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. REED ENGINEERING GROUP, INC., Respondent.	OSHRC Docket No. 02-0620

DECISION

Before: RAILTON, Chairman, and ROGERS, Commissioner.

BY THE COMMISSION:

At issue in this case is whether Administrative Law Judge Robert Yetman erred in granting the Secretary of Labor's motion to amend a citation issued to Reed Engineering Group, Inc. (Reed). Although the judge did not err in granting the motion, we conclude that he erred in failing to grant a continuance to cure any prejudice from his grant of the motion. Thus, we remand for further proceedings.

Background

Reed is an environmental testing company that, at the site in issue, had been hired by a landowner to test for hazardous materials. Reed subcontracted with an earthmoving contractor named Lacy Construction to dig test pits. After a Reed employee was killed in one of the pits, the Secretary cited Reed for alleged violations of three construction standards: 29 C.F.R. §§ 1926.21(b)(2), which imposes a duty on employers to institute safety programs that include inspections to prevent accidents; 1926.651(k)(1), which requires daily inspections of excavations; and 1926.652(a)(1), which requires employers to protect "employees in excavations" from cave-ins. Four days before the start of the

hearing on the matter, and well outside the scheduling order's 15-day time limit for filing motions and amendments to pleadings, the Secretary moved to amend the citation and complaint to allege in the alternative a violation of the general duty clause, 29 U.S.C. § 654(a)(1). At the commencement of the hearing, Reed's counsel argued that he would be prejudiced if the judge granted the amendment motion and proceeded with the hearing, because defending a general-duty clause citation required proof of different facts than the construction-standards citations, and there had been no time to conduct further discovery. However, the judge granted the motion to amend without granting a continuance.

On review, Reed contends that it was prejudiced by the amendment because prior to the amendment motion it had planned to argue that the construction standards were inapplicable because it was not engaged in construction, but after the amendment the legal and factual matters that it had to defend changed dramatically. *See, e.g., Tampa Shipyards Inc*., 15 BNA OSHC 1533, 1535 (No. 86-360, 1992) (elements of § 654(a)(1) violation are (1) hazardous condition or activity in workplace presented to employee, (2) hazard was recognized, (3) hazard was likely to cause death or serious bodily harm, (4) feasible abatement method, and (5) employer knew or reasonably could have known of violative conditions).

Discussion

We will uphold the judge's decision to grant the amendment unless it was an abuse of discretion. *See Bland Constr. Co*., 15 BNA OSHC 1031, 1041 (No. 87-992, 1991); *Anoplate Corp*., 12 BNA OSHC 1678, 1687 (No. 80-4109, 1986). We conclude the judge did not abuse his discretion in granting the amendment motion. *See* Fed. R. Civ. P. 15(a)-(b) (leave to amend shall be freely given when justice so requires); *Miller Brewing Co*., 7 BNA OSHC 2155, 2157 (No. 78-3216, 1980) ("Where fair notice is given, administrative pleadings are liberally construed and easily amended."). However, the judge was required to ensure that "fair notice" was given, which he easily could have done by granting a continuance. *See, e.g., United Cotton Goods, Inc*., 10 BNA OSHC 1389, 1390 (No. 77-1892, 1982) (continuance could cure any possible prejudice). The

judge's failure to do so here was an abuse of discretion, especially in light of the extremely short amount of time between the Secretary's motion and the hearing. *See Baytown Constr. Co.*, 15 BNA OSHC 1705, 1708 (No. 88-2912, 1992) (abuse-of-discretion standard), *aff'd*, 983 F.2d 232 (5th Cir. 1993).

We disagree with the judge's finding that Reed would have or should have conducted the same discovery to defend both the initial and amended citations. Reed's defense that it was not subject to the cited construction standards was a purely legal defense requiring it to, at most, present evidence that it was not engaged in construction work as defined by the Occupational Safety and Health Act. In contrast, defending against the section 654(a)(1) citation would require presenting evidence to rebut one or more of the five elements listed in *Tampa Shipyards, supra*. Accordingly, we conclude the judge erred in granting the amendment without also granting a continuance to allow Reed a reasonable opportunity to develop its defense, *see Bland*, 12 BNA OSHC at 1041 (question is whether employer can prepare defense in time remaining for hearing, or during reasonable continuance); *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004), and we remand so that Reed may be allowed to conduct further discovery and present evidence in defense of the general-duty clause citation.

We also find that the judge erred in overruling Reed's hearsay objection to the Compliance Officer's (CO) testimony regarding what Lacy's backhoe operator, Elvie Pelton, had told him about the underlying events. At the beginning of the hearing the Secretary sought to call Pelton as a witness, but the judge did not allow him to testify because the Secretary had identified him outside the timetable of the scheduling order without showing good cause. Later, over Reed's hearsay objection, the judge allowed the CO to testify extensively as to what Pelton had told him.

Such testimony may not be hearsay if it was made by the party's agent or servant within the scope of the agency or employment and during the existence of the relationship. Fed. R. Evid. 801(d)(2)(D); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2185 (No. 90-1747, 1994). However, before allowing testimony in under Rule 801(d)(2)(D), the judge must be satisfied that an agency relationship exists between the

declarant and the employer against whom the testimony is being offered. *See, e.g., Beck v. Haik*, 377 F.3d 624, 639-40 (6th Cir. 2004); *Lippay v. Christos*, 996 F.2d 1490, 1498 (3d Cir. 1993); *Sanford v. Johns-Manville Sales Corp*., 923 F.2d 1142, 1149-50 (5th Cir. 1991); *Nekolny v. Painter*, 653 F.2d 1164, 1171 (7th Cir. 1981). Here, no evidence was introduced to show that Pelton was an agent of Reed's. Rule 801(d)(2)(D) is based on the assumption that an agent or servant speaking on a matter within the scope of his agency or employment during the existence of that relationship is unlikely to make statements that would damage his principal or employer unless those statements are true, but that assumes the existence of an agency or employment relationship. *See Nekolny*, 653 F.2d at 1172.

Thus, we conclude the judge erred in admitting the CO's testimony concerning what Pelton said, without first determining that an agency relationship existed between Pelton and Reed. On remand the parties may present evidence concerning the agency relationship, or, preferably, the judge could allow Pelton to testify for himself.

Order

Accordingly, we remand this case for further proceedings.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

Dated: September 8, 2005

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. REED ENGINEERING GROUP, INC., and its successors, Respondent.	OSHRC DOCKET NO. 02-0620

APPEARANCES:

For the Complainant:
Susan Williams, Esq., Janice Holmes, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Steven R. McCown, Esq., Littler Mendelson, Dallas, Texas

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Reed Engineering Group, Inc. (Reed), at all times relevant to this action maintained a place of business in the 1400 Block of Loop 288, Denton, Texas, where it was engaged in environmental testing. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 22, 2002, Elan Allen, a Reed employee, was killed at Reed's Denton, Texas work site. Upon learning of the fatality, the Occupational Safety and Health Administration (OSHA) conducted an investigation into the conditions at the Denton work site. As a result of that investigation, Reed was issued citations alleging violations of the Construction Standards at Part 1926 of the Act, together with proposed penalties. By filing a timely notice of contest Reed brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Four days prior to the hearing, the Secretary filed a written motion to amend the citation to include, in the alternative, an alleged violation of §5(a)(1) of the Act. The motion to amend was granted at the

hearing on this matter, which was held on October 8, 2003, in Arlington, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

As a preliminary matter, Respondent strongly objected to Complainant's motion to amend the pleadings on the ground that the motion was untimely (a pretrial order required all motions to be filed fifteen days prior to the hearing), and Respondent would be unduly prejudiced by the amendment (Tr. 5-9). Respondent has renewed its objection in its memorandum of law on the ground that the amendment has denied Respondent due process of law.

The filing of the motion to amend the pleadings four days prior to the hearing clearly fails to conform with the directions of the pretrial order that all amendments must be filed no later than fifteen days prior to the scheduled hearing. Complainant argues, however, that the alternative pleading "addresses the same conditions identified in the original Complaint" (Tr. 5). Moreover, the factual allegations remain the same for both pleadings *ibid.* Thus, argues Complainant, Respondent has been on notice as to the factual basis underlying the original allegations and the alternative pleading and, therefor, the Amendment should relate back to the date of the original pleading. Complainant also relies upon the holdings of *Brock v. Dow Chemical USA*, 801 F.2d 926, 930 (7th Cir. 1986) and *Simplex Time Recorder Co. v. Sec. of Labor (Simplex)*, 766 F.2d 575, 585 (D.C. Cir. 1985) that administrative pleadings are to be liberally construed and easily amended. Since Respondent has had notice of the factual basis for the original allegations and the amendment since the inception of this matter, Respondent, according to Complainant, has not been prejudiced by the amendment or the failure to comply with the pretrial order.

Respondent strongly argues that the general duty clause alternative pleading presents new elements of proof required to be met by the Secretary and, therefor, different facts must be established. In view of Complainant's failure to comply with the pretrial order, Respondent argues that it was precluded from preparing its case to meet the new allegation.

It is well settled that amendments to pleadings may be permitted at any time during the course of litigation. *Foman v. Davis*, 371 U.S. 178 (1962) and the amendments should be granted freely. *See Heyl & Pattersen Int'l, Inc. v. F.D. Rich Housing*, 663 F.2d 419, 425 (3rd Cir. 1981). "This approach ensures that a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chemical USA*, 921 F.2d 484 (3rd Cir. 1998) relying upon Wright, Miller *Federal Practice and Procedure* Vol. 6 § 471 at 505. *See also, Brock v. Dow Chemical* and *Simplex, supra.* Moreover, Federal Rules of Civil Procedure, Rule 15(a), provides that in response to motions to amend pleadings ". . . leave shall be freely given when justice so requires," and the amendment shall relate back to the date of the original pleading when the

amended claim "arose out of the conduct, transaction or occurrence set forth . . . in the original pleading." (Rule 15(c) F.R.C.P.).

The policy favoring liberal amendment of pleadings is not without limitation. As established by the Supreme Court in *Foman, supra,* an amendment may not be granted if it is the result of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." 371 U.S. 178, 182 (emphasis supplied).

A review of the record reveals that the basis for the amendment is a response to Respondent's asserted defense that it is not engaged in construction (Tr. 136) and, therefor, not subject to the construction standards cited by Complainant. The Secretary claims that "only one hazard" (Tr. 135) exists and either the construction standards or the general duty clause applies to the factual basis underlying the original violation. Although Complainant believed that Respondent was engaged in construction, an alternative pleading was sought to ensure that some standard, either construction or general industry, applied to the factual basis for the citation. However, since no general industry standards apply to the facts, the Secretary cited the general duty clause.

The primary issue is whether Respondent has had adequate notice of the factual basis underlying the original citation and the alternative pleading. After a full hearing on the merits, it is clear that the same facts were offered by Complainant in support of the original and alternate pleadings including employer knowledge. These facts were or should have been discovered by Respondent in preparation for the original citation. Moreover, Respondent was able to mount a vigorous defense at the hearing as to the original allegations as well as the alternative pleading. Indeed, Respondent has not identified any area of inquiry which was denied to it nor has it identified any elements of the general duty clause violation for which it was unable to present a defense. In other words, Respondent has not demonstrated that its ability to present its defense was seriously impaired by the Amendment.

In *Dole v. Arco Chemical Co., supra,* the Third Circuit Court of Appeals, in a case similar to the instant matter, stated:

> We have held that "'prejudice to the nonmoving party is the touchstone for the denial of the amendment.'" *Bechtel*, 886 F.2d at 652, quoting *Cornell & Co., Inc., v. OSHRC,* 573 F.2d 820, 823 (3d Cir. 1978). A mere claim of prejudice is not sufficient; there must be some showing that [Respondent] "was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Id.,* quoting *Heyl & Patterson Int'l,* 663 F.2d at 426. 921 F.2d at 488.

There is nothing in this record to support the conclusion that the amended citation created such a hardship for Respondent. After a full hearing on the merits, it is clear that Complainant's amendment in the alternative is based upon facts and circumstances which do not differ significantly from the original allegations. Thus, "when an amendment puts no different facts in issue than did the original citation, reference to an additional legal standard is not prejudicial." *Donavan v. Royal Logging Co.*, 645 F.2d 822, 827 (9th Cir. 1981). Accordingly, there is no basis on this record to reverse the ruling to permit the Secretary to amend the pleadings.

Background

During his inspection, Compliance Officer Benito Mercado (OSHA) interviewed Ronald Reed, Respondent's owner (Tr. 27), Karla Smith, Respondent's employee, and Elvie Pelton, Sean Eller and Michael Hoselton, employees of Lacy Construction Company. The testimony offered by the Compliance Officer relating to the events leading to and at the time of the fatal accident was based upon information obtained from these individuals (Tr. 26, 27, 33). The other witnesses called by the parties were Ms. Smith and Messrs. Eller and Hoselton.[1] Mr. Mercado testified that, as a pre-condition of Terry Worrell's sale of his Denton parcel of land to Hunt Properties, Reed was engaged by Worrell to determine whether hazardous materials were present on the site (Tr. 25, 28, *See also,* testimony of Karla Smith, Tr. 153). Prior to February 20, 2002, Reed found evidence of creosote in the soil, and determined that further investigation was merited to locate its source (Tr. 24). Subsequently, Reed arranged with Lacy Construction, an earthmoving contractor engaged in "balancing out the property," by grading the site, filling in ponds, burying demolished concrete (Tr. 28, 93, 100), and to dig some test pits in the area where creosote had been detected (Tr. 32, 34, 74, 103).

On February 22 Elvie Pelton, a backhoe operator with Lacy Construction, met with the deceased, Elan Allen, who directed him to dig five trenches (Tr. 35-36, 95, 107; Exh. R-2). One trench was approximately 9 feet deep, 4 feet wide and 30 to 40 feet long (Tr. 36, 95, 109; Exh. R-2). The other four were greater than 10 feet deep, 4 feet wide, and ranged from 60 to 80 feet long (Tr. 36, 95, 131, Exh. R-2). The walls of the trenches were vertical, and were not shored or shielded (Tr. 49-50, 113, 131). According to Mercado, Pelton stated that Allen instructed him to bench the north ends of the trenches so that he could enter them (Tr. 82, 88, Exh. R-2). Pelton told Mercado that Allen had gone into four of the five trenches to determine whether the odor of creosote was present (Tr. 53; Exh. R-2).

[1]There are references in the record to photographs of the worksite taken by the decedent and a police report. These documents were not offered into evidence.

Allen instructed Pelton to start backfilling the trenches as soon as he (Allen) collected one last sample (Tr. 82-83). Pelton stated that he saw Allen go into a trench one last time and then go to his truck. Pelton thought that he saw Allen leave the site with some Denton city workers, and at that point he began backfilling (Tr. 83). Mr. Allen's body was found several days later more than 10 feet down in the back-filled third trench (Tr. 47, 95).

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury.

> Employees performing work activities in and around trenches/excavations have not been trained on the hazards and regulations applicable to this activity potentially exposing those who do enter to being caught in a possible cave-in, i.e., on or about February 22, 2002, an employee was fatally injured when working in a trench greater than 10 feet in depth located at and/or near the 1400 block of Loop 288 @ Brinker Rd. in Denton, TX. A total of five trenches had been excavated at this site and each trench contained straight walls that lacked adequate cave-in protection.

Serious citation 1, item 2 alleges:

29 CFR 1926.651(k)(1): An inspection of the excavations, the adjacent areas, and protective system was not conducted by the competent person prior to the start of work and as needed throughout the shift:

> On or about February 22, 2002, trenches located at and/or near the 1400 block of Loop 288 @ Brinker Rd. in Denton, TX, were not inspected by a competent person prior to the start of work and as needed throughout the shift. A total of five trenches were excavated at this site and each trench lacked cave-in protection. Workers entering these trenches were exposed to being caught in a cave-in greater than 10 feet in depth.

Serious citation 1, item 3 alleges:

29 CFR 1926.652(a)(1): A worker entering several trenches located at and/or near the 1400 block of Loop 288 @ Brinker Rd. in Denton, TX, was not protected from cave-in by adequate protective systems; i.e., sloping systems, benching systems, or other applicable systems specified in §29 CFR1926.652 paragraph (b) or (c). This employee was exposed to a trench collapse and being caught in a resulting cave-in as follows:

> On or about February 22, 2002, a total of five trenches had been excavated at this site and each trench contained vertical walls that lacked cave-in protection. A worker of Reed Engineering entered these trenches to find possible sources of creosote contamination noted from previously bored monitoring wells, exposing the individual to being caught in a cave-in greater than 10 feet in depth.

Violation of §5(a)(2) standards

In order to prove a violation of §5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition and; (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991).

As a threshold matter, Reed argues that it was not engaged in construction at the Denton site and its activities were not governed by the construction standards at Part 1926.

Applicability of the Cited Standards

Facts

According to Karla Smith, head of Reed's environmental department, Reed conducts environmental site assessments or evaluations of properties involved in commercial transactions in order to assure the acquisition of financing (Tr. 153). On occasion, Reed also provides compaction testing and testing of construction materials on construction sites (Tr. 152-53).

Michael Hoselton, Lacy's residential excavation manager, testified that he uses geotechnical reports, similar to those produced by Reed, to provide developers with accurate estimates of the cost of moving earth and rock (Tr. 97-116). He stated that Reed had worked with Lacy in the past, testing the moisture content and compaction of Lacy's fills (Tr. 119). Hoselton, however, was not familiar with the purpose of the environmental report Reed was preparing in this case (Tr. 118). The Secretary introduced no evidence that Reed was engaged to provide construction testing at the Denton site.

Discussion

Section 1910.12(a) and (b) state that construction refers to "actual construction work, [work for construction, alteration, and/or repair, including painting and decorating], or related activities that are an integral and necessary part of construction work." In *B.J. Hughes, Inc.*, 10 BNA OSHC 1545, 1982 CCH OSHD ¶25,977 (No. 76-2165, 1982), the Commission held that activities that *could* be regarded as construction work *should not* be so regarded when they are performed solely as part of a non-construction operation. In *United Geophysical Corp.*, 9 BNA OSHC 2117, 1981 CCH OSHD ¶25,579, (No. 78-6265, 1981), the Commission found that the Administrative Law Judge did not err in finding the construction standards inapplicable to the employer's geophysical exploration operations. In that case the employer argued that its activities constituted "site preparation" integral to the eventual construction of oil wells. The Commission noted that site preparation was not *directly* related to oil

well construction, and noted that no evidence had been introduced establishing an integral relation between the employer's activities and any construction work.

The facts in this case are similar to those in *United Geophysical Corp.*, in that the only evidence presented show that Reed's environmental testing was integral only to the pending commercial real estate transaction between Worrell and Hunt. Nothing in the record establishes an integral connection between the pending real estate transaction and any eventual construction which might, or might not, take place on the property once sold. The Secretary failed to produce any evidence in this case establishing that Reed's environmental testing was so closely related to construction as to fall under the construction standards.

Complainant argues that it need not establish that Reed's environmental testing was integrally related to construction because Reed employed a backhoe operator to excavate its test pits. According to Complainant, excavation is, in itself, "construction." Complainant points to OSHA standards regulating excavations, which are found in the Construction standards at Part 1926. Thus, according to Complainant, any excavation activity must fall within the definition of construction. Complainant's argument fails, however, because it ignores the fact that many of the same occupational activities are employed in both general industry and construction. In some cases, standards covering such activities are found in both the general industry and construction parts. Welding and cutting standards may be found at both Part1910 Subpart Q and Part1926 Subpart J; electrical hazards are addressed at both Part1910 Subpart S and Part1926 Subpart K; regulations covering stairways and ladders are found both in Part1910 Subpart D and Part1926 Subpart X. Clearly, one cannot conclude, merely from the presence of welding regulations in the Construction Part, that welding equals construction. Likewise, it cannot be concluded that all excavation is construction.[2] The Secretary bears the burden in any given case of showing, by a preponderance of the evidence, an integral relationship between a cited excavation project and a construction activity.

Finally, Complainant maintains that Reed's operation was integral to Lacy's earthmoving operations, in that Lacy could not complete its grading of the site until Reed's test pits were backfilled (Tr. 114). Complainant claims, without citing any authority for this contention, that earthmoving is construction. Earthmoving does not of necessity involve the erection, alteration and/or repair of any kind of structure. The Secretary submitted no evidence that Lacy's earthmoving operations were

[2]As an example, a manufacturer of excavating equipment would not be engaged in construction activities when testing its product by excavating trenches, or, as in this case, excavation work solely preparatory to the sale of real estate.

preparatory, or integral to a construction project.[3] On this record, it cannot be concluded that the Secretary established, by a preponderance of the evidence, that Reed, by utilizing the services of a backhoe, was engaged in construction.

Section 5(a)(1)

The purpose of §5(a)(1) is to provide protection against recognized hazards where no duty under a specific standard exists. *Con Agra, Inc.*, 11 BNA OSHC 1141, 1983 CCH OSHD ¶26,420 (No. 79-1146, 1983). The Secretary, therefore, pleads:

IN THE ALTERNATIVE: Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish to each of his employees a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the following conditions:

> Employees performing work activities in and around trenches/excavations were exposed to the hazards associated with trenches and excavations. On or about February 22, 2002, an employee was fatally injured when working in a trench greater than 10 feet in depth located at and/or near the 1400 block of Loop 288 at Brinker Rd. In Denton, TX. A total of five trenches had been excavated at this site and each trench contained straight walls that lacked adequate cave-in protection.
>
> Abatement for this violation would include (1) Employees performing work activities in and around trenches/excavations shall be trained on the hazards and regulations applicable to this activity, (2) An inspection of the excavation, the adjacent areas, and protective systems shall be conducted by the competent person prior to the start of work and as needed throughout the shift, and (3) employees shall be protected from cave-in by adequate protective systems; i.e. sloping systems, benching systems, or other applicable systems specified in §29 CFR 1926.652.

Facts

Karla Smith testified that Reed's environmental department collects soil and groundwater samples to test for potential environmental problems on properties belonging to Reed's clients. She and Elan Allen were co-team leaders of the department (Tr. 142-44, 153) and Mr. Allen was the department's health and safety officer (Tr. 148). Smith testified that in addition to 40 hours of OSHA training and 8 hours of safety and health training, Reed has general in-house training regarding excavations. She and Allen received the same training and participated in the same safety discussions

[3]Since the Secretary has presented no evidence that construction activities were performed at the worksite, the principles set forth in *CH_2M Hill Inc. v. Herman*, 192 F.3d 711 (7th Cir. 1999) and *Foit-Albert Associates*, 17 BNA OSHC 1975 (No. 92-654 1997) as argued by the parties in their respective post-hearing briefs are not applicable to this case.

(Tr. 144). When Smith first came to work at Reed, Allen told her that Reed's company policy prohibited entry into excavations (Tr. 148-49, 155-57). During discussions of particular projects, she and Allen verbally relayed this rule to their team (Tr. 146, 149). According to Ms. Smith, Reed treats excavations as "confined spaces." She testified that because Reed did not have confined space certifications, employees were simply not allowed to enter any excavations more than waist deep (Tr. 144-45, 151, 156). Smith conceded that Reed's policy was unwritten, and that she did not know of any instance where an employee had been disciplined for violation of the unwritten rule (Tr. 44-46, 156-57).

Smith testified that there is never any reason for Reed employees to enter an excavation. Water samples are taken from excavations with a bailer, which is thrown over the edge of the excavation and "grab samples" of soil are collected from an excavation by asking the backhoe operator to scrape soil from whichever portion of the trench wall the geologist is interested in (Tr. 145, 147, 160). A flame ionization detection meter (FID) can be used in the field to test a soil sample for the presence of organic vapors (Tr. 161). Soil samples are then placed in a jar and sent to the lab for more exact readings (Tr. 146). Smith testified that, if testing for creosote, she would have brought a sample of soil out of the trench, "smelled" it with an FID, and sent it to the lab (Tr. 163). She would not have entered the trench (Tr. 170). Smith stated that she worked with Mr. Allen for almost ten years and had numerous discussions about excavations and the proper means of taking samples (Tr. 146). According to Smith, there was no situation, including those present on the Denton work site on February 22, 2002, where entering an excavation would be required (Tr. 152, 172). Nonetheless, in notes taken in his closing conference with Reed, CO Mercado stated that several of the employees he interviewed at Respondent's office told him that they had entered trenches in the past on various occasions (Exh. R-5).[4]

Discussion

In order to prove a violation of §5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992).

[4] CO Mercado's notes were proffered by Respondent, marked as Exh. R-5 and received into evidence at the hearing (Tr. 177).

The evidence establishes that Elan Allen's entry into unguarded trenches 4 feet wide and ranging between 9 and 15 feet deep constituted a serious hazard which could, and in this case did result in Mr. Allen's death.

Hazard Recognition. The record establishes that Reed recognized a number of hazards posed by employee entry into excavations. Karla Smith testified that Reed conducted in-house training in excavation hazards. Mr. Allen told Smith that it was company policy not to enter excavations under any circumstance. According to Smith it was common knowledge within the company that excavations, because they had limited access and egress and might contain hazardous materials, were to be treated as confined spaces. Smith testified that because Reed did not have confined space certifications, employees were not allowed to enter excavations that were more than waist deep. Because Respondent knew of the dangers associated with unguarded transactions, it developed procedures for collecting soil and water samples from excavations which did not require employees to expose themselves to those hazards. Accordingly, this element has been established.

Knowledge. Though Complainant introduced no evidence that Reed's management was aware that Allen intended to enter the excavations on the Denton site, Reed's constructive knowledge of the violative conditions has been established. The preponderance of the evidence establishes that Mr. Allen intentionally ignored Reed's standard operating procedures on February 22, 2002, by asking Lacy's backhoe operator to bench the end of each of the five trenches excavated so that he could enter the excavations to detect the odor of creosote. That Allen planned his entry and entered the excavations repeatedly suggests that his behavior was not an isolated occurrence, despite Smith's insistence that Reed's technicians were trained not to go into excavations under any circumstance. This inference is supported by CO Mercado's interviews with Ronald Reed and other Reed employees during the closing conference. CO Mercado noted, without contradiction, that several employees admitted entering trenches in the past. (See Exhibit R-5.)

The knowledge of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing that knowledge. *Ormet Corp.*, 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991); *Iowa Southern Utilities Co.*, 5 BNA OSHC 1138, 1977-78 CCH OSHD ¶21,612 (No. 9295, 1977). The record establishes that Elan Allen held a supervisory position as a co-team leader for Reed's environmental department. His knowledge must, therefore, be imputed to Reed, unless Reed can rebut the Secretary's prima facie showing of employer knowledge by establishing that Mr. Allen's failure to follow proper procedures was unpreventable. Specifically, Reed must establish that it had relevant work rules that

it adequately communicated and effectively enforced. *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-531, 1991). Effective enforcement requires both the exercise of reasonable diligence to discover violations, and institution of a progressive disciplinary plan with increasingly harsh measures taken for infractions of work rules. *See, Precast Services, Inc.* 17 BNA OSHC 1454, 1995 CCH OSHD ¶30,910 (93-2971, 1995); *Pace Construction Corp.* 14 BNA OSHC 2216, 1991-93 CCH OSHD ¶29,333 (No. 86-758, 1991). The Commission has held that misconduct by a supervisor constitutes strong evidence that the employer's safety program is lax. *Consolidated Freightways Corp.* 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991).

Reed failed to prove that it took reasonable steps to discover and prevent violations of its unwritten rule prohibiting employees from entering trenches. Though the Act does not require constant supervision of experienced employees in anticipation of possible future safety violations, *see; New England Tel. & Tel. Co. v. Secretary of Labor*, 589 F.2d 81, (1st Cir. 1978), Reed introduced no testimony or other evidence indicating that it made *any* efforts to supervise its employees in the field or otherwise ascertain whether its policy prohibiting entry into excavations was followed. Though employees told CO Mercado that they did, in fact, enter trenches on various occasions, Ms. Smith did not know of any instance where an employee had been disciplined for their violation of Reed's unwritten prohibition of the practice. Reed introduced no evidence of any established disciplinary procedures. Because Reed failed to rebut the Secretary's prima facie showing, its constructive knowledge of the violation has been established.

Abatement. Complainant maintains that feasible means of abating the cited hazard include training employees working in and around trenches and/or excavations so that they are familiar with the hazards and regulations applicable to the activity. Respondent argues that there is no situation where it is necessary for Reed employees to enter an excavation of any type to obtain the samples necessary for analysis. However, the evidence in this case shows that employees do regularly work around and occasionally in excavations. Under those circumstances, training in the hazards associated with excavations and the protective measures which must be taken to avoid those hazards would be recognized by knowledgeable persons familiar with excavating as "necessary and valuable steps for a sound safety program". *See Cerro Metal Products Division, Marmon Group, Inc.,* 12 BNA OSHC 1821, ¶27,579 (No. 78-5159, 1986).

It is clear from the trenching standards themselves that where there is no employee exposure, inspections need not be conducted, and neither sloping nor shoring need be utilized. Nonetheless, Reed

may reasonably be expected to train employees who routinely work around and, occasionally, in excavations about hazards associated with trenches and excavations and in the steps which must be taken before an employee may enter those excavations. If Reed intends to rely solely on a flat prohibition against entering excavations, training explaining the hazards associated with excavations must be accompanied by the institution of a safety program calculated to discover violations of the prohibition and discipline for employees who violate the rule. Accordingly, there is no evidence that Respondent satisfied this requirement. The violation of Section 5(a)(1) has been established.

Penalty

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). CO Mercado testified that, in calculating the proposed penalties in this matter, he began with a gravity based penalty of $5,000.00 for each of the alleged items. Mercado testified that the gravity of the violations was severe, in that an employee engulfed in an excavation would most likely suffer serious injuries, broken bones and/or death (Tr. 48, 56). The original proposed penalty was reduced by 50% based on Reed's size and history (Tr. 56). Mercado stated that Reed is a medium size company, with between 50 and 100 employees (Tr. 57). Reed had no history of violations of the Act within the previous three years (Tr. 57). CO Mercado stated that no further reduction for good faith was merited (Tr. 58).

Based on the evidence in the record, a penalty of $2,500.00 is appropriate, and will be assessed.

Findings of Fact

All findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All findings of fact inconsistent with the decision are hereby denied.

Conclusions of Law

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act.
2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.
3. At the time and place alleged, Respondent violated the provisions of Section 5(a)(1) of the Act as alleged and said violation was serious within the meaning of the Act.

ORDER

1. Citation 1, item 1, alleging violation of 1926.21(b)(2) is VACATED.

2. Citation 1, item 2, alleging violation of 1926.651(k)(1) is VACATED.

3. Citation 1, item 3 alleging violation of 1926.652(a)(1) is VACATED.

4. The violation of §5(a)(1), pleaded in the alternative, is AFFIRMED, and a penalty of $2,500 is ASSESSED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: April 14, 2005