevant to willful characterization). Lanzo's "efforts" here do not affect the willfulness of this violation under Commission or Eleventh Circuit precedent. Therefore, we find Lanzo's violation of 29 C.F.R. § 1910.422(c)(1)(i) to be willful.

We also find that Lanzo's violation of 29 C.F.R. § 1926.652(a)(1)[13] was willful. The record shows that Lanzo had a heightened awareness of the requirements of the standard. Lanzo's safety manual incorporates the cited excavation standard, and Lanzo complied with the standard in other areas of the work site by using steel sheeting and a trench box. Lanzo's general superintendent admitted that the trench box was utilized in part because Lanzo was "just previously" cited for not using one at another work site. Despite this heightened awareness of its duty to protect employees from cave-ins, Lanzo failed to slope, bench or shield the trench walls, or otherwise protect employees from cave-ins at the cited location.

Lanzo argues that it believed in good faith that it could not comply with the standard because its use of protective measures, such as steel sheeting, would create a greater hazard.[14] We find that the record does not show that the use of steel sheeting

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[13] 29 C.F.R. § 1926.652(a)(1) provides:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in according 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 (1.54m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

[14] Lanzo also claims that the walls of the trench could not be sloped. There is little or nothing in the record to support this claim. Nor is there any evidence that Lanzo even attempted to slope the walls of the trench.

would pose a greater hazard than the collapse of the trench itself.[15] Although pounding steel sheeting into the ground might produce vibrations, Lanzo does not suggest that employees would be in the trench while the sheeting is being installed. Nor does it question the fact that once the sheeting is installed, it would protect employees from cave-ins. Based on the paucity of evidence Lanzo introduced to support this defense, we find that it has failed to establish that it had a good faith belief that it could not comply with the standard. Moreover, the testimony of Lanzo's general superintendent that protective measures were not used because he believed it was "safe enough" indicates that Lanzo chose to substitute its own judgment for that of the standard, an action which clearly establishes willfulness. *See Conie Constr. Inc.*, 16 BNA OSHC 1870, 1993-95 CCH OSHD ¶ 30,474 (No. 92-0264, 1994). Therefore, as with the violation dealing with the communication system, we find this violation willful under both Commission and Eleventh Circuit precedent. Accordingly, Lanzo's violation of 29 C.F.R. § 1926.652(a)(1) is affirmed as willful.

C. Penalty

The Secretary grouped the two violations before us with other violations for penalty purposes. She proposed a penalty of $63,000 for the willful violations in Items 1a, 1b, and 1c of Citation 2. The judge reclassified Item 1c (Lanzo's failure to provide a two-way voice communication system) and 1a (Lanzo's failure to train dive team members in cardiopulmonary resuscitation and first aid) as serious, vacated Item 1b, and assessed a $7,000 penalty. The Secretary also proposed a penalty of $63,000 for the willful violations in Items 3a and 3b of Citation 2. The judge also reclassified Item 3b (Lanzo's failure to protect employees from cave-ins with an adequate protective system)

[15] To establish the greater hazard affirmative defense, an employer must prove that the hazards caused by complying with the standard are greater than those encountered by not complying, that alternative means of protecting employees were either used or were not available, and that application for a variance under section 6(d) of the Act would be inappropriate. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159, 1993-95 CCH OSHD ¶ 30,042, p. 41,226 (No. 90-1620, 1993) (consolidated). The judge rejected Lanzo's defense to the underlying violation here, and it is not before us on review.

and Item 3a (Lanzo's failure to locate a safe means of egress from the excavation) as serious and assessed a $7,000. We review the penalty assessments in light of our findings above.

The Commission, pursuant to section 17(j) of the Act, 29 U.S.C. § 666(j), must give due consideration to four factors in assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith, and (4) the employer's prior history of OSHA violations. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). Based on our review of the record, Lanzo is entitled to a reduction in penalty for size, but not for prior history and good faith. It is undisputed that Lanzo has a prior history of OSHA violations. Nor do we find that Lanzo has shown sufficient good faith to merit a reduction in penalty. However, because Lanzo had approximately 80 employees, we give credit for Lanzo's size.[16]

The gravity of the violation is usually the factor of greatest significance in penalty assessment. *See Orion Constr., Inc.,* 18 BNA OSHC 1867, 1999 CCH OSHD ¶ 31,896 (No. 98-2014, 1999). The gravity of Lanzo's failure provide a two-way voice communication system is high based on the conditions at the work site. Not only was Lanzo in violation of numerous diving standards, such as the failure to require the diver to wear a safety harness with an attachment point for an umbilical or lifeline, Lanzo's use of the pull-and-tug system made diving operations especially hazardous since pulling on the air hose could potentially disconnect the diver from his air source. Similarly, we find the gravity of the trenching violation to be high. The presence of murky water in the trench and the evidence that the walls have previously caved in on the diver demonstrate the highly hazardous conditions that the diver was exposed to when performing his duties. Accordingly, we find the gravity of both violations to be high.

[16] Although the judge noted in his decision that Lanzo had approximately 200 employees, there is conflicting testimony at the hearing that Lanzo had approximately 80 employees. In her post-hearing brief to the judge, the Secretary appears to accept that Lanzo had 80 employees.

Based on these factors, we assess a penalty of $23,100 for Citation 2, Items 1a and 1c, and $23,100 for Citation 2, Items 3a and 3b.

Order

Accordingly, the judge's decision finding the violation of 29 C.F.R. § 1910.422(c)(1)(i) and 29 C.F.R. § 1926.652(a)(1) not willful is reversed. Both violations are affirmed as willful. A total penalty of $46,200 is assessed for Citation 2, Item 1 and Citation 2, Item 3.

SO ORDERED.

/s/
James M. Stephens
Commissioner

/s/
Thomasina V. Rogers
Commissioner

Dated: February 27, 2004

RAILTON, Chairman, concurring in the judgment:

With all due respect, I believe my colleagues have misconstrued the issue raised by Respondent. They interpret ABA Model Rule 4.2 as incorporated in Commission Rule 104. Rule 104 has to do with standards of conduct of representatives of parties appearing before the Commission. It addresses actions that the Commission and its judges may take *against* such representatives. Respondent has not, however, asked the Commission to take action against the solicitor because of his alleged misconduct. Instead, Respondent consistently before the judge and on appeal has asked that the Secretary be sanctioned by having the citations dismissed based upon the alleged misconduct.[17] Accordingly, I believe the discussion concerning how ABA Model Rule 4.2 should be interpreted for application under Rule 104 by the majority in Part II A of their opinion is gratuitous and unnecessary. Moreover, I do not agree with the majority's analysis, and I note particularly that they would apply commentary to the 2002 version of the ABA Model rule retroactively to include alleged misconduct that occurred in 1998. I also believe that on the record in this case, the solicitor improperly became privy to an attorney-client protected communication between Respondent's attorney and its employee, Atkinson. Accordingly, I do not join in and do disassociate myself from Part ll A of the majority's opinion.

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[17] At times during the hearing and by motion, Respondent broadened its allegations of misconduct to include instances of contact between an OSHA compliance officer, Heath, and the diver, Atkinson. Respondent has not on appeal repeated the arguments that the misconduct includes contacts that occurred between the diver and the investigating compliance officer after the notice of contest. Accordingly, I deem them waived. However, I note that my colleagues fail to recognize that this case involves unethical conduct in which the compliance officer was used as an agent by the solicitor. I also note the fact that Respondent broadened the allegations supports its contention at trial that the motion for sanctions was laid under the Commission's general rules. That is, Respondent specifically cited the general rule on motions and did not mention the special rule about sanctions against a party's representative.

A. The Solicitor Improperly Listened To A Privileged Attorney-Client Communication.

The Supreme Court has clearly indicated that attorneys for organizations have a duty to seek information relevant to their cases from all levels of the client organization in order to properly prepare and litigate their cases. *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981). That duty imposes no artificial barriers between managers, decision makers and other levels of employment within the organization. *Id*. Communications of this kind are protected by the attorney-client privilege. *Id.* at 391.

The transcript in this case does not tell us the actual words of the conversation between the diver Atkinson and Respondent's attorney. Nevertheless, it does tell us that Atkinson told solicitor Black that he had met with Respondent's attorney the previous day to discuss the citations. It also tells us that during this conversation, Black listened without objection while Atkinson conveyed what he had communicated to Respondent's attorney and, more importantly, what Respondent's attorney had communicated to Atkinson. The latter was unquestionably a trespass into an attorney-client privilege. Contrary to my colleagues, it is of no consequence that we do not know from the record what were the actual words of the conversation between Atkinson and Respondent's attorney. Indeed, the attorney-client privilege protects communications about the facts. *See id.* at 395-396. So, when Atkinson told Black what Respondent's attorney had told Atkinson, it was clearly more than just facts; it was a *communication* concerning the case and that clearly is protected under the attorney-client privilege according to *Upjohn*.

My colleagues avoid the issue raised by the solicitor's impermissible conduct by characterizing the question asked by Respondent's counsel as a leading question. Unlike my colleagues, the solicitor did not object to the question. It was his duty as the trial attorney for the Secretary to object. Accordingly, the testimony is in the record without objection, and my colleagues overstep their bounds by not only raising the objection on the solicitor's behalf but also by basing their determination that nothing untoward occurred. It is decidedly not the duty of the Commission to do the solicitor's work.

My colleagues also suggest in their opinion that Atkinson only related the facts to the solicitor. There is absolutely nothing in the record to support the suggestion. The

fact is the Counsel for both parties failed to inquire further after counsel for respondent elicited the response that Atkinson tried to accurately convey the communication he had with Respondent's attorney to the solicitor. This gap in the record makes our decision extremely difficult.

Having determined that Black intruded into attorney-client privilege in this case, the next thing to be determined is the appropriate remedy. Respondent would have the Commission vacate the citation solely because of the solicitor's impermissible conduct. I am reluctant to agree to the request. First, we are confronted with violations that clearly are serious as that term is defined in Section 17 of the Act and under Commission case law. Second, Respondent is no neophyte concerning its obligations under the trenching and diving standards cited in this case. It had violated them in the past. In these circumstances, I can only conclude that Respondent could and should have done more to demonstrate that the solicitor's transgression was of such magnitude that we should paint the Secretary's case in some negative fashion as a consequence. Certainly, Respondent has done nothing by way of showing that the solicitor's transgression warrants the draconian relief requested by Respondent. Indeed, Respondent's arguments appear to be theoretical and to call for the sanctions solely because of the infringement into the protected communication. Respondent appears to request that the Commission call a technical foul against the Secretary. In sum, there is no evidence here that the Respondent has been prejudiced as a result of the unlawful trespass.

B. The Majority's Interpretation of Rule 4.2 Works an Advantage for the Secretary.

As I indicated above, Respondent never moved for sanctions against the solicitor. Accordingly, I believe the discussion by the majority concerning the meaning of Model Rule 4.2 as applied under Commission Rule 104 is completely unnecessary. Indeed, the issue, if discussed at all, is broader in scope than the question they discuss, *i.e.*, what contacts may the lawyer for OSHA have with members of a represented organization during litigation. As noted in footnote 1 to this opinion, the broader question must include a discussion of the permissible contacts, if any, OSHA's compliance officers may have with employees of a represented organization during litigation of a citation or

penalty notice. As the record in this case makes clear, the solicitor used the compliance officer's contacts with Atkinson to prepare for trial.[18] Indeed, the solicitor's litigation strategy in this case demonstrates just why the decision of the majority is bad policy. Simply put, they give prosecuting solicitors and OSHA compliance officers carte blanche to contact low-level employees during the litigation. As the solicitor did here, the Secretary will take full advantage of decisional law of the Commission and maintain the information developed in confidence until the day of the hearing. Our decisions go further. If the information is not used during the Secretary's case or the employee(s) do not testify, then the Secretary does not have to inform the employer of the information she has obtained through the contacts. *See Massman-Johnson (Luling),* 8 BNA OSHC at 1378, 1980 CCH OSHD at p. 29,810.

In other words, the rule the majority adopts allows the Secretary to shoot from ambush at trial and more, keep potentially exculpatory information from the contesting employer if the information is not used. The majority purports to adopt a reading of Rule 104 while admitting to the fact that there is no institutional memory for the Rule. It seems to me that the Commission's adoption of discovery rules make clear that Commission

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[18] The Secretary in this case would not produce notes made by the compliance officer of his conversation with Atkinson after the litigation was commenced. The Secretary claimed they were privileged under the informers' privilege. Indeed, counsel for the Secretary went so far as to claim that they were protected as work product after Respondent demanded the notes following testimony by Atkinson at the hearing. The judge properly ordered their production over the objection by the solicitor. *See Bethlehem Steel Corp.*, 9 BNA OSHC 1321, 1330, 1981 CCH OSHD ¶ 25,200, p. 31,112 (No. 12817, 1981) (stating that the requirement that a witness's prior statement be produced after that witness has testified on direct examination does not depend on whether the statement includes any material that would be exempt from pretrial discovery under the work product doctrine); *Massman-Johnson (Luling),* 8 BNA OSHC 1369, 1376 1980 CCH OSHD ¶ 24,436, p. 29,808 (No. 76-1484, 1980) (concluding that once the witness has testified, the Secretary shall, upon motion by the respondent, turn over all the witness's prior statements that relate to the subject matter of the testimony); *Donald Braasch Constr., Inc.,* 17 BNA OSHC 2082, 2084, 1997 CCH OSHD ¶ 31,259, p. 43,867 (No. 94-2615, 1997)(opining that an informer's privilege is waived once the identity of the informer is voluntarily disclosed).

proceedings are not to be ambush sites. The whole purpose of the discovery rules are to avoid surprise, to allow the parties to learn the facts against them including admissions against interest, to assist in obtaining settlement of contested cases, and to reduce the amount of time and possibly expenses for hearings. The policy adopted by the majority frustrates all of these goals.[19] It also leaves open the possibility of the solicitor trespassing into attorney-client privilege, which is exactly what happened in this case.

The policy decision they make is unnecessary as well. Indeed, the Secretary has ample authority under section 8 of the Act to investigate her cases prior to issuing her citations. If she believes those investigations are incomplete during the discovery stage of a Commission proceeding and she needs to talk to witnesses of the kind who can make admissions in situations where the contesting organization is represented by counsel, she needn't sneak down a dark alley if counsel for the organization refuses permission for her interviews. I trust that the judges of this Commission are fully capable of protecting her rights as well as those of contesting employers in these situations. Our Rules authorize the issuance of protective orders just as the Federal Rules allow.

/s/_____
W. Scott Railton
Chairman

Dated: February 27, 2004

[19] Our case law dictates that when surprise engendered by the Secretary's failure to reveal relevant information prior to trial because she maintains it in secret under privileges does occur, the Respondent is to be given a continuance if that is required to avoid prejudice**.** *See Massman-Johnson,* 8 BNA OSHC at 1376-1377, 1980 CCH OSHD at p. 29,809. Obviously all parties and the Commission are beneficiaries of policies that avoid continuances for this purpose.

Secretary of Labor,
Complainant,
v.

Lanzo Construction Co., Inc.,
Respondent.

OSHRC Docket No. **97-1821**

APPEARANCES

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Lanzo Construction Co., Florida (Lanzo-Florida), contests citations issued to it by the Secretary on October 1, 1997.[1] On April 3, 1997, Lanzo-Florida was engaged in installing a force main sewer for the Miami-Dade Water and Sewer Department. The excavation in which the pipe was being laid was filled with water, so Lanzo-Florida employed a diver to assist in the installation of the pipe. Occupational Safety and Health Administration (OSHA) compliance officer Michael Heath arrived at the worksite on April 3, 1997, and began an inspection. As a result of Heath's inspection, the Secretary issued three citations to Lanzo-Florida.

In Citation No. 1, the Secretary alleges that Lanzo-Florida committed the following serious violations:

Item 1: § 1910.423(d)(1), failure to record and maintain required dive information;
Item 2: § 1910.425(c)(2), failure to station a diver at the underwater point of entry;
Item 3a: § 1910.421(b), failure to keep a list of required telephone numbers at the dive location;
Item 3b: § 1910.430(a)(2), failure to record each equipment repair, test, calibration, or service;
Item 3c: § 1910.430(b)(2), failure to locate air compressor intakes away from exhaust areas;
Item 3d: § 1910.430(j)(2)(ii), failure to ensure the diver's safety harness had an

[1] Lanzo Construction Co., Florida, is a subsidiary of Lanzo Construction Co., which was the Respondent in a case heard by this court immediately preceding the hearing in this case. The court referred to the employer in its decision for the previous proceeding (No. 97-1512) as "Lanzo." In the instant decision, the court refers to the employer as "Lanzo-Florida."

attachment point for the umbilical.

The Secretary alleges in Citation No. 2 that Lanzo-Florida committed the following willful violations:

Item 1a: § 1910.410(a)(3), failure to train all dive team members in CPR and first aid;
Item 1b: § 1910.422(b)(3), failure to provide means to assist an injured diver from the water;
Item 1c: § 1910.422(c)(1)(i), failure to use a two-way voice communication system;
Item 2a: § 1926.20(b)(1), failure to initiate and maintain a safety program;
Item 2b: § 1926.21(b)(2), failure to provide safety training to employees;
Item 2c: § 1910.420(a), failure to develop and maintain a safe practices manual;
Item 2d: § 1926.421(d), failure to make required assessments in planning dive operation;
Item 3a: § 1926.651(c)(2), failure to provide a safe means of egress from an excavation;
Item 3b: § 1926.652(a)(1), failure to provide an adequate protective system in an excavation.

The Secretary alleges that Lanzo-Florida committed the following repeat violations contained in Citation No. 3:

Item 1: § 1910.410(c)(1), failure to have a designated person-in-charge at the dive location;
Item 2: § 1910.430(b)(4), failure to test the output of air compressor systems for air purity every 6 months.

Lanzo-Florida admits jurisdiction and coverage. The hearing in this matter was held on June 25 and 26, 1998. The parties have filed post-hearing briefs. Lanzo-Florida admits noncompliance of the relevant standards for several of the items, but contends that the Secretary's proposed penalties are excessive. For most of the other items, Lanzo-Florida argues that the Secretary failed to establish that its employees were exposed to any hazards.[2] For the reasons stated below, the Secretary prevails on all but one of the items of the citations, and the items classified as willful are affirmed as serious.

Background

[2] Lanzo-Florida also asserts that the Secretary engaged in procedural misconduct when preparing for the hearing in this case. Lanzo-Florida moved for involuntary dismissal based on this alleged misconduct at the close of the Secretary's case in chief and again at the close of its defense. The motions were denied (Tr. 363-370, 455-456). After the hearing, Lanzo-Florida filed a renewed motion for involuntary dismissal, based on the same alleged misconduct that Lanzo-Florida raised at the hearing. Lanzo-Florida has failed to demonstrate any prejudice to it resulting from the alleged misconduct. The motion for involuntary dismissal is denied.

The Miami-Dade Water and Sewer Department hired Lanzo-Florida to install approximately 3,000 feet of force main sewer pipeline. The pipeline consisted of 20-foot long sections of 48-inch diameter reinforced concrete pipe (Exh. R-4; Tr. 23, 28, 57, 375-377).

On April 3, 1997, Lanzo-Florida had excavated a trench that was approximately 14 feet deep and 12 feet wide, and filled with water approximately 10 feet deep (Tr. 24-27, 55). Visibility in the grayish-brown water was "zero" (Tr. 71-72). Pipe installation on this project required an underwater diver to assist in the pipe connection. For a routine dive, diver James Atkinson would clean debris out of the open (bell) end of the pipe so that when the next pipe was pushed into place it would form a good seal. Atkinson would also place a "diaper" around the joint after the next pipe was pushed into place; concrete would then be poured into the diaper to fasten the joint (Tr. 54-55, 63).

Atkinson and foreman Paul Sadro were at the site the day of the inspection, along with a third employee, who acted as the "tender," or the diving attendant. Atkinson was in the water and the tender was atop the excavation when Heath arrived. Superintendent Glenn Straw was at the project but not in the immediate area of the excavation when Heath arrived (Tr. 131-133, 381).

Heath conducted the OSHA inspection assisted by OSHA trainee Danezza Quintero. Heath subsequently recommended that the Secretary issue the citations and proposed penalties that gave rise to the instant case.

Citation No. 1

> The Secretary has the burden of proving her case by a preponderance of the evidence.
>
> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

In order to establish that a violation is "serious" under § 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show

that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Item 1: Alleged Serious Violation of § 1910.423(d)(1)

The Secretary alleges that Lanzo-Florida committed a serious violation of § 1910.423(d)(1), which provides:

> The following information shall be recorded and maintained for each diving operation:
>
> (i) Names of dive team members including designated person-in-charge;
> (ii) Date, time, and location;
> (iii) Diving modes used;
> (iv) General nature of work performed;
> (v) Approximate underwater and surface conditions (visibility, water temperature and current); and
> (vi) Maximum depth and bottom time for each diver.

Subpart T of § 1910, in which § 1910.423(d)(1) is found, applies to "diving and related support operations conducted in connection with all types of work and employments, including general industry [and] construction." Section 1910.401(a)(2). While Lanzo-Florida argues in its brief that the "standard cited is not applicable to the operation which Lanzo was conducting," it is clear from the argument that Lanzo-Florida is not disputing the applicability of the standard, but whether a hazard existed (Lanzo-Florida's brief, p. 14). Section 1910.401(a)(2) establishes that § 1910.423(d)(1) applies to the commercial diving operation conducted by Lanzo-Florida employee Atkinson.

Neither Atkinson nor anyone else at Lanzo-Florida kept a record of Atkinson's dives (Tr. 61-62, 145-148). In its brief, Lanzo-Florida "admits that the logs were not kept at this particular site" (Lanzo-Florida's brief, p.15). Lanzo-Florida claims that there was no need to keep records of the dives because the dives were routine and in a shallow in-land excavation (Tr. 61-62).

The standard makes no exceptions for routine or shallow dives. The employer is not free to ignore the requirements of a safety standard because it believes that only a minimal risk exists. Lanzo-Florida was aware that no information regarding Atkinson's dives was being recorded. The Secretary has established that Lanzo-Florida was in violation of § 1910.423(d)(1).

Heath testified that a diver could develop an air embolism (a bubble of air that blocks the bloodstream) while diving in only 10 feet of water (Tr. 148): "It only takes a pressure differential of about two feet to create the condition of an air embolism." The failure to record the required information regarding the dives exposes the diver to a hazard "because the physician treating the injured employee would need that information to determine what the nature of injury that did occur, what he was looking at and to start his treatment recommendation based on that" (Tr. 148). The violation is serious.

Penalty Determination

The Secretary proposed a penalty of $4,000 for the violation alleged in this item. Lanzo-Florida contends that the penalty is excessive. The court agrees.

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Lanzo-Florida employed approximately 200 employees (Tr. 156). The Secretary had cited the company for violations during inspections in 1994 and 1995 (Exhs. C-9 and C-10; Tr. 157-158). No evidence of bad faith was adduced at the hearing.

The court determines that the gravity of the violation is moderate. Heath testified that a diver could develop an air embolism in only 10 feet of water, but his scenario for how this was most likely to happen (the diver jumping up suddenly while holding his breath after being startled by a rock falling on him) is somewhat speculative (Tr. 147-148). A penalty of $2,000 is assessed.

Item 2: Alleged Serious Violation of § 1910.425(c)(2)

The Secretary alleges that Lanzo-Florida committed a serious violation of § 1910.425(c)(2), which provides:

> A diver shall be stationed at the underwater point of entry when diving is conducted in enclosed or physically confining spaces.

Atkinson was diving in enclosed and physically confining spaces. He was required to go

20 feet or more into a 48-inch concrete pipe and into the narrow spaces between the pipe and the walls of the excavation. No standby diver was stationed at the underwater point of entry (Tr. 62-63, 149).[3] Lanzo-Florida concedes that it did not have the required standby diver, but argues that "[a]dding an additional diver to a confined area with zero visibility cannot reasonably lead to a safer work area" (Lanzo-Florida's brief, p. 16). Lanzo-Florida is again questioning the wisdom of the standard, which is not a viable defense. The lack of visibility in the water makes the need for a standby diver more urgent, not less.

The Secretary has established a violation of § 1910.425(c)(2). The hazard created by noncompliance with the standard is that if the diver became trapped or entangled, the absence of a standby diver would prevent an immediate rescue (Tr. 153-154). The violation is serious.

Penalty Determination

The gravity of this violation is moderate. Lanzo-Florida had a tender monitoring Atkinson's dive from the top of the excavation. A penalty of $2,000 is assessed.

Items 3a and 3b: Alleged Serious Violations of § § 1910.421(b) and 430(a)(2)

In Item 3a, the Secretary charged Lanzo-Florida with a serious violation of § 1910.241(b), which provides:

> A list shall be kept at the dive location of the telephone or call numbers for the following:
> (1) An operational decompression chamber (if not at the dive location);
> (2) Accessible hospitals;
> (3) Available physicians;
> (4) Available means of transportation; and
> (5) The nearest U.S. Coast Guard Rescue Coordination Center.

In Item 3b, the Secretary charged Lanzo-Florida with a serious violation of § 1910.430(a)(2), which provides:

> Each equipment modification, repair, test, calibration or maintenance service shall be recorded by means of a tagging or logging system, and include the date and nature of work performed, and the name or initials of the person

[3] The description under this item in the citation states that the excavation was 25 feet deep and that 13 feet of water was contained in the excavation. Heath conceded at the hearing that he had mismeasured the depth of the excavation and the depth of the water in it. The excavation was approximately 14 feet deep and contained approximately 10 feet of water (Tr. 150-153). The inaccurate measurements contained in the citation do not affect the determination that Lanzo-Florida was in noncompliance with the cited standard.

performing the work.

It is undisputed that Lanzo-Florida did not have available the required list of telephone numbers at the dive location, nor did it record equipment modifications, repairs, tests, calibrations, or maintenance services (Tr. 163-167). The employer concedes that it was in violation of § 1910.430(a)(2).

Lanzo-Florida believes that the only telephone number required for safety at a dive location is 911. Section 1910.421(b) presumes a hazard exists if its requirements are not met. The company argues that the Secretary failed to establish that its employee was exposed to a significant risk of harm by its failure to have the required telephone numbers available at the dive location. Heath testified, however, that diving injuries require specialized treatment that can be more readily provided by physicians who have received special training at facilities equipped to handle diving injuries. Heath stated that a decompression chamber, which is not available at all hospitals, is the only recognized treatment for an air embolism (Tr. 164).

The Secretary has established that Lanzo-Florida was in serious violation of § § 1910.421(b) and 430(a)(2). Failure to have the required telephone numbers could result in a delay in getting the injured diver to a physician or a facility equipped to treat him. Failure to keep a record of equipment repairs, calibrations, and maintenance could result in a diver using equipment that had not been repaired or maintained (Tr. 167).

Item 3c: Alleged Serious Violation of § 1910.430(b)(2)

Section 1910.430(b)(2) provides:

> Air compressor intakes shall be located away from areas containing exhaust or other contaminants.

Heath stated that the air intake on the compressor was located 2 to 3 feet from the engine that was running the compressor. Engines emit exhaust containing carbon monoxide and hydrogen sulfide (Tr. 178). Atkinson estimated that the intake was 2½ feet from the engine (Tr. 67). Lanzo-Florida contends that the Secretary failed to prove that it was in noncompliance with § 1910.430(b)(2). Lanzo-Florida argues that the Secretary failed to present any physical evidence that showed the distance between the engine exhaust and the air compressor intake. While Heath took no measurements and the Secretary adduced no photographs of the location of the air

compressor intake, the testimony of Heath and Atkinson is uncontradicted. At most the intake was located 3 feet from the exhaust.

Lanzo-Florida also argues that the Secretary failed to establish what constitutes an appropriate distance between the intake and the exhaust. Heath testified that carbon monoxide is heavier than air so that it would drift downward. In diving operations, the air intake is normally located on a stand 6 to 8 feet above the compressor engine. Lanzo-Florida's compressor was "very close on the same level" as the intake (Tr. 183-184). While the standard does not provide a precise distance that intakes should be from the engine's exhaust, it requires that intakes "be located away from areas containing exhaust." Locating an intake on the same level approximately 3 feet from the exhaust fails to comply with the standard.

The Secretary has established a violation of § 1910.430(b)(2). The hazard created by the proximity of the intake to the exhaust was that the diver could be "exposed to a possible high volume of carbon monoxide gas" resulting in unconsciousness or death (Tr. 180). The violation is serious.

Item 3d: Alleged Serious Violation of § 1910.430(j)(2)(ii)

Section 1910.430(j)(2)(ii) provides:

> Except when heavy gear is worn or in SCUBA diving, each diver shall wear a safety harness with:
>
> . . .
>
> (ii) An attachment point for the umbilical to prevent strain on the mask or helmet[.]

Atkinson did not wear a safety harness with an attachment point for the umbilical (Tr. 67). In its brief, Lanzo-Florida states that it "has determined that it was in violation of § 1910.430(j)(2)(ii)" (Lanzo-Florida's brief, p. 20). The tender used a series of pulls on the air hose attached to Atkinson's mask to signal him. Using this system could have resulted in the pulls dislodging Atkinson's mask, causing him to drown (Tr. 193-194). The violation is serious.

Penalty Determination

The gravity of the violations established under Items 3a, 3b, 3c, and 3d is high. By failing to comply with the requirements of the diving standards, Lanzo-Florida exposed Atkinson to the

risks of injuries and drowning. Lanzo-Florida's actions also increased the possibility of delays in getting Atkinson to appropriate medical care. A penalty of $4,000 is assessed.

Citation No. 2

Item 1a: Alleged Willful Violation of § 1910.410(a)(3)

The Secretary alleges that Lanzo-Florida committed a serious violation of § 1910.410(a)(3), which provides:

> All dive team members shall be trained in cardiopulmonary resuscitation and first aid (American Red Cross standard course or equivalent).

The dive team members were Atkinson and the tender. The tender was not trained in CPR (Tr. 195). Lanzo-Florida concedes that it was in violation of § 1910.410(a)(3), but contends that the violation should not be classified as willful.

> It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, *or* with plain indifference to employee safety. . . . A finding of willfulness, however, must be predicated upon a showing that the employer possessed a "heightened awareness," rather than a simple knowledge of conduct or conditions constituting a violation.

Continental Roof Systems, Inc., 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997) (citations omitted).

The Secretary cited Lanzo-Florida for a serious violation of § 1926.1076(a)(3) in 1994 (Exh. C-9, Item 1 of Citation No. 1). Section 1926.1076(a)(3) is identical to § 1926.410(a)(3). The Secretary also cited the employer for violations of the diving standards in 1995. The Secretary points to the previous citation for the same violation and the numerous allegations of violations of other diving standards as evidence of willfulness.

The Secretary has failed to establish that Lanzo-Florida's violation of § 1910.410(a)(3) is willful. After the 1994 citation, Lanzo-Florida established a safety program and developed a safety manual (Exh. R-2). The manual's section entitled "PIPE DIVING OPERATIONS" lists the training requirements for divers, attendants, and pipe diving supervisors in Section VI, Parts A, B, and C. The training requirements for attendants includes first aid and CPR. Lanzo-Florida failed to follow its safety manual and enforce § 1910.410(a)(3). However, this failure does not establish that Lanzo-Florida acted willfully. Lanzo-Florida's development of a safety manual

with rules specifically addressing training in CPR and first aid demonstrates that it neither voluntarily disregarded the requirements of the Act, nor that it was plainly indifferent to its employees' safety.

The record does establish that the violation was serious. The failure to train the tender in CPR increased the possibility of delay in treatment needed by the diver in the event of an emergency. Such a delay could be fatal.

Item 1b: Alleged Willful Violation of § 1910.422(b)(3)

Section 1910.422(b)(3) provides:

> A means shall be provided to assist an injured diver from the water or into a bell.

Lanzo-Florida contends that it had a gurney basket on the worksite that was available to assist an injured diver out of a trench. Superintendent Straw testified that the gurney basket was not in the immediate area of the diving operation because that operation was located in a high-crime area and that, "Nothing can be left unnailed" (Tr. 379).

The Secretary relies on Atkinson's testimony that he did not see the gurney at the dive location to establish the violation of this standard. However, Atkinson could not say whether Lanzo-Florida had the gurney available someplace near the dive location or how long it would take to implement the gurney if it was needed to rescue the diver (Tr. 70-71).

The Secretary has failed to establish a violation of § 1910.422(b)(3). The standard requires that the employer provide a means of assistance to remove the injured diver from the water. It does not require that the means of assistance be located immediately at the dive location. The Secretary did not cross-examine Straw regarding the distance between the location of the gurney and the dive location. No estimate was given as to the amount of time that would be needed to retrieve the gurney and put it to use. It may be that the location of the gurney was too remote to bring the employer into compliance with the standard, but it is the Secretary's burden to establish this. Straw's testimony that the gurney was available for use somewhere on the worksite, though not at the immediate dive location, is unrebutted and uncontradicted. Item 1b is vacated.

Item 1c: Alleged Willful Violation of § 1910.422(c)(1)(i)

Section 1910.422(c)(1)(i) provides:

> An operational two-way voice communication system shall be used between:
> (i) Each surface-supplied air or mixed-gas diver and a dive team member at the dive location or bell (when provided or required)[.]

It is undisputed that Atkinson and the tender were not using a two-way voice communication system during the dive (Tr. 71, 201). Atkinson and the tender had instead agreed upon using a series of tugs to signal Atkinson's intentions. Four tugs on the air hose meant that the tender was to pull Atkinson out (Tr. 112).

Lanzo-Florida admits that it violated § 1910.422(c)(1)(i) but argues that the violation was not willful. The court agrees. The Secretary has not shown that the violation demonstrated voluntary disregard for the requirements of the Act or plain indifference to employee safety.

The violation is serious. Failure to use the two-way voice communication could result in the diver's inability to signal the tender if he became trapped.

Penalty Determination

The gravity of the violations of § 1910.410(a)(3) (Item 1a) and of § 1910.422(c)(1)(i) (Item 1c) is high. Failure to train the tender in CPR and failure to use a two-way voice communication system increased the diver's potential exposure to death or serious physical injury. A total penalty of $7,000 is assessed for Items 1a and 1c.

Item 2a: Alleged Willful Violation of § 1926.20(b)(1)

The Secretary alleges that Lanzo-Florida committed a willful violation of § 1926.20(b)(1), which alleges:

> It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

Lanzo-Florida had a written safety program (Exhs. R-2 and R-6). The record abundantly establishes, however, that the safety program was not enforced at the worksite. The worksite was rife with obvious safety violations. Lanzo-Florida provided no safety training and held no regular safety meetings (Tr. 72-73).

The evidence falls short of establishing a willful violation. Lanzo-Florida did have a

written safety program which Heath testified was adequate on paper (Tr. 210). The violation is affirmed as serious.

Item 2b: Alleged Willful Violation of § 1926.21(b)(2)

Section 1926.21(b)(2) provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Other than distributing copies of the safety manual to employees, Lanzo-Florida failed to provide any instruction to its employees in the recognition and avoidance of unsafe conditions (Tr. 72-73). Lanzo-Florida argues that this standard should not apply to it because foreman Sadro and diver Atkinson "were properly instructed in recognition and avoidance of unsafe conditions by way of their combined 21 years of experience in underground utility installation" (Lanzo-Florida's brief, p. 29).

The cited standard states that the employer "shall instruct each employee," not that the employer shall total the years of experience of its employees. The standard requires active engagement on the part of the employer in training its employees. Trusting to the experience and assumed past training of the employees does not comply with § 1926.21(b)(2).

The fault in Lanzo-Florida's approach is evident. Despite Sadro and Atkinson's years of experience, they violated any number of diving standards. The dive team did not have two-way voice communication, did not use a standby diver, did not record required information, and Atkinson did not wear a safety harness with an attached umbilical. Safety training would have reminded the employees (or, perhaps, apprised them for the first time) of what OSHA requires for diving operations.

Item 2b is affirmed as serious. The Secretary did not establish that Lanzo-Florida acted with voluntary disregard of the Act or plain indifference to employee safety.

Item 2c: Alleged Willful Violation of § 1910.420(a)

The Secretary alleges that Lanzo-Florida committed a willful violation of § 1910.420(a), which provides:

> The employer shall develop and maintain a safe practices manual which shall be made available at the dive location to each dive team member.

Lanzo-Florida had a safe practices manual at the time of the inspection (Exh. R-2). Atkinson testified that he was not aware of a safe practices manual at the site (Tr. 75-76). Sadro testified that he had the safe practices manual on site in his truck at the time of Heath's inspection, and that he showed it to Heath (Tr. 411).

The standard requires the employer to not only develop and maintain a safe practices manual, but to make it available at the dive location to each dive team member. Even if Sadro had a copy of the manual in his truck, Atkinson was unaware of its existence. Lanzo-Florida failed to make the manual available to each dive team member. Item 2c is affirmed.

No showing of willfulness was made. The violation is classified as serious.

Item 2d: Alleged Willful Violation of § 1910.421(d)

Section 1910.421(d) provides:

> Planning of a diving operation shall include an assessment of the safety and health aspects of the following:
>
> (1) Diving mode;
> (2) Surface and underwater conditions and hazards;
> (3) Breathing gas supply (including reserves);
> (4) Thermal protection;
> (5) Diving equipment and systems;
> (6) Dive team assignments and physical fitness of dive team members (including any impairment known to the employer);
> (7) Repetitive dive designation or residual inert gas status of dive team members;
> (8) Decompression and treatment procedures (including altitude corrections); and
> (9) Emergency procedures.

Atkinson explained how he planned for a diving operation (Tr. 76): "Planning was just basically checking the ditch for depth, looking at the sides for cracks, watch the sides to see if it was coming up. That's about it and just telling them, 'I'm going down to clean out the bell and go inside the pipe and check the joint.'" Atkinson testified that he and the tender did not discuss emergency procedures the day of the OSHA inspection, but they had previously agreed that if Atkinson tugged on his air hose four times, it meant that he needed to be pulled out. No

discussions regarding treatment procedures were held (Tr. 77).

The Secretary has established a violation of § 1910.421(d). The Secretary has failed to establish that the violation was willful. Atkinson did assess some of the required factors of the dive operation, and the dives he made were routine and in shallow water. The violation was serious.

Penalty Determination

The violations cited under Items 2a, 2b, 2c, and 2d involve failures of training and planning regarding dive operations. The gravity is mitigated by the experience of Atkinson, the routineness of the dives, and the shallowness of the water. The gravity of the violations is moderate. A total penalty of $7,000 is assessed for Items 2a through 2d.

Item 3a: Alleged Willful Violation of § 1926.651(c)(2)

Section 1926.651(c)(2) provides:

> A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

Lanzo-Florida had a ladder on the site, but it was not in the excavation. Atkinson testified that he did not like to use the ladder because he believed it could not be stabilized in the excavation (Tr. 111). There was a dirt ramp at the end of the excavation, but it could not be reached from the dive location without climbing over a large pipe that crossed the excavation (Exh. C-2; Tr. 232-233).

The Secretary has established a violation of the cited standard. Lanzo-Florida is not excused from compliance with the standard because Atkinson did not like using the ladder. The dirt ramp was not a safe means of egress because Atkinson would have to climb over a large pipe in order to gain access to the ramp. In the event of an emergency, the pipe would be a significant obstacle to reaching the ramp.

The violation is not willful. Lanzo-Florida did have a ladder on site. The violation is classified as serious.

Item 3b: Alleged Willful Violation of § 1926.652(a)(1)

The Secretary alleges that Lanzo-Florida committed a willful violation of §

1926.652(a)(1), which provides:

> 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 (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The excavation was approximately 14 feet deep and 12 feet wide. It had vertical walls and was filled with water. The excavation was not in stable rock. Heath stated that it was one of the worst trenches he had ever seen in terms of safety (Tr. 220).

Lanzo-Florida contends that it had been using a trench box in the excavation during the installation project. The day of the OSHA inspection, Lanzo-Florida could not use the trench box in the excavation because of the crossing utilities (Tr. 387).

Lanzo-Florida admits that Atkinson was in the excavation without a protective system in place the day of the inspection, but contends that using any alternative protective system would have created a greater hazard. The excavation could not be sloped because it ran parallel to an open roadway (Tr 322-323). Lanzo-Florida did not want to use sheeting because, Straw explained, in order to place the sheeting, "You use a vibratory hammer and sometimes when you use a vibratory hammer around utilities like that, you can create more damage than good. What you're actually doing is loosening the material by the beating" (Tr. 390). Straw testified that placing the sheeting would actually increase the risk of a cave-in.

> To establish a greater hazard defense the employer must show that (1) the hazard created by complying with the cited provision would be greater than those due not to complying, (2) other methods of protecting its employees from the hazards were used or were not available, and (3) a variance is not available or that application for a variance is inappropriate.

State Sheet Metal Co., 16 BNA OSHC 1155 (No. 90-1620, 1993).

Lanzo-Florida presented no evidence of either the application for a variance or the inappropriateness of applying for a variance. The employer has also failed to show that the hazards of a cave-in created by compliance would be greater than the hazards created by noncompliance. Lanzo-Florida did not establish that alternative protective systems other than shoring and sloping were not available.

Lanzo-Florida was in serious violation of § 1926.652(a)(1). The violation is not

classified as willful because the employer did have a trench box on the worksite that it had been using. Neither voluntary disregard for the Act nor plain indifference to employee safety is found.

Penalty Determination

The gravity of the violations cited under Items 3a and 3b is high. The excavation was in an extremely hazardous condition, and no safe means of egress was provided for the diver. The potential for a cave-in was great. A total penalty of $7,000 is assessed for Items 3a and 3b.

Citation No. 3

Item 1: Alleged Repeat Violation of § 1910.410(c)(1)

The Secretary alleges that Lanzo-Florida committed a repeat violation of § 1910.410(c)(1), which provides:

> The employer or an employee designated by the employer shall be at the dive location in charge of all aspects of the diving operation affecting the safety and health of dive team members.

Lanzo-Florida contends that foreman Sadro was the person designated to be in charge of all aspects of the diving operation. The standard requires that the designated person "shall be at the dive location." It is undisputed that when Heath arrived at the site, Sadro was not in the immediate area of the dive location and that Atkinson was in the water. Heath testified that Sadro was 50 to 75 yards away from the dive location (Tr. 242). Sadro corroborated Heath's estimate, stating, "I was standing next to my truck, maybe 150 feet away" (Tr. 415).

The Secretary has established a violation of the cited standard. The standard requires that the designated person in charge be at the dive location. A dive was underway at the time Heath arrived at the site. From where Sadro was located, he could not have monitored "all aspects of the diving operation affecting the safety and health of the dive team members."

The Secretary alleges that the violation was a repeat violation. A violation is considered a repeat violation "if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). "A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996).

The Secretary cited Lanzo for the violation of § 1923.1076(c)(1) on May 6, 1994 (Exh. C-

9, Item 2 of Citation No. 1). The language of that standard is identical to the language of § 1910.410(c)(1). Lanzo did not contest the citation and it became a final order (Tr. 159-160).

The Secretary has established a repeat violation of § 1910.410(c)(1).

Penalty Determination

The gravity of the violation is moderate. Sadro was within viewing distance of the tender and was able to get to the dive location quickly if he was signaled. A penalty of $5,000 is assessed.

Item 2: Alleged Repeat Violation of § 1910.430(b)(4)

Section 1910.430(b)(4) provides:

> The output of air compressor systems shall be tested for air purity every 6 months by means of samples taken at the connection to the distribution system, except that non-oil lubricated compressors need not be tested for oil mist.

Lanzo-Florida admits in its brief that it was in violation of § 1910.430(b)(4) (Lanzo-Florida's brief, p. 39). The Secretary cited Lanzo for violating § 1926.1090(b)(4), which contains identical language to that of § 1910.430(b)(4), on May 6, 1994, and October 10, 1995 (Exhs. C-9 and C-10, Item 13 of Citation No.1 and Item 2 of Citation No. 1, respectively). The citations became final orders of the Review Commission (Tr. 159-160).

The Secretary has established a repeat violation of § 1910.430(b)(4).

Penalty Determination

The gravity of the violation is moderate. Lanzo-Florida had its air compressor tested after Heath's inspection, and its output tested pure (Exh. R-5). A penalty of $5,000 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that the items contained in the citations be disposed of as follows:

Citation No.1

1. Item 1, alleging serious violation of § 1910.423(d)(1), is affirmed and a penalty of $2,000 is assessed.

2. Item 2, alleging serious violation of § 1910.425(c)(2), is affirmed and a penalty of $2,000 is assessed.

3. Item 3a, 3b, 3c, and 3d, alleging serious violations of §§ 1910.421(b), 1910.430(a)(2), 1910.430(b)(2), and 1910.430(j)(2)(ii), are affirmed and a total penalty of $4,000 is assessed.

Citation No. 2

1. Item 1a, alleging a willful violation of § 1910.410(a)(3); and Item 1c, alleging a willful violation of § 1910.422(c)(1)(i), are affirmed as serious and a total penalty of $7,000 is assessed.

2. Item 1b, alleging a willful violation of § 1910.422(b)(3), is vacated;

3. Item 2a, alleging a willful violation of § 1926.20(b)(1); Item 2b, alleging a willful violation of § 1926.21(b)(2); Item 2c, alleging a willful violation of § 1910.420(a); and Item 2d, alleging a willful violation of § 1926.421(d), are affirmed as serious and a total penalty of $7,000 is assessed;

4. Item 3a, alleging a willful violation of § 1926.651(c)(2); and Item 3b, alleging a willful violation of § 1926.652(a)(1), are affirmed as serious and a total penalty of $7,000 is assessed;

Citation No. 3:

1. Item 1, alleging a repeat violation of § 1910.410(c)(1), is affirmed and a penalty of $5,000 is assessed;

2. Item 2, alleging a repeat violation of § 1910.430(b)(4), is affirmed and a penalty of $5,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: May 10, 1999