



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
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Washington, DC 20036-3419

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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 90-3249
	:	
MADISON UNDERGROUND, INC.,	:	
	:	
Respondent.	:	
	:	

DECISION

Before: FOULKE, Chairman; MONTROYA, Commissioner.

BY THE COMMISSION:

A decision of Commission Administrative Law Judge Benjamin R. Loye is before the Commission for review pursuant to section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j) and Commission Rule 92, 29 C.F.R. § 2200.92. In his decision Judge Loye affirmed one item and vacated one item of a two-item citation issued to Madison Underground that alleged willful violations of 29 C.F.R. § 1926.652(a)(1).¹ He assessed a \$300 penalty for the item he affirmed, rather than the \$10,000 proposed by the Secretary. The Commission granted a petition for review filed by the Secretary on the following issues:

¹The standard states:

§ 1926.652 Requirements for protective systems.

- a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
 - (i) Excavations are made entirely in stable rock; or
 - (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

1) Whether the ALJ erred in assessing a penalty of \$300 instead of the Secretary's proposed penalty of \$10,000 for willful citation 1, item 1, alleging a violation of 29 CFR § 1926.652(a)(1).

2) Whether the judge erred in vacating willful citation 1, item 2, alleging a violation of 29 CFR § 1926.652(a)(1).

In response to the Commission's order requesting briefs, Madison's president wrote to the Commission stating that Madison would not be filing a brief and that Madison was "no longer an entity". He explained that "United Fire & Casualty of Cedar Rapids, IA took over the contract obligations in November 1991 and all assets were surrendered to the Bank of Sun Prairie to settle indebtedness."

The Secretary responded by letter, stating that, in light of Madison's representations and the Secretary's own follow-up investigation, "the issue of a higher penalty than that assessed by the judge is essentially moot since there is little likelihood of the agency collecting any fines assessed against this entity." The Secretary also noted that the issue of whether a judge erred in assessing an unreasonably low penalty is already before the Commission in *Hern Iron Works*, Docket No. 88-1962. The Secretary did state, however, that he:

continue[d] to have an interest in the Commission deciding the issue of whether the judge erred in vacating Willful Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1926.652(a)(1). A decision on the substantive issue will help to establish legal precedent concerning this frequently cited excavation standard. In addition, a decision on this issue would serve to establish a history of non-compliance as to this employer and its president in the event that either engages in any future trenching operations.

We interpret the Secretary's letter to be a withdrawal of issue one, the issue of the low penalty assessment. The statement that penalties are "essentially moot since there is little likelihood of the agency collecting *any* fines assessed against this entity" [emphasis added] is consistent with Madison's letter. The penalty issue raised by the Secretary is present in another pending case. Accordingly, for these reasons, we will not address the penalty issue.

In contrast to these representations, the Secretary explicitly seeks resolution on the merits of the second issue directed for review. However, in view of the circumstances of

this case, particularly the mootness of the penalty issue and the absence of any dispute as to abatement, we read the Secretary's request for a decision on the issue of whether the judge erred in vacating Willful Citation 1, Item 2, as a request for a declaratory order pursuant to section 554 of the Administrative Procedure Act, 5 U.S.C. § 554(e).

As the APA provides, the issuance of a declaratory order is discretionary. *See Granite City Terminals Corp.*, 12 BNA OSHC 1741, 1748, 1986-87 CCH OSHD ¶ 27,547, p. 35,777 (No. 83-882-S, 1986). We conclude that the issuance of a declaratory order in this case would serve no useful purpose. The only unresolved issue is a factual one that turns on the unique facts of this case.² Its resolution would be of dubious precedential value, and could be resolved in a subsequent case. The Secretary's interest in having the item affirmed in order to establish a history of non-compliance as to Madison or its principal has already been accomplished by the judge's affirmance of Item 1 of the Willful Citation, which Madison did not appeal.

We therefore exercise our discretion to preserve the Commission's resources rather than resolve any factual uncertainty here.

Accordingly, we decline to issue a declaratory order. The direction for review is vacated.



Edwin G. Foulke, Jr.
Chairman



Velma Montoya
Commissioner

Dated: July 23, 1993

²Because it has not been reviewed by the Commission, the judge's decision is accorded the significance of an unreviewed judge's decision and has no precedential value. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976).



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v.	:	Docket No. 90-3249
	:	
MADISON UNDERGROUND,	:	
INC.,	:	
	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on July 23, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

July 23, 1993
 Date

Ray H. Darling, Jr.

 Ray H. Darling, Jr.
 Executive Secretary

Docket No. 90-3249

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,

v.

MADISON UNDERGROUND, INC.
Respondent.

OSHR DOCKET
NO. 90-3249

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 11, 1992. The decision of the Judge will become a final order of the Commission on March 12, 1992 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before March 2, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: February 11, 1992

DOCKET NO. 90-3249

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SECRETARY OF LABOR,
Complainant,

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MADISON UNDERGROUND, INC.,
Respondent.

OSHRC Docket No. 90-3249

APPEARANCES:

For the Complainant:

Lisa R. Williams, Esq., U.S. Department of Labor, Office of the Solicitor,
Chicago, Illinois

For the Respondent:

Paul D. Lawent, Esq., The Associated General Contractors of America, Inc.,
Madison, Wisconsin

DECISION AND ORDER

Loye, Judge:

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

Respondent, Madison Underground, Inc. (Madison), at all times relevant to this matter maintained a workplace at 15224 Vera Cruz Drive, New Berlin, Wisconsin where it was engaged in sewer and water main construction (Tr. 17; Answer ¶II).

Madison admits it employed workers at the New Berlin site and that it is involved in a business affecting commerce (Answer ¶III), and is, therefore, an employer within the meaning of the Act.

On September 20, 1990, a compliance officer (CO) for the Occupational Safety and Health Administration (OSHA) conducted an inspection of Madison's New Berlin worksite (Tr. 105-106). As a result of that inspection, on October 26, 1990 Madison was issued citations alleging violations and suggesting proposed penalties pursuant to the Act (Answer ¶IV).

By filing a timely notice of contest to all citations Madison brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 9 and 10, 1991 a hearing was held in Milwaukee, Wisconsin. At the hearing the Secretary withdrew "repeat" citation 2, item 1. Madison withdrew its contest to "serious" citation 1, item 1, which will automatically become a final order of the Commission. Remaining at issue is "willful" citation 3, items 1 and 2, alleging two separate violations of 29 CFR §1926.652(a)(1).

The parties have submitted briefs and this matter is now ready for decision.

Alleged Violations

Willful citation 3, item 1 alleges:

1

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652 (b)(1)(i) in that the excavation was sloped at an angle steeper than (sic) one and one-half horizontal to one vertical (34 degrees measured from (sic) the horizontal):

(a) An employee working in an excavation at 15224 Vera Cruz Drive, New Berlin on 9/20/90 on the north side of the road that was 8 feet deep, 12 feet long and 11 feet wide, was not protected from the hazards of moving ground by a sloping/benching system that met all of the elements of options (1), (2), (3), (4). Specifically, this excavation in Class B soil was sloped to a 60 degree angle where (sic) a 45 degree angle is required.

Willful citation 1, item 2 alleges:

2

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-in (sic) by an adequate protective system designed in accordance with paragraph (b) or (c) of this section:

(a) An employee entered an excavation that was 7 feet deep and 3 feet wide in Class A soil. The excavation had vertical walls with no protective system provided exposing the employee to a moving ground hazard.

The cited standard provides:

§1926.652(a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

- (i) Excavations are made entirely in stable rock; or
- (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Facts

Madison's New Berlin worksite included two excavations on either side, north and south, of Vera Cruz Drive, which Madison had linked up by excavating beneath the roadbed with a "mole," or air powered borer (Tr. 19), in order to tie lateral residential water lines from the south to the water main north of the roadbed (Tr. 22). On September 20, 1990, the excavations, which had been filled in over night (Tr. 67-68), had been reopened and the copper laterals pulled through a four inch hole created by the mole (Tr. 87-88, 227). The copper laterals had not yet been connected to the main (Tr. 87).

Milt Zimmerman, Madison's job foreman and the "competent person" on site for purposes of the excavation standards (Tr. 17-18), testified that the north, or water main trench was about 10 feet wide, 11 feet long at the surface. Zimmerman believed that the width at the bottom of the trench was about "bucket width," or 30 inches, and that the trench was seven feet deep (Tr. 21-22, 37). CO Leslie Berendt measured the north excavation at 12 feet long, 11 feet wide and eight feet deep (Tr. 117-118, 135).

Zimmerman stated that the southern lateral trench was approximately three feet wide, ten feet long and seven feet deep (Tr. 20, 38). Berendt measured the south trench at three feet wide, seven feet long and six feet deep (Tr. 118).

The north trench was dug in soil composed partially of undisturbed hardbound clay, partially of backfill (Tr. 117-118). The south trench was dug entirely in hardbound clay (Tr. 118). Based on her penetrometer readings, Berendt concluded that the hard-

bound clay had a compressive strength on average of over 1.5 tons per square foot (Tr. 120-121). The previously disturbed soil was less cohesive and showed fissuring in some areas (Tr. 122). Both Berendt and Zimmerman classified the soil in the north excavation as class B soil, due to the presence of backfill, and the south trench as type A (Tr. 25, 30, 122, 141).

The sides of the south trench were vertical (Tr. 39, 135; Ex. C-1-3 through C-1-17). The north excavation had a two foot wide bench running along most of the west side, two feet below ground level. A second bench was located near the bottom of the trench (Tr. 126-128, 133; Ex. C-1-18 through C-1-29, C-5). Madison stipulated at the hearing, however, that the benching was incidental to the trenching operation and was not intended to provide protection from moving ground, or to comply with the sloping requirements of the excavation standards (Tr. 263-264). Hydraulic shores and a trench box or shoe were available at the Madison site, a block from the cited trenches (Tr. 34-35, 65), but were not being used at the time of the inspection (Tr. 68). Neither excavation was shored (Tr. 34).

On September 20, 1990, CO Berendt was assigned to respondent's New Berlin worksite with instructions to perform an on-site investigation (Tr. 105). At approximately 10:15 a.m., as Ms. Berendt drove up to the site, she observed a Madison employee, Paul Goodman, running in the direction of her car and yelling "get out of the trench, get out of the trench" (Tr. 106-107, 170). Ms. Berendt pulled her car around a large spoil pile and saw another employee, Kelly Reese, climb out of an excavation and walk away with Mr. Goodman (Tr. 107).

In an interview on the day of the inspection Reese told CO Berendt "I was making a connection, in the process of it. We had pulled that copper through, one inch copper, after we got the mole unstuck. It was a matter of two minutes and the connection would have been made"(Tr. 72).

At the hearing Reese admitted that he had been in the south trench, on a ladder, watching the mole, earlier on the day of the inspection (Tr. 77-78). Reese further stated that he was in the north trench when Berendt arrived (Tr. 75), but "had not made it to the bottom of the ditch" (Tr. 74). The Madison crew was working in another hole, and

Reese stated that he had just stepped down onto the top ledge of the north excavation to pick up a bucket of tools and head to the other worksite when he heard Goodman yelling at him to get out of the hole (Tr. 69, 73, 75, 89; Ex. C-1-24 through C-1-28).

Goodman, Madison's backhoe operator, testified that he was unaware of CO Berendt's arrival on the worksite. At the time she drove up to the site he was on his way to get Kelly and take him up to the other site (Tr. 230). Goodman thought that he saw Kelly standing on the back side of the north trench as he walked up, but admitted that Kelly could have been in the trench, standing on the ledge (Tr. 231, 236). Goodman stated that as he approached, he told Kelly, "we got to go, we got to go to a different hole." (Tr. 235).

Foreman Zimmerman testified that when an employee is going to make a connection in an excavation, a trench box is placed in the bottom of the trench with a backhoe; the employee enters the box by way of a ladder (Tr. 55, 56). Both Zimmerman and Goodman testified that, to the best of their knowledge, no Madison employees worked in any of the New Berlin trenches without the protection of shoring or the shoe at any time during the job (Tr. 58, 236-237).

Goodman, however, was unaware of any specific work rules prohibiting the entry of employees into unshored trenches, and did not believe Madison had any written rules on the subject (Tr. 337-338). Reese stated that he would not have gone into the excavation to make a connection without the benefit of either a shoe or shoring (Tr. 70, 77-79), but had not received any training from Madison specifically covering OSHA safety regulations governing trench entry (Tr. 62-63). Any safety training he had received came through his union and from his 10 or 11 years of on the job experience (Tr. 61-63).

Madison received four prior citations between 1987 and 1990 for violations of the excavation standards, specifically, for failure to effectively shore the sides of excavations (Tr. 163-167).

Alleged Violation of §1926.652(a)(1)

The cited standard requires employers to provide a system of protection from cave-ins for employees in excavations over five feet deep which are dug in soils other than stable rock.

In order to prove a violation of section 5(a)(2) of the Act, 29 U.S.C. §654-(a)(2), 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.

Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶25,578, pp. 31,899-900 (No. 78-6247, 1981).

It is undisputed that Madison's New Berlin excavations were more than five feet deep and were dug in soils subject to the regulation. It is also admitted that the excavations contained none of the cave-in protection described in the standard.

Respondent maintains, however, that the Secretary failed to prove employee exposure to the hazard addressed by the standard, because "there is no evidence that anyone was more than 2 or 3 feet below the surface on the north trench. . . and none that anyone was in the south trench at all" (Brief of Respondent, p. 1).

As regards item 1, Respondent's argument is unconvincing. Though Kelly's testimony at trial adequately explains his earlier statement to CO Berendt, in which he appeared to state that he had been in the bottom of the north trench making a connection, he did admit to being in the trench, standing on the west wall's first bench retrieving his tools.

Because the cited standard states only that an employee must be *in* the trench rather than *in the bottom* of the trench, and because a cave-in of the trench's west wall could affect an employee standing on the bench, carrying him to the bottom of the trench, this Judge finds that the Secretary's invocation of the cited standard in this instance is reasonable and that Madison's employee was exposed to the hazard addressed by the standard.

Kelly's observation of the mole's operation while standing on a ladder placed in the south trench, however, does not appear to entail the same hazards. An employee on a grounded ladder is supported by more than the very ground which is in danger of giving way, and would not necessarily be dislodged by the movement of the soils of the

trench walls. This Judge finds that the Secretary's attempt to apply the cited regulation to an employee on a ladder is unreasonable. Item 2 will, therefore, be dismissed.

The final element of the Secretary's burden as to item 1, actual or constructive knowledge, is established by the record.

In *Secretary of Labor v. Ormet Corp.*, 14 BNA OSHC 2134, 2137, 1991 CCH OSHD ¶29,254, p. 39,201 (No. 85-531, 1991) the Commission reaffirmed its position that it is not necessary to show that the employer knew of a specific instance of violative conduct in order to establish constructive knowledge. The Commission cited *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270 (6th Cir. 1987), *cert. denied*, 484 U.S. 989, 108 S.Ct. 479 (1987), which holds that:

the Secretary makes out a *prima facie* case of the employer's awareness of a potentially preventable hazard upon the introduction of proof of the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions.

Id. at 1277 (emphasis added). *See also; Danco Construction Co., v. OSHRC*, 586 F.2d 1243, 1246 (8th Cir. 1978)(employer may not "fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous working practices.")

- Kelly was not instructed to enter the unsupported trench, and no supervisory personnel observed him step down on to the bench. However, Goodman testified that he knew of no established work rules prohibiting the entry of employees into unshored trenches, and did not believe Madison had any written rules on the subject. Kelly testified that he received no training from Madison on safety or on OSHA regulations governing excavations. The testimony of Kelly and Goodman was not rebutted by supervisory personnel testifying at the hearing. In fact, Respondent's counsel introduced *no* evidence indicating that Madison had any safety program whatsoever.

Madison's failure to institute and communicate safety rules prohibiting work practices which are unsafe and contrary to OSHA excavation regulations is sufficient to establish not only constructive knowledge of the violation but, in light of Madison's history of OSHA violations, to establish a "willful" state of mind.

The Commission has held 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.” *Secretary of Labor v. Calang Corp.*, 14 BNA OSHC 1789 1991 CCH OSHD ¶29,080 (No. 85-319, 1990).

Since 1987 Madison has received four separate citations for allowing employees to work in inadequately sloped or shored trenches. In spite of those citations, it apparently failed to institute rules prohibiting entry into unguarded trenches, or to instruct its personnel in OSHA regulations regarding such trenches. Accepting the unrebutted facts presented at hearing, this judge cannot but find that Madison was indifferent to both the requirements of the Act and employee safety.

Penalty

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. *Long Manufacturing Co. v. OSHRC*, 554 F.2d 902 (8th Cir. 1977). 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. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶15,032 (No. 4, 1972).

The Commission has stated that the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Secretary v. National Realty and Construction Co.*, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 85, 1971).

The gravity of the violation in this case is negligible, only one employee was exposed to the danger of moving ground for less than a minute. The probability of an injury resulting from this brief exposure was virtually nil. Because of the “willful” failure of Madison to institute work rules consistent with OSHA regulations and to convey them to its employees, however, this Judge feels that some penalty is appropriate. A penalty of \$300.00 will, therefore, be assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law that are inconsistent with this decision are denied.

ORDER

1. "Willful" citation 1, item 1 alleging violation of 29 CFR §1926.652(a)(1) is **AFFIRMED** and a penalty of \$300.00 is **ASSESSED**.
2. "Willful" citation 1, item 2 alleging violation of 29 CFR §1926.652(a)(1) is **VACATED**.



Benjamin R. Loye
Judge, OSHRC

Dated: February 3, 1992