



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
GLOBE CONTRACTORS, INC.
Respondent.

**OSHRC DOCKET
NO. 95-0494**

**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 September 30, 1996. The decision of the Judge will become a final order of the Commission on October 30, 1996 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 October 21, 1996 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
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Petitioning parties shall also mail a copy to:

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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. / R.H.A.
Ray H. Darling, Jr.
Executive Secretary

Date: September 30, 1996

DOCKET NO. 95-0494

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SECRETARY OF LABOR,

Complainant,

v.

GLOBE CONTRACTORS, INCORPORATED,

Respondent.

OSHRC DOCKET NO. 95-0494

APPEARANCES:

For the Complainant:

Steven E. Walanka, Esq. U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois

For the Respondent:

Charles B. Palmer, Esq., Palmer Law Offices, Waukesha, Wisconsin; C.H. Stuart Charlson, Krukowski and Costello, Milwaukee, Wisconsin

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

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, Globe Contractors, Incorporated (Globe), at all times relevant to this action maintained a place of business at 4543 Meade Street, Appleton, Wisconsin, where it was engaged in underground construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 21, 1994 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Globe's Appleton work site. As a result of that inspection, Globe was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Globe brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 10, 1996, a hearing was held in Oshkosh, Wisconsin. The parties have submitted briefs on the issues and this matter is ready for disposition.

**Alleged Violations of the Fourth Amendment
and §8(a) and 8(e) of the Act, and Selective Prosecution**

As a threshold matter Globe argues that OSHA's inspection of its work site was conducted without either its consent or a warrant, in violation of the Fourth Amendment. Globe further maintains that the OSHA inspection and citations at bar resulted from the the OSHA Compliance Officer's personal animosity towards Respondent, and that the OSHA inspection was not conducted within reasonable limits as required by §8(a) and 8(e) of the Act.

Facts

OSHA Compliance Officer (CO) Tom Crandall testified that on October 21, 1994, he was assigned to inspect Globe's Appleton work site (Tr. 45). Globe's work site was located on a public road, which was closed to all but dump truck traffic because of the construction in progress (Tr. 47, 266). Barricades blocked the street, stating "Road Closed, Local Traffic Only." (Tr. 47, 470). About five private homes were located on the street (Tr. 47, 470). Kevin Van Straten, Globe's foreman, testified that the residents did not enter the area during the day while work was going on, by "mutual understanding" (Tr. 470).

Crandall admits that, upon his arrival on Globe's work site, he yelled at Globe employees as he exited his vehicle; "What the f___ is the matter with you guys? Are you trying to kill yourselves?" (Tr. 51, 153, 159). Van Straten testified that Crandall repeated such statements at least twice before asking who was in charge, and presenting his business card a couple of minutes later (Tr. 160, 452-53). Van Straten testified that Crandall continued to use profanity, and accused employees of lying in answer to his questions (Tr. 454-55). Crandall remained on the site for approximately 15 minutes without asking for Van Straten's consent (Tr. 454). Later that day, Crandall returned to the work site with another compliance officer, Gordon Krohn, because he had doubts about Van Straten and his crew (Tr. 70-71). There is no question that the Globe crew knew who Crandall was when he arrived on the site in the afternoon.

The Open Fields Doctrine

The Commission has consistently held that an employer cannot claim a reasonable expectation of privacy, or evoke the protections of the Fourth Amendment, where the worksite is observed from a public thoroughfare, open to public view. *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1991-93 CCH OSHD ¶29,681 (No. 89-2019, 1992). In *Tri-State Steel Construction Inc.*, 15 BNA OSHC 1904, 1991-93 CCH OSHD ¶29,852 (Nos. 89-2611, 89-2705, 1992), the Commission found that the "open fields" doctrine is generally applicable to roadway construction activities conducted out of doors, as there is no societal interest in protecting the privacy of such activities. The Commission's holding in *Tri-State Steel* was

unaffected by the employer's erection of traffic control barricades to keep the public out of its work area. The erection of barricades, intended to keep motorists out of the work area, did not create a reasonable expectation of privacy. *Id.* at 1910, fn.15-16.

The undersigned finds that, under Commission precedent, Globe had no legitimate expectation of privacy in its worksite, which was located on a public road, and failed to create a privacy right by erecting traffic barricades. Because Globe's work site is not subject to Fourth Amendment protections, neither its consent, nor a warrant is required to conduct an OSHA inspection of that site.

Selective Prosecution

Globe maintains that CO Crandall conducted the October 21, 1994 inspection with the intent to harass Globe. Globe, however, introduced no evidence whatsoever which would support its contention that the October 1994 OSHA inspection was based on impermissible criteria. Globe introduced evidence of Crandall's later conduct to show personal bias; *i.e.*, in April, 1994 Crandall was observed using binoculars to watch the Globe crew at work (Tr. 465-68). Nothing in the record, however, indicates that Crandall had any predisposition against Globe in October, 1994.

Moreover, the conscious exercise of some selectivity in enforcement is not in itself a constitutional violation. Relief is available only if decision to prosecute is shown to have been deliberately based on an unjustifiable standard such as race or religion or other arbitrary classification. *Cuyahoga Valley Ry. V. United Transportation Union*, 474 U.S. 3, 106 S.Ct. 286 (1985). In the absence of any allegation that OSHA chose Globe for inspection based on a proscribed classification, Globe fails to state a claim for which relief may be granted.

Sections 8(a) and 8(e)

Globe maintains that CO Crandall failed to present proper credentials, thus denying Globe the right to accompany him on his inspection. Globe further maintains that the inspection was not conducted in a "reasonable manner," in that the CO behaved inappropriately during the inspection.¹

¹ Section 8(a) provides:

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --

(1) to enter without delay and at reasonable time any factory, plant, establishment, construction site or other area, workplace or environment where work is performed. . . and

(2) to inspect and to investigate during regular working hours and at other reasonable times, within reasonable limits and in a reasonable manner any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Section 8(e) requires:

Subject to regulations issued by the Secretary, a representative of the employer. . . shall be given an opportunity

The Commission has held that any rights granted by section 8(a), requiring credentials, should be read as coinciding with those of the Fourth Amendment. *See, e.g. Gem Industrial, Inc.*, 17 BNA OSHC 1185, 1995 CCH OSHD ¶30,762 (No. 93-1122, 1995); *Hamilton Fixture*, 16 BNA OSHC 1073, 1991-93 CCH OSHD ¶30,034 (No. 88-1720, 1993). In addition, Globe concedes that under Commission precedent there can be no remedy for the Secretary's failure to comply with other provisions of §8(a) or §8(e) [reasonable time/place, walk arounds], unless the record reveals a failure by the Secretary to substantially comply with those sections, *and* such noncompliance substantially prejudices the cited employer. *Gem Industrial, Inc., supra*. The Commission has held that a general claim of prejudice is not enough; specific evidence of the loss of material or mitigating information is required. *Id.*

As discussed above, the October 1994 OSHA inspection conformed to the requirements of the Fourth Amendment. The evidence establishes that not only were adequate credentials presented to Globe's foreman within a reasonable time of the CO's arrival on site, but that Globe's foreman was present from the CO's arrival until such credentials were presented. Although the record reflects that CO Crandall behaved in an unprofessional and belligerent manner, Globe failed to establish that his behavior resulted in any prejudice in its ability to present its defense. Globe's contention that it was prejudiced by Crandall's failure to conduct a more thorough investigation, or his refusal to credit the explanations of Globe's employees is without merit. Globe had ample opportunity to examine and record conditions at the work site and to question its own employees during and after the OSHA inspection. Moreover, Globe was afforded a full opportunity to correct any of Crandall's misapprehensions at its informal settlement conference in December 1994 (Exh. R-1). Finally, as is shown by the record, Globe was able to mount a complete defense at the April 1996 hearing.

In the absence of a showing of prejudice, there is no basis for the suppression of evidence obtained during the inspection.

Alleged Violation of §1926.600(a)(6)

Serious citation 1, item 1 alleges:

29 CFR 1926.600(a)(6): Equipment operating in vicinity of power lines did not comply with requirements of 29 CFR 1926.550(a)(15). 29 CFR 1926.550(a)(15) requires all equipment not to be operated within 10 ft. of electrical distribution or transmission lines rate 50 kv or below and/or insulating barriers not part of, or an attachment to the equipment shall be erected to prevent physical contact with the lines:

to accompany the Secretary or this authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection.

(a) Link belt, LS-3400, Series: CII, Crawler Excavator in operation at the extreme west end of the excavation. Boom with bucket was directly below overhead energized electric power line which crossed Meade St. from primary source to residence, when boom was raised it came within an estimated 5' distance of contact with the line. Power pole had been removed and line was supported by a tree branch.

The cited standard provides:

All equipment covered by this [subpart O--Motor Vehicles, Mechanized equipment, and Marine Operations] shall comply with the requirements of §1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters.

Section 1926.550(a)(15) requires that:

Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

(i) For lines rated 50 kV, or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet. . . .

Facts

CO Crandall testified, without contradiction, that during his afternoon inspection he observed Globe's backhoe operating below an energized low hanging overhead power line that came across Meade Street and into the residence at 4543 Meade Street (Tr. 110-13, 124; Exh. C-18). Crandall testified that as the boom of the backhoe was elevated to remove the spoil to the spoil pile, and to return to the trench, it was within five to seven feet of the power line (Tr. 114, 125-27). Crandall testified that contact between the boom and the energized line could result in electrocution of the operator and/or employees working near the backhoe when it became energized (Tr. 117).

Globe presented no evidence on this item, though the backhoe operator, Bob Hansen, testified at the hearing (Tr. 501-25). In its brief, Globe argues that the overhead wire pictured in Complainant's exhibit C-18 is not a power line, but a telephone line not covered by the regulation.

Discussion

Section 1926.550(a)(15)(vi) states that:

Any overhead wire shall be considered to be an energized line unless and until the person owning such line or the electric utility authorized indicates that it's not an energized line and that it has been visibly grounded.

The Secretary's *prima facie* burden of showing the applicability of the cited standard is met by the presumption contained in subsection (a)(15)(vi); the burden of proving that the conditions cited here are otherwise exempted from coverage lies with Globe, the party claiming the benefit of the exception. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1991-93 CCH OSHD ¶30,059 (No. 89-2883, 89-3444, 1993). No evidence in the record supports Globe's contention that the pictured wire is a telephone wire.

The uncontested testimony of the compliance officer establishes that the standard was violated and that at least one employee, the backhoe operator, was exposed to the hazard. A *prima facie* case of actual or constructive knowledge is made out where, as here, an established violation is in plain view. *Williams Enterprises, Inc.*, 10 BNA OSHC 1260, 1981 CCH OSHD ¶25,830(No. 16184, 1981).

The violation has been proven.

Penalty

A penalty of \$2,000.00 was proposed for this violation. Globe is a medium sized employer, with at least 50 employees (Tr. 375). Globe has a history of prior OSHA violations dating from 1989 through 1993 (Exh. C-19 through C-35). Although Globe has a written work rule prohibiting the operation of overhead equipment within ten feet of an overhead line, no evidence that the rule was communicated or enforced was introduced at the hearing (Exh. R-6, Rule H-2). One employee was shown to have been exposed to the cited hazard. Crandall testified that although the potential for harm posed by the boom's proximity to the energized wire was high, the probability of an accident occurring was lesser (Tr. 121). The proposed penalty is well below the statutory maximum allowed for "serious" violations of the Act, and is deemed appropriate. \$2,000.00 will be assessed.

Alleged Violations of §1926.651(k)(2) and 652(a)(1)

Facts

CO Crandall testified that when he arrived on Globe's work site on the morning of October 21, 1994 he noted a man standing on the south side of an excavation holding onto a ladder. Crandall testified that as he approached the excavation he saw two people come up the ladder, remove the ladder from the trench and leave the site (Tr. 48-49, 181). Crandall stated that during his approach, he could not see the men because the trench was over their heads (Tr. 49). Crandall stated that he was approximately 25 feet from the excavation when he saw the men exit the trench (Tr. 49). Crandall stated that the man who had been holding the ladder identified himself as Kevin Van Straten (Tr. 50, 152). All of Globe's employees denied being in the trench (Tr. 68).

Kevin Van Straten testified that when Crandall arrived on the site, he was standing by his pick-up, approximately 20 yards from the trench; Steve Jackson, the top man, was holding a ladder on the south side of the trench; the pipe layer, Dean Van Straten, was standing on the ladder chest deep in the trench (Tr. 445-47; *See also*, Testimony of Dean Van Straten, Tr. 531, 536-38). Kevin Van Straten stated that when the employees saw Crandall drive up, Dean Van Straten climbed out of the trench and “gave the ladder a fling” (Tr. 451). Bob Hansen testified that when Crandall arrived, Steve Jackson was not in the trench; Dean Van Straten was standing partway down the ladder, giving him signals (Tr. 512-13).

Crandall testified that the trench ran east to west from the centerline of Meade Street towards the residence at 4543 Meade (Tr. 52). Inside that trench Crandall noted a capped six-inch PVC pipe with a locating bar wedged in the dirt holding the cap in place (Tr. 52-53; Exh. C-2). A second, perpendicular trench intercepted the east-west trench from the south (Exh. C-1). Globe’s ladder had been placed against the west wall of the trench from the south at its intersection with the east-west trench (Tr. 471-72, 546-47; Exh. C-3). Backfill added at the east end of the trench created a slope; footprints indicate the slope was used for access (Tr. 53, 57, 63; Exh. C-1, C-4). Kevin Van Straten testified that a trench box was used in the area during the installation of the PVC pipe (Tr. 497). Dean Van Straten stated that he was in the trench box after the backfill had been placed in the trench, and had made the footprints at that time (Tr. 532-35).

Crandall stated that the walls were vertical, and no protective system was in place (Tr. 52, 58; Exh. C-2). Crandall testified that he measured the trench in the area where he had seen the ladder; from the surface to the approximately three foot wide bench where the PVC pipe lay (Tr. 60-61). He stated that the bench was approximately eight feet down (Tr. 61, 88-89; Exh. C-10, R-2). That testimony was contradicted by Kevin Van Straten, who stated that the PVC pipe on the bench was approximately five feet deep (Tr. 461-62, 478). Crandall measured the depth to the bottom of the trench at 11'-6" (Tr. 251; Exh. C-4, C-5, C-6). The competent person on site, Kevin Van Straten (Tr. 422-24), told Crandall, that the trench was excavated in type B soil (Tr. 58).

When he returned to the work site later that afternoon, Crandall again saw an employee standing in the trench (Tr. 78). As he and CO Krohn approached the site, both heard the backhoe operator call out; “Lay down so he can’t see you” (Tr. 79; 267). Crandall then saw and photographed the employee, identified as Dean Van Straten, scramble from a water pipe up the side of the trench with the help of Steve Jackson (Tr. 80; Exh. C-8). A ladder was in the east end of the trench; buckets of lubricant lay by the end

of the pipe Crandall had observed in the morning; again footprints were noted in the backfill (Tr. 93-94; Exh. C-16).

Dean Van Straten admitted during the inspection, and at trial, that when Crandall returned to the work site that afternoon he was standing on top of the water main signaling the backhoe operator (Tr. 458, 543). CO Krohn estimated the depth of the water main at seven feet (Tr. 318). Kevin Van Straten and Hanson both testified that the water main was between five and six feet deep in the trench (Tr. 459, 523).

Kevin Van Straten testified that he was again standing by his pick-up, but that he did not know Dean Van Straten was back in the trench (Tr. 457-58, 483). Crandall, however, photographed the foreman on the north side of the trench within a few seconds of his arrival on the site (Tr. 214-19; Exh. C-9).

The trench was dug out further towards the west when Crandall returned the second time; the type B soil became type C at the point the trench intercepted the water main (Tr. 87; Exh. C-9). The trench was vertical with the exception of some sloping on the west end, and where the previously disturbed soil around the main had collapsed (Tr. 87-88; Exh. C-9). The trench measured 10'-6" deep at the water main and approximately 14 feet across where there was previously disturbed soil. The remainder of the trench was approximately 8 feet across (Tr. 91, 273-75, 460; Exh. C-14).

Globe has a written safety program that contains the bare requirement that employees are to "[e]nter trenches over 5' deep only when they are sloped to a safe angle of repose or if a trench shoring, sheeting or shield system is in use." (Tr. 396; Exh. R-6, p.15). The rule provides no specific guidance as to whether standing on ladders or pipes in the trench complies with the rule. Daniel Olson, Globe's safety director since 1990, admitted that depending on how deep an employee was in a trench, and other trench conditions, an employee standing on a ladder or pipe in a trench could be exposed to a hazard (Tr. 408-11).

All employees are given a refresher course on the trenching standards annually (Tr. 378-79, 397-98). The last training before the October 21, 1994 inspection was in March 1993 (Tr. 394; Exh. R-4, p.1). Kevin and Dean Van Straten and Bob Hansen were all present at the March training session (Tr. 395). Olson stated that he performed spot inspections of Globe work sites two to three times a week; any given area was visited monthly (Tr. 185-86). Olson stated that he never found employees working in an excavation more than five feet deep without sloping, a trench box, or other cave-in protection (Tr. 386). Globe has no written disciplinary system, and Olson knew of no instance where any employee was disciplined for working in an unsafe trench (Tr. 399).

Dean Van Straten testified that he was aware of Globe's trenching work rule prior to October 21, 1994, but did not consider himself in violation of the rule on that date (Tr. 527, 544-45). Dean Van Straten was not disciplined for being in the trench during the OSHA inspection (Tr. 496).

Citation 2, Item 1, §1926.651(k)(2)

Willful Citation 2, item 1 alleges:

29 CFR 1926.651(k)(2): where the competent person found evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees were not removed from the hazardous area until the necessary precautions had been taken to ensure their safety:

The competent person (foreman-in-charge) allowed employees to enter into an excavation which was not protected by sloping of the ground, shoring or use of a trench shield. The employees were exposed to the potential hazard of a cave-in.

(a) Two employees were observed exiting from an unprotected excavation eleven feet six inches (11'-6") deep at 10:42 AM, 10/21/94.

(b) One employee was observed in the bottom of the same unprotected excavation at a depth of ten feet six inches (10'-6"). This incident occurred at 1:20 PM, 10/21/94.

The cited standard provides:

(k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

(2) Where the competent person finds evidence of a situation that could result in possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

Discussion

This judge finds that §1926.651(k)(2) is not applicable to the circumstances cited here.

The intent of the cited standard is to require interim inspections to address changing conditions in a trench which may require the removal of employees working therein. *See*, Preamble to Final Rule, 54 FR 45894, at 45926 (October 31, 1989); *See also*, *Secretary of Labor v. American Sterilizer Co.*, 15 BNA OSHC 1476, 1991-93 CCH OSHD ¶19,575 (No. 86-1179) [Preamble is the most authoritative statement

of the Secretary's intent.] In this case, the Secretary does not allege that inspections were not made, or that previously undetected hazardous conditions were found or developed during the course of work in the excavation. Instead the employer is cited for failing to exert adequate supervisory authority in preventing employees from entering a trench known to require a protective system under §1926.652(a)(1), which is also cited as item 2 below. The exposure of Globe's employees, and the knowledge of Globe's supervisory personnel are elements of the substantive violation of §1926.652(a)(1), rather than a separate violation of §1926.651(k)(2).

For the same reason, the cited violation is duplicative of item 2, below, in that both cited violations require the same abatement conduct. *J.A.Jones Construction Co.*, 16 BNA OSHC 1497, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993).

Item 1 is vacated.

Citation 2, item 2, §1926.652(a)(1)

Willful citation 2, item 2 alleges:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-in 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 one and one half horizontal to one vertical (34 degrees measured from the horizontal):

(a) Two employees were observed exiting from an excavation eleven feet six inches (11'-6") deep. The excavation was not shored, sloped or have a trench box installed for employee protection against cave-in. This incident occurred at 10:42 AM, 10/21/94.

(b) One employee was observed in the bottom of the same excavation at a depth of ten feet six inches (10'-6") deep. The excavation was not shored, sloped or have a trench box installed for employee protection against cave-in. This incident occurred at 1:20 PM, 10/21/94.

The cited standard provides:

(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.

Discussion

Globe's witnesses consistently and credibly testified that no employees worked at the bottom of the cited trench without cave-in protection. It is admitted, however, that upon CO Crandall's arrival at Globe's

work site, one Globe employee, Dean Van Straten, was standing on a ladder on a bench in an 11' 6" trench. CO Crandall's actual measurement of the bench depth, at approximately eight feet, is credited over the estimates of Globe's witnesses. The foreman, Kevin Van Straten, admitted he was in the vicinity and witnessed Dean Van Straten in the trench, but took no steps to prevent him from signaling the backhoe operator from that position. It is also admitted that when Crandall arrived on the site in the afternoon, Dean Van Straten was standing on a water pipe between five and seven feet deep in the trench, which was 10' 6" at that point.

Globe maintains that the cited standard only prohibits employees in the *bottom* of the trench, that the Secretary failed to prove employer knowledge of the violation, and that any violations were the result of unpreventable employee misconduct.

Interpretation. Globe maintains that the standard does not prohibit the cited conduct, relying on *Madison Underground, Inc.*, 1991-93 CCH OSHD ¶29,614 (No. 90-3249, 1992), in which this judge found that an employee on a ladder would not necessarily be dislodged by collapsing soil. However, at the hearing in this matter CO Crandall testified convincingly that a potential for injury exists any time the employee is in the trench; an employee standing on a ladder, for instance, could be thrown up against the opposite wall or knocked from his perch in the event of a cave-in (Tr. 97). Based on Crandall's testimony, this judge cannot say that the Secretary's application of this standard here is unreasonable. It is well settled that the interpretation of a standard by the promulgating agency is controlling unless clearly erroneous. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991). The *Madison Underground* decision was unreviewed and is without precedential value; moreover, upon reconsideration, I find that the probability of accident or injury is not relevant to the standard's scope, but is properly a factor only in the determination of an appropriate penalty.

I find, therefore, that Dean Van Straten's presence on a ladder in the trench was in violation of the cited standard. Likewise, Dean Van Straten was in violation of the cited standard as he stood on the water main in the trench.²

Knowledge. The record establishes that Globe's foreman had actual knowledge of Dean Van Straten's presence on the ladder in the trench at the time of CO Crandall's morning and afternoon

² Globe contends that the trench was properly sloped if measured from the depth at which the exposure occurred, *i.e.*, the level of the water main, to the surface (Tr. 655). Globe's method of determining the slope is rejected. In order to determine a trench's compliance with the standard, it is measured from the toe of the trench to the surface at the *lateral* location at which the exposure occurred (Tr. 283). The cited trench would have had to measure approximately 25 feet across the top to comply (Tr. 282).

inspections. Taking into account his proximity to the trench, his knowledge that Dean Van Straten had been signaling the backhoe operator from inside the trench, and his demeanor at the hearing, the undersigned finds Kevin Van Straten's testimony that he was unaware of Dean Van Straten's presence on the water main implausible, and affords it no weight.

Employee Misconduct. In order to prove an unpreventable employee misconduct defense, the employer must show that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶ (91-2897, 1995).

Here, the evidence fails to establish that Globe's work rules either were sufficiently designed to prevent the violation, or were effectively enforced.

Neither Globe's written work rule, nor its training addresses the problem of being in a trench either on a ladder or pipe, though Globe's safety director admitted that an employee engaging in either conduct could be in jeopardy. As a result Dean Van Straten did not feel he violated company rules by doing either.

Kevin Van Straten did not feel that Dean's presence in the trench merited disciplinary action. No reprimand or other action was taken as a result of the October 21 inspection. In fact, Globe failed to introduce a single instance of disciplinary action taken to enforce its trenching rules, in spite of a history of prior OSHA violations of the trenching standards, seven citations dating from 1989 through 1993 (Exh. C-19 through C-35).

Globe failed to establish the defense of employee misconduct. A violation of §1926.652(a)(1) is proven.

Willful

The cited violation was classified as "willful." Despite the absence of a work rule specifically prohibiting working on a ladder or pipe in a trench, the record shows that Globe employees knew their conduct violated OSHA regulations. Dean Van Straten and Steve Jackson pulled the ladder out of the trench and ran from the trench area when CO Crandall pulled up on the morning of the inspection.³ When Crandall returned in the afternoon, Hanson told Dean Van Straten to lie down in the trench so that Crandall would not see him. I find that Kevin Van Straten knew of both incidents, and either condoned or ignored them.

³ Dean Van Straten's testimony, that he vacated the trench, with the ladder, in fear that CO Crandall would drive into the trench is found implausible and is discounted.

Globe's contention that, based on this judge's decision in *Madison Underground*, it believed in good faith that it was not violating the cited standard, allowing employees to enter a trench more than five feet deep, but above the five foot level, is rejected. First, there is no evidence that Globe actually knew of, or relied on *Madison Underground* in formulating its safety program. Second, Crandall's first appearance on site should have cleared up any misconceptions Globe personnel had about OSHA's interpretation of the standard. Lastly, the behavior of Globe's employees clearly demonstrates that they knew they were again in violation of the standard when CO Crandall returned to the site.

The citation was properly classified as "willful"

Penalty

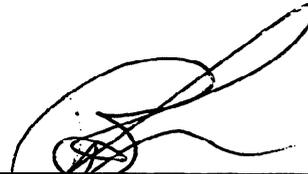
A penalty of \$56,000.00 was proposed. Crandall testified that collapse of the trench walls could result in death by asphyxiation or serious crushing injuries to the lower extremities (Tr. 99). During the morning inspection, tension cracks were visible on the north side of the excavation (Tr. 63-64; Exh. C-6). Crandall testified that tension cracks develop when soil dries out and begins to lose its cohesiveness. Cracking is indicative of impending failure of a trench wall (Tr. 63).

However, the gravity of the violation was overstated, in that the likelihood of an accident occurring was remote. In neither instance was Dean Van Straten shown to have been in the bottom of the trench. The ladder was grounded against the sloped backfill at the east end of the trench and was secured from above. The soil above the water main was sloped and was unlikely to slough into the trench from above or to knock the employee into the trench. The possibility of the employee being covered by falling soil was remote.

Taking into account the gravity of the violation, as well as the employer's size and history of prior violations, I find that the proposed penalty is excessive. A penalty of \$20,000.00 will be assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.600(a)(6) is AFFIRMED, and a penalty of \$2,000.00 is ASSESSED.
2. Willful citation 2, item 1, alleging violation of §1926.651(k)(2) is VACATED.
3. Willful citation 2, item 2, alleging violation of §1926.652(a)(1) is AFFIRMED, and a penalty of \$20,000.00 is ASSESSED.



Benjamin R. Loye
Judge, OSHRC

Dated: September 20, 1996