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SECRETARY OF LABOR,  
Complainant,

v.

B & B PLUMBING, INC.,  
  
Respondent.

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OSHRC DOCKET  
NO. 99-0401

APPEARANCES:

William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor,  
Seattle, Washington

Wayne Boring, President, B & B Plumbing, Inc., Taylor, Arizona

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

In this action the Secretary of Labor seeks to affirm two citations issued by the Occupational Safety and Health Administration to the Respondent for the alleged violations of safety regulations adopted under the Occupational Safety and Health Act of 1970. The matter arose after a compliance officer for the Administration investigated a fatality at the workplace of the Respondent, concluded that it was in violation of a number of safety regulations and recommended that the citations be issued. The Respondent disagreed with the conclusion of the Agency and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Phoenix, Arizona.

Citation 1, item 1, charged that:

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:

- (a) Alchesay High School, Whiteriver, AZ: Employer did not train his employees in the environment hazard and injuries when working in 8 foot trenches, how to recognize and avoid hazards. Employees were exposed to cave-ins from unprotected trenches.

in violation of the regulation appearing at 29 CFR §1926.21(b)(2) which reads as follows:

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

Item 2 of the serious citation stated that:

Appropriate personal protective equipment was not worn by employee(s) in all operations where there was exposure to hazardous conditions:

- (a) Alchesay High School, Whiteriver AZ: Employees working in a trench 8 to 9 feet deep were not provided and were not wearing hard hats. Employees were exposed to soil and rocks rolling from the soil being laid back on the hillside (sic) on the hillside on the edge of the trench.

violating the regulation at 29 CFR §1926.28(a) reading:

- (a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such ~~equipment~~ to reduce the hazards to the employees.

Citation 1, item 3, is shown below:

- (a) Alchesay High School, Whiteriver, AZ: No ladders, ramps or other safe means of egress were provided for employees working in a trench 79 feet 4 inches long and 8 to 9 feet deep. employees were exposed to being trapped by cave-ins.

in violation of the regulation at 29 CFR §1926.651(c)(2) found below:

- (2) *Means of egress from trench excavations.* A stairway, ladder, ramp or other

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

The material facts in this case are not in substantial dispute and may be briefly summarized. The Respondent is a sanitation plumber and was under contract to furnish and to install plumbing at an Indian reservation school which was to resume classes on Monday, January 3, 1999. The son of the Respondent's principal, Wayne Boring, was in charge of the project. At his son's request Wayne Boring took over the management of the project on Saturday, January 1, 1999. He had not been near the worksite for some time and was surprised that the trench was not completed. The trench he encountered was about 75 feet long, unfinished, and in some areas as deep as 8 feet when plans called for a maximum of 4 feet. The reason for the slower completion and different depth was a pipe which was not shown on the blueprints.

The first forty feet of trenching seemed stable despite the fact that it was open for some time. Mr. Boring did not feel insecure that there was no shoring or protection for him and two other employees who worked in the trench. There was no evidence of instability. Nevertheless there was a cave-in in the 8 foot depth area, resulting in the death of an employee in the trench. Mr. Boring was of the opinion that the cave-in was the result of a pipe which was not shown on the project papers. At no time did he consider the trench to be dangerous, merely a couple of feet deeper. There was no problem with falling rocks or sloughing off.

Immediately after the accident, the safety director of the White Mountain Apache Tribe arrived on the scene to investigate the mishap. He took photographs of the immediate area and observed that the trench had vertical sides and appeared unstable. Its length was about 80 feet without the benefit of shoring or ladders. There was an adjacent side trench but of no benefit as an escape route in case of an emergency. Mr. Boring, president of the Respondent, remarked that he knew shoring was necessary in an 8 foot deep trench, but he did not have the equipment.

The Administration's compliance officer who investigated the accident a few days after the mishap furnished the same information as provided by the tribe's safety director. He learned that it was Respondent's intent to complete the job before school was to start. There had been no safety training, and employees did not wear hard hats.

As noted, Citation 1, item 1 charged that the Respondent did not instruct each employee in

the recognition and avoidance of unsafe conditions and regulations applicable to the work environment. The record supports this charge. While there was vague evidence with respect to the Respondent's training, the only training was supplied by the general contractor. This item of the citation was therefore violated.

With respect to item 2 regarding personal protective equipment, there is no dispute of the fact that employees were not wearing hard hats while in the trench. This item of Citation 1 is also affirmed.

Item 3 of Citation 1 stated that there was no means of egress from the trench such as a stairway, ladder, ramp or other safe means. With respect to the trench in question, there was no safe egress. There was a ramp in another adjacent trench, but there is no proof that the ramp was within the 25 feet required by the regulation. This item of the citation is affirmed.

The willful citation also contained three items. Item 1 asserted that employees were not protected from cave-ins by an adequate protective system as required by the regulation at 29 CFR §1926.652(a)(1) reading:

- (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 © 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.

The second item of the willful citation related that the Respondent did not provide adequate protection from falling loose rock or soil to employees working in an 8 foot deep trench, thus violating the regulation at 29 CFR §1926.651(j)(1) which states:

- (j) *Protection of employees from loose rock or soil.* (1) Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

The third item of the willful citation alleges that the Respondent's competent person who found evidence of a situation which could result in a possible cave-in did not remove exposed

employees from the hazardous area to ensure their safety, a violation of the regulation at 29 CFR §1926.651(k)(2) shown below:

- (2) Where the competent person finds 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 shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

The main concern at the hearing was the willful designation of Citation 2. It is uncontested that the competent person permitted work in an unshored trench 8 feet deep with perpendicular walls; that employees were in an excavation 8 feet deep without shoring or other protective system; and that employees were not protected from loose rock or soil which could pose a hazard by falling or rolling in from the excavation face.

Based upon the record in this case, the Complainant asserts that the infractions were properly designated as willful because the employees were in a trench about 8 feet in depth with straight walls and no shoring. The Secretary points out that Mr. Boring knew that employees were to be protected working at that depth but did not supply the safety equipment. Also, the Respondent was in a hurry to complete the job before school was to commence, even to the point of neglecting safety.

On the other hand, Mr. Boring maintains that he would not be in a dangerous trench and would not permit any employee to work in an unsafe place. Mr. Boring explains that the first portion of the trench remained stable despite its exposure for a number of days, and he had no inkling that the newer portion of the trench was in a worse condition. There was no feeling of insecurity while working in the trench. In his opinion the cause of the accident was the presence of a pipe which did not appear in the blueprints.

Commission precedent defines a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." According to the cases it is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation because such evidence is

already necessary to establish any violation. A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard

or plain indifference.

The Commission has found heightened awareness where the employer was previously cited for violations of the standards in question and is on notice that violative conditions exist; where an employer allowed three employees to work in an unprotected excavation despite prior citations and a city inspector's warning; and where the employer ignored the compliance officer's warning that the trench was not properly sloped.

There must be evidence of aggravating circumstances apart from mere lack of diligence or adequate care in order to establish a finding of a willful citation. Simply failing to address a recognized hazard will not support a willful violation.

In this case the blueprints called for a trench about four feet deep, and Mr. Boring was surprised to learn that a portion of the trench was deeper than five feet. The major portion of the trench was exposed for a number of days with no indication of collapse. No soil sloughing was noted. Mr. Boring believed it was safe to work in the trench; the danger was due to the presence of a pipe not shown in the plans.

Comparing the Commission's interpretation of the term "willful" with the facts in this case, I cannot conclude that the Respondent was in willful violation of the three regulations in Citation 2.

While the Respondent's failure to comply with the regulation in issue was not willful, it does come within the definition of "serious" which is defined in Section 17(k) of the Occupational Safety and Health Act of 1970 as follows:

- (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

I find that the Respondent violated the regulations found at 29 CFR §1926.652(a)(1); 29 CFR §1926.651(j)(1); and 29 CFR §1926.651.(k)(2), in that the regulations applied to the cited condition;

that at least two employees had access to the hazardous condition; that Respondent knew or could have known of the hazardous condition with the exercise of reasonable diligence; and that death resulted.

In summary, items 1, 2 and 3 of Citation 1 are AFFIRMED with a penalty of \$5,000.00; items 1, 2 and 3 of Citation 2 are designated as serious and AFFIRMED with a penalty of \$7,000.00.

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Sidney J. Goldstein  
Judge, OSHRC

Dated: May 1, 2000