

Secretary of Labor,  
Complainant,  
v  
The Fishel Company,  
Respondent.

OSHRC Docket No. **97-102**

#### APPEARANCES

Maureen M. Cafferkey, Esq.  
Office of the Solicitor  
U. S. Department of Labor  
Cleveland, Ohio  
For Complainant

Lawrence F. Feheley, Esq.  
Kegler, Brown, Hill & Ritter  
Columbus, Ohio  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

#### **DECISION AND ORDER**

The Fishel Company (Fishel), an underground utility contractor, was locating buried telephone cables in Dublin, Ohio, on October 16, 1996, when its excavation site was inspected by the Occupational Safety and Health Administration (OSHA). As a result of the inspection, Fishel received a willful citation alleging violations of § 1926.651(j)(2) for failing to maintain the spoil pile and backhoe at least two feet from the edge of the excavation, and, § 1926.652(a)(1) for failing to shore or otherwise protect the excavation from cave-ins. OSHA proposed a penalty of \$70,000 for each violation. Fishel timely contested the citation.

The hearing was held in Columbus, Ohio on July 15-16, 1997. Jurisdiction and coverage were stipulated (Tr. 4). The parties filed post-hearing briefs. Fishel argues that it lacked knowledge of the violations and asserts an employee misconduct defense. Fishel's employee misconduct defense is supported by the record and the violations are vacated.

#### *Background*

On September 1, 1996, Fishel contracted with a telephone company named Ameritech to uncover underground telephone cables and encapsulations in front of an above-ground telephone terminal at Snouffer and Bent Tree Roads, Dublin, Ohio (Exh. C-3). Ameritech wanted to move

the terminal further away from the road. To redirect the underground cables, Ameritech needed the existing cables uncovered and spliced to new telephone cables running to the newly-installed terminal (Exh. R-2; Tr. 159-161).

Ameritech was responsible for locating the existing underground telephone cables and splicing them to the new cables. Fishel was responsible for digging and uncovering the existing cables and splice encapsulations (Tr. 168). The initial work took three to four weeks (Tr. 200). During this period, Ameritech located and Fishel uncovered 15 underground cables (Tr. 199). All the cables were located at a depth of 36 inches (Tr. 162, 168-169).

After Fishel had completed its work, Ameritech discovered that it had failed to locate three additional cables (Tr. 164-165). Ameritech requested Fishel to return to the site and uncover the additional cables (Tr. 170). Instead of the foreman who had supervised the initial work,<sup>1</sup> Fishel sent Jeromy Perry, crew leader, with a backhoe and laborer Jerrod Gussler to uncover the cables (Tr. 202).

On October 15, 1996, Perry and Gussler uncovered two of the missing cables and a splice encapsulation (Tr. 202, 207). There was no shoring or other protective equipment to prevent cave-ins used for the excavation (Tr. 26, 173-174). There is no evidence that the excavation dug on October 15, 1996, exceeded five feet in depth.

On October 16, 1996, Perry and Gussler returned to the site to uncover the third cable. As Perry operated the backhoe to excavate to a depth immediately above the cable, Gussler, using a shovel, removed the dirt from around the cable (Tr. 203-204, 209). As they followed the cable from the old terminal, the excavation led into a small hill which apparently was made after the cable was buried (Tr. 185, 240). Gussler located the splice encapsulation where the Ameritech splicers needed to work (Tr. 187). No work was to be performed two to three feet beyond the splice encapsulation (Tr. 91-92, 244). However, the excavation extended approximately 10 to 14 feet beyond the encapsulation (Tr. 196, 203, 209-210, 240).

After uncovering the splice encapsulation, Perry went into the excavation (Tr. 247). The splice encapsulation was at a depth of 4 feet, 6 inches (Tr. 92). On the side of the encapsulation

---

<sup>1</sup>The foreman was assigned to another job out of town (Tr. 201).

nearest the backhoe, Perry exposed two cables leading from the backside of the encapsulation (Tr. 247). Gussler remained in the shallow area of the excavation (Tr. 244). Approximately two to three feet beyond the splice encapsulation, the cable ran into the ground and back toward the side of the excavation. Perry placed a shovel under the cable to mark the location of the cable when he resumed digging with the backhoe. Where Perry placed the shovel, which was two to three feet beyond the splice encapsulation, the excavation exceeded five feet in depth. Perry was in the excavation for five to ten minutes (Tr. 241, 247-248).

On his way to conduct another OSHA inspection, compliance officer Richard Burns drove through the intersection of Snouffer and Bent Tree Roads. He saw Perry and Gussler in the excavation (Tr. 34, 83-84). Burns immediately went around the block, parked his car and returned to the site in less than ten minutes. Perry and Gussler were still in the excavation (Exhs. C-5, C-6; Tr. 34-35). Burns measured the depth of the excavation where Perry had placed the shovel at 7 feet, 6 inches (Exhs. C-4, at 2 min. 9.8 sec., C-9; Tr 47, 70).<sup>2</sup> The width of the excavation was ten feet (Exh. C-10). The walls were practically vertical and not shored or otherwise protected to prevent cave-ins (Exh. C-2; Tr. 73-74). The walls were “spalled badly” (Tr. 54). Burns described the soil as consisting of gravel and sand (Exhs. C-4, at 2 min. 59.1 sec., and 3 min. 28.8 sec.; Tr. 54, 70). At the end of the excavation, the spoil pile and backhoe were located within six inches of the edge (Exh. C-7). Burns observed materials from the spoil pile falling into the excavation (Exh. C-4, at 3 min. 28.8 sec.; Tr. 54). In interviewing Perry, Burns discovered that Perry was the designated competent person and that he had classified the soil as Type C (Tr. 40, 238). Perry told Burns that he was widening the excavation to install shoring and would move the spoil pile (Tr. 101, 140).

Immediately after the OSHA inspection, shoring was installed and the spoil pile was moved (Tr. 220, 250). Fishel’s job at the site was completed on October 16, 1996 (Tr. 249). Perry was disciplined by Fishel for safety violations (Tr. 251).

---

<sup>2</sup>Burns admitted that his measurement was made in a small hole and therefore may not show the actual depth of the trench where Perry placed the shovel (Tr. 94-95, 147-148). Regardless of the actual depth of the excavation at the location of the shovel, it is clear that the depth exceeded five feet. Fishel conceded the violative condition (Tr. 5-7).

### Discussion

The Secretary has the burden of proving a violation.

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

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

### ALLEGED VIOLATIONS

The citation, item 1, alleges that employees in the trench were exposed to a "struck-by hazard" due to the placement of the spoil pile and backhoe within six inches of the side of the trench. Section 1926.651(j)(2) provides that:

Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The citation, item 2, alleges that each employee working in the trench was not protected from cave-ins by sloping the trench to the proper angle or by using protective systems such as trench boxes or shield systems. Section 1926.652(a)(1) provides that:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

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

Fishel does not dispute that §§ 1926.651(j)(2) and 1926.652(a)(1) applied to its excavation on October 16, 1996; that the terms of the standards were not complied with; and, that an employee was exposed to the conditions of the spoil pile and inadequately protected trench walls (Tr. 5-7).<sup>3</sup> Fishel was excavating at the site to uncover underground telephone cables. The excavation on October 16, 1996, was a trench. *See* definitions, § 1926.650(b). Fishel's designated competent person, Perry, classified the soil as Type C (Exh. C-1, response to interrogatory no. 6; Tr. 238). The trench exceeded five feet in depth, at least where Perry had placed the shovel; the walls of the trench were not shored or properly sloped; and the backhoe and spoil pile were located within two feet of the edge.

### Exposure

The record establishes that crew leader Perry was exposed to the inadequately protected trench walls which exceeded five feet at the location where Perry had placed the shovel. Fishel does not dispute that he was exposed to the placement of the spoil (Tr. 6-7). Although Perry was in the trench for less than ten minutes, his exposure is sufficient to establish the violations (Tr. 35, 248). Even a brief exposure to a hazardous condition does not negate a violation or its seriousness. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992); *H.H. Hall Construction Co.*, 10 BNA OSHC 1042 (No. 76-4765, 1981) (five to ten minutes in an unsafe trench results in a serious violation and a \$1,000 penalty).

Fishel's argument that Perry was not exposed to the backhoe located at the edge of the trench is rejected (Tr. 6-7). It is undisputed that the backhoe was within six inches of the edge with its wheels off the ground and its weight on its outriggers (Exh. C-4, at 3 min. 16.7 sec.; Tr. 72). Fishel's safety guide prohibited positioning vehicles close to a trench's edge unless the trench is shored and proper precautions are taken (Exh. C-11, p. 35). The backhoe's estimated weight was between 14,500 to 17,500 pounds (Tr. 71). The backhoe was approximately ten feet

---

<sup>3</sup>To the extent Fishel is challenging the violative conditions cited by OSHA, it is denied (Fishel Brief, pp. 10-17). During discovery, its pre-hearing statement and its statements at the beginning of the hearing, Fishel consistently stipulated to the violative conditions and employee exposure, except to the backhoe (Exhs. C-1, C-3; Tr. 5-7). Thus, Fishel waived any argument as to the depth of the trench exceeding five feet and the exposure of an employee to the spoil pile. To hold otherwise at this late date prejudices the Secretary.

from where Perry placed the shovel. Based on the superimposed load on the walls of the unshored trench and the unpredictability of the backhoe falling or rolling into the trench, Perry was reasonably within the zone of danger when he placed the shovel.

However, laborer Gussler's presence in the trench is not considered exposure to an unsafe condition. There is no evidence that he went beyond the encapsulation or any portion of the trench which exceeded five feet in depth (Tr. 86, 131, 190, 213, 244). He was in excess of 14 feet from the backhoe and spoil pile. Compliance officer Burns testified that Gussler worked only in the area of the trench which did not need shoring or sloping because it measured 4 feet, 6 inches deep (Tr. 92). The test for determining an employee's exposure to a hazard is whether it is "reasonably predictable" that employees would be in the zone of danger created by a noncomplying condition. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). The Secretary must show that it is reasonably predictable, either by operational necessity or otherwise, including inadvertence, that employees have been or will be in the zone of danger. The inquiry is not whether the exposure is theoretically possible but whether the employee's entry into the danger zone is reasonable predictable. *See Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

Here, there is no evidence of Gussler's actual exposure, and it was not shown reasonably predictable that he would enter the deeper portion of the trench. Gussler's work ended when he uncovered the encapsulation. Perry told Gussler that he intended to shore the trench and move the spoil pile before any other work was done. There was no reason for Gussler to enter the unsafe portion of the trench.

### Knowledge

In addition to employee exposure, the Secretary must establish that the employer knew or with reasonable diligence should have known of the violative conditions. Jerome Perry, crew leader, was assigned to dig the trench. He was also the designated the competent person (Tr. 282).

Fishel argues that Perry was not a supervisory employee whose knowledge could be imputed. "Because corporate employers can only obtain knowledge through their agents, the

actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation.” *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). Fishel classifies its workers in ascending order as laborer, crew leader, foreman, and supervisor (Tr. 281). Fishel argues that Pat Covell was the supervisor in charge of the excavation site (Fishel Brief, p. 19; Tr. 159, 232). Perry had no authority to hire, fire, or discipline employees. He also did not assign or schedule work, and he had no authority to bind Fishel (Tr. 122, 281-283). Fishel promoted Perry from laborer to crew leader. At the time of the OSHA inspection, Perry had been a crew leader for six to eight months (Tr. 178).<sup>4</sup> As a crew leader, Perry was responsible for directing the work of laborer Gussler. He was also responsible for his safety and the safe condition of the excavation. Thomas Kulp, Fishel’s safety director, acknowledged that Perry was in charge of the excavation site and supervised laborer Gussler (Tr. 51-52, 103). Perry could recommend employee discipline (Tr. 122). He was also the designated competent person (Tr. 178, 282). He controlled the job site (Tr. 59, 64). In his capacity as crew leader and competent person, he was aware of the unsafe condition of the trench. He created the hazards and had the authority to abate hazards. An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (Nos. 86-360 and 86-469, 1992). Fishel delegated Perry the responsibility for compliance with the trenching standards. He was responsible for the safety of Gussler (Tr. 177). Perry’s knowledge of the unsafe condition of the trench is imputed to Fishel for the purposes of establishing knowledge of the violative conditions

Accordingly, violations of §§ 1926.651(j)(2) and 1926.652(a)(1) are supported by the record.

#### EMPLOYEE MISCONDUCT DEFENSE

---

<sup>4</sup>Perry worked as a laborer for one year when he was promoted to crew leader (Tr. 178).

Fishel asserts an affirmative defense of unpreventable employee misconduct. In order to establish employee misconduct, an employer must show that (1) it has established work rules designed to prevent reasonably anticipated violative conditions; (2) it has adequately communicated the work rules to its employees; (3) it has taken steps to discover violations of the rules; and (4) it has effectively enforced the work rules when violations have been discovered. *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1994).

As discussed, Fishel's argument that Jeromy Perry was not a supervisor is rejected. Perry was given the authority to direct the work of the laborer. He was also responsible for the unsafe condition of the trench (Tr. 59, 64, 177). He was the crew leader and designated competent person. When a supervisory employee is involved in the alleged misconduct, the employee misconduct defense is more difficult to establish, since it is the supervisor's duty to protect the safety of employees under his supervision. *Archer Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). The "fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax." *United Geophysical Corporation*, 9 BNA OSHC 2117, 2123 (No. 78-6265, 1981).

Fishel's employee misconduct defense is supported by the record. The Secretary does not dispute that Fishel's safety program was good; that it has specific work rules requiring shoring in excavations in excess of five feet deep and prohibiting the placement of the spoil pile and equipment within two feet of the trench's edge; and, that Fishel's work rules were violated by Perry (Exh. C-11, p. 35; Tr. 105; Secretary's Brief, p. 14). Also, the Secretary does not dispute that through pamphlets, training programs, and weekly tailgate meetings, Fishel's work rules were effectively communicated to its employees, including Perry (Exhs. R-4, R-5, R-7; Tr. 106; Secretary's Brief, p. 14). Compliance officer Burns considered Fishel's safety training program as the best he had seen in almost 330 OSHA inspections (Tr. 34, 124). He testified that Fishel's safety training was not indifferent to the requirements of OSHA (Tr. 129). Burns also agreed that Perry was effectively trained and knew the requirements of the trenching standards (Tr. 109-110).

Perry acknowledged knowing the work rules and having been trained in the rules. He agreed the conditions at the trench on October 16, 1996, were contrary to Fishel's safety rules. Perry was unable to explain his conduct on October 16, 1996, when he entered the unsafe portion

of the trench. He had completed a training course in trenching and shoring safety on April 6, 1996 (Exh. R-6).

The issue in contention is whether Fishel's safety rules were effectively monitored and enforced. The Commission considers monitoring and enforcement as critical elements of the employee misconduct defense. An employer must show that it took adequate steps to discover violations of its work rules. This requires an employer to have an effective system to detect unsafe conditions and violations of its work rules. Also, an employer must adequately enforce its safety rules by showing evidence of an effectively administered discipline program when work rule violations occur. *GEM Industrial Inc.*, 17 BNA OSHC 1861, 1863-1865 (No. 93-1122, 1996) (oral reprimands were ineffectively enforced in that the same work rule had been violated three times in the month prior to OSHA's inspection). There should be evidence that disciplinary action progressed to higher levels of punishment designed to provide deterrence.

#### Monitoring

The record establishes that Fishel effectively monitored its safety program. The Secretary argues that because Fishel did not inspect the trench site on October 15 and 16, 1996, and failed to anticipate the need for shoring, its safety program was not monitored (Secretary Brief, p. 14-16). The Secretary notes Perry's age (19 or 20 years old) and inexperience as a crew leader (six to eight months) to argue the need for closer monitoring (Tr. 21, 173).

The Secretary's argument is rejected. There is no evidence that prior to October 16, 1996, shoring was required or that the prior excavations for Ameritech exceeded five feet in depth. Also, a young age and short time in the position of crew leader does not necessarily equate to inexperience in maintaining safe trench conditions. Perry had received orientation training in trenching and shoring safety (Exh. R-4). He was specifically trained in the proper placement of spoil piles and not to enter unshored trenches over five feet in depth (Exh. C-11, p. 35; Tr. 226-227). He also attended a course on OSHA's trenching standards and received certification as a competent person (Exhs. R-5, R-6; Tr. 228-230). He attended weekly safety tailgate meetings in which trench safety was regularly discussed. In his initial work assignments, Perry worked under the direction of an experienced foreman (Exh. R-7; Tr. 219-220, 230-231).

Compliance officer Burns was unable to identify any prior incidents showing Perry's lack of experience or judgment (Tr. 142). Burns considered Perry a competent person on the trenching standards (Tr. 145). Prior to October 16, 1996, Perry had never been reprimanded for violations of Fishel's trenching safety rules or other safety rules (Tr. 115, 179, 184).<sup>5</sup> Pat Covell, supervisor, testified that Perry had received high safety evaluations and he considered Perry cautious and safety-conscious (Exh. R-3; Tr. 179-182). Perry kept a copy of Fishel's safety booklet and an outline of OSHA's trenching standards in his truck at the trench site (Tr. 224, 228).

The record does not show that Fishel should have monitored Perry closer merely because of his age and inexperience as a crew leader. *See Moseman Construction Co.*, 12 BNA OSHC 1435 (No. 84-1036, 1985) (employee misconduct upheld despite the foreman having only three weeks experience with the company); *S.K. Construction Co.*, 16 BNA OSHC 1486 (No. 92-2480, 1993) (trenching violations vacated although it was the foreman's first job with employer and he received a minimal discipline after the violation); *Davey Tree Expert Company*, 17 BNA OSHC 1011 (No. 93-1849, 1994) (employee misconduct upheld despite acting foreman having been employed for less than 18 months).

An employer's obligation to closely monitor a potentially inexperienced crew leader also relates to the unsafe conditions reasonably anticipated at the site. The Secretary fails to show that Fishel should have anticipated that the trench on October 16, 1996, would exceed five feet in depth, thus requiring shoring. Compliance officer Burns could not identify any reason for Fishel to know that the trench would be deeper than 36 inches, which was the depth of all other telephone cables uncovered for Ameritech (Tr. 150).

Also, it is uncontroverted that Fishel employs seven safety coordinators who periodically inspect job sites for safety violations (Tr. 263). The coordinators inspect each job at least once a week. Fishel's trench safety is also frequently inspected by its insurance carrier (Exh. R-12; Tr. 271-272). Although, no Fishel supervisor or foreman inspected the excavation site on October 15 and 16, 1996, Pat Covell, supervisor, had inspected the site at least twice when Fishel had done its

---

<sup>5</sup>Perry received a warning for not reporting a minor accident and for off-duty speeding in a Fishel vehicle (Tr. 181-182, 260).

initial work uncovering the 15 cables (Tr. 173, 186, 198). During Covell's inspections, the depth of the excavations did not exceed 36 inches.

The failure to discover a safety violation that occurs in less than ten minutes is not evidence of a lack of monitoring. Compliance officer Burns was unable to identify any facts which suggested that Fishel should have known Perry would violate its trenching requirements (Tr. 115-116, 143). *See Engineers Construction, Inc.*, 3 BNA OSHC 1537 (No. 3551, 1975) (no evidence that employer should have known supervisor would enter an unshored trench); *Pipeline Distribution Contractors, Inc.*, 16 BNA OSHC 1293 (No. 91-3312, 1993) (unreasonable for employer to assume that the foreman would violate further safety rules when he worked in an unshored trench).

The Secretary's argument that Perry's unsafe conduct was motivated by trying to finish the job quickly is also rejected (Tr. 24, 256; Secretary Brief, pp. 12, 15). The record does show that Ameritech was in a hurry to complete the job (Tr. 256). The job should have been completed by October 15, 1996 (Tr. 24). However, there is no evidence that anyone from Fishel told Perry to hurry to complete the job. He was not given a scheduled time for completion (Tr. 174-175, 237). In fact, Fishel was not behind its scheduled work with Ameritech (Tr. 172). Ameritech's telephone customers did not have any disruption of service (Tr. 163, 200). Further, because Perry still had to shore the trench before Ameritech's employees could splice the cable, Perry did not save time by entering the unshored trench (Tr. 190, 247-249, 260). Even if Perry was motivated to rush the job, it was not shown that Fishel should have anticipated his motivation and more closely monitored his work.

#### Discipline Program

The record shows also that Fishel has an effective disciplinary program. Fishel's progressive disciplinary program includes verbal and written reprimands, suspension, demotion and termination (Exh. R-8). Its discipline procedure was written and verbally communicated to employees (Exh. R-8; Tr. 264-265). Compliance officer Burns described Perry's conduct as a "mistake" (Tr. 117). As a result of his mistake, Fishel immediately disciplined Perry with five days suspension without pay and removal for six months from Fishel's safety incentive program. Perry was also demoted to laborer and put under the supervision of a foreman with 25 years'

experience (Exh. R-9; Tr. 251-252). Fishel reported Perry's unsafe conduct to its other employees (Exh. R-15). Perry acknowledged his failure to comply with Fishel's safety rules. Prior to this incident, he testified that he had never been in an unshored trench over five feet deep (Tr. 250).

Fishel also showed that it has disciplined other employees for safety violations during the preceding three years (Exhs. R-10, R-11). Fishel disciplined laborers, foremen and supervisors (Tr. 291). Its discipline included verbal reprimands, written reprimands, suspension and termination (Exh. R-8). Among other disciplinary actions, Fishel suspended a backhoe operator and a foreman on September 29, 1994, for three days without pay for trench safety violations (Exh. R-10). According to its records, Fishel in 1996 recorded 118 incidents of safety related violations and administered 177 disciplinary actions (Exhs. R-13, R-14). However, only three incidents involved trenching and excavations violations. Of the 177 disciplinary actions in 1996, Fishel issued 15 oral reprimands, 67 written reprimands, 24 suspensions without pay, 61 removals from the safety program, and 6 employees discharged (Exh. R-13). Fishel is a large employer with 250 employees (Tr. 65). Between 1993 and 1996, Fishel expanded from approximately 2 million to 3 million man hours per year, primarily in trenching activities (Tr. 264).

During the previous four years, Fishel had not received any OSHA citations, which is evidence of an effective monitoring and discipline program (Tr. 127). According to OSHA's history of violations, Fishel has only been cited for two previous violations of § 1926.652(a)(1) in 1990 and 1992 and one previous violation of § 1926.651(j)(2) in 1981 (Exh. C-13). Compliance officer Burns agreed that Fishel enforced its safety program through disciplinary action, and he was unaware of any employee who continued to violate a safety rule after being warned (Tr. 108, 116).

The employee misconduct defense is supported by the record.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

**ORDER**

Based upon the foregoing decision, it is ORDERED that willful Citation:

1. Item 1, alleging violation of § 1926.651(j)(2), is vacated.
2. Item 2, alleging violation of § 1926.652(a)(1), is vacated.

---

KEN S. WELSCH  
Judge

---

Date: July 20, 1998