UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, JOHN R. DAVIES & SON, Respondent.	OSHRC DOCKET NO. 5486

April 19, 1976

DECISION

BEFORE BARNAKO, Chairman; MORAN and CLEARY, Commissioners.

BY THE COMMISSION:

A report of Administrative Law Judge David G. Oringer, dated November 8, 1974, is before the Commission pursuant to an order issued under section 12(j) of the Occupational Safety and Health Act of 1970.[1] The report affirmed a citation alleging failure to comply with the trench timbering requirements specified by 29 CFR § 1926.652(g)(1). Judge Oringer modified the proposed penalty of $500 to $150.

The order for review was issued on his own motion by Commissioner Moran. It stated the following issue:

Did the citation in this case comply with the particularity requirements of 29 U.S.C. § 658(a)?

The issue was not raised by either party at any stage in these proceedings. It was mentioned for the first time in the judge's report, and as noted he affirmed the citation. Neither party petitioned for review, hence there has been no appeal to the full Commission. Respondent has not indicated any interest, whether by letter, brief, or other means, in having the judge's report reviewed. The Secretary has filed a letter asking affirmance of the report.

In these circumstances and in the absence of any compelling public interest we decline to pass on the directed issue or any other aspect of the judge's report. Abbott-Sommer, Inc., Docket No. 9507 (R.C., February 17, 1976). Further, because of our disposition herein we accord the

[1] 29 U.S.C. § 651 et seq.

judge's report the same precedential value as an unreviewed judge's decision, i.e., it is not binding on OSHRC judges.

Accordingly, the judge's report is affirmed. So ORDERED.

FOR THE COMMISSION:
William S. McLaughlin
Executive Secretary
Dated: April 19, 1976

MORAN, Commissioner, Dissenting:

The Commission again errs in refusing to address a viable issue[2] that was directed for review on the asserted ground that respondent failed to raise it below or pursue it here. They state that respondent 'has not indicated any interest . . . in having the judge's report reviewed.' This statement is not supported by the record and even if it was, it would not justify the tergiversation and terminological inexactitude which Messrs. Barnako and Cleary have served up in the majority opinion.

Silence on an issue on appeal does not necessarily mean that there is no interest. See Brennan v. Smoke-Craft, Inc., No. 74–2359 (9th Cir., February 13, 1976); Brennan v. OSAHRC and Santa Fe Trail Transport Company, 505 F.2d 869, 871 (5th Cir. 1975); Brennan v. OSAHRC and Hanovia Lamp Division, Canrad Precision Industries, 502 F.2d 946, 948 (3rd Cir. 1974).

A number of reasons could exist as to why the issue was not raised below or pursued here. The record establishes that this pro se respondent was so unknowledgeable of Review Commission procedures and the defenses cognizable under the Act that the judge felt compelled to intercede on his behalf during trial. Therefore, lack of knowledge may have been the reason for its silence. Other possibilities include insufficient time, finances, or other resources needed to pursue the matter here or to discover what was possible as a defense below.

The point of the matter is that various and sundry reasons exist to possibly explain respondent's silence. To conclude that disinterest is the reason defies logic, is unfair to the respondent, shirks our responsibility to address viable issues, and is unsupported by the record before us.

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[2] See, e.g., Secretary v. Abbott-Sommer, Inc., OSAHRC Docket No. 9507, February 17, 1976.

The Commission is obligated to address the merits of review directed cases. See for example, the opinion of Mr. Cleary in Secretary v. Thorleif Larsen and Son, Inc., 12 OSAHRC 313, 314–315 (1973). Since I took an oath to faithfully discharge the duties of the office which I hold, I turn now to a discussion of the merits of this case. It is my opinion that the citation herein failed to meet the 'particularity' requirements set forth in 29 U.S.C. § 658(a). This section provides that:

> 'Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the . . . standard . . . alleged[ly] . . . violated.' (Emphasis added.)

'Particularity' means that employers must be informed in the citation of the specific acts which allegedly constitute a failure to comply with the cited standard.[3] Secretary v. L. E. Myers Company, 16 OSAHRC 686, 687 (1975). This requirement is not met when the factual description in the citation is effectively nothing more than a recitation of the cited standard. See Secretary v. Union Camp Corporation, 5 OSAHRC 514 (1973).

The necessity for complainant to meet his statutory obligation is clear. Employers need this information in the citation in order to make the crucial and irrevocable decision of whether or not to contest it within the statutory period prescribed in 29 U.S.C. § 659(a).[4] If the cited employer decides not to contest, specificity of the factual description is needed in order to fully understand what hazard must be abated. Secretary v. J. L. Mabry Grading, Inc., 9 OSAHRC 98, 110 (1973). Additionally, specificity of facts gives employers an adequate opportunity to raise affirmative defenses. Secretary v. L. E. Myers Company, supra at 688.

In National Realty & Construction Co., Inc. v. OSAHRC, 489 F.2d 1257, 1264 (D.C. Cir. 1973), it was stated that:

> '. . . the central function of the citation . . . is to alert a cited employer that it must contest the Secretary's allegations or pay the proposed fine. In the typical case, the more inaccurate or unhappily drafted is a citation, the more likely an employer will be to contest it. But a citation also serves to order an employer to correct the cited condition or practice, and a failure to correct is a punishable violation.'

[3] See Brennan v. OSAHRC and Hendrix, 511 F.2d 1139, 1142 (9th Cir. 1975).

[4] This section provides that:

> 'If, within fifteen working days from receipt of the notice [of proposed penalty] . . . the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty . . . the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.'

Analyzing—in this light—the factual description in this citation, it is evident that the 'particularity' requirement was not met. Respondent was cited for allegedly failing to comply with the requirements of 29 C.F.R. § 1926.652(g)(1), which provides that:

'Minimum requirements for trench timbering shall be in accordance with Table P–2.'

The citation described the facts which allegedly constituted a failure to comply with this standard as follows:

> 'Employer failed to install trench timbering in accordance with the minimum requirements for trench shoring, as set forth in Table P–2. Location is Station 3 & 90.'

This description of the facts is nothing more than a reiteration of the wording of the standard. The Judge below, concluding that this description did not describe the nature of the violation with 'particularity,' stated that:

> 'The citation did not recite whether the violation was of the minimum dimension of the upright [specifications set forth in Table P–2, as incorporated by reference in the cited standard], or in the spacing of the upright, the minimum dimension of the stringers, the maximum spacing of the stringers, and [this] . . . may well have led to dismissal of the charge.'

I agree with these conclusions, but disagree with the Judge's action in allowing the complainant to remedy the defect by amendment of the citation. As I have recently explained in Secretary v. Warnel Corporation, OSAHRC Docket No. 4537, March 31, 1976 (dissenting opinion), a citation is a unique document to which the liberal rules of amendment in the Federal Rules of Civil Procedure do not apply. Therefore, I would vacate the citation and penalty assessment therefor.

Finally, I must register my disagreement with my colleagues' unsupported assertion regarding the precedential value of the Judge's decision. Congress provided in 29 U.S.C. § 661(i) that:

> 'The report of the hearing examiner shall become the final order of the Commission within thirty days after such report . . . unless within such period any Commission member has directed that such report shall be reviewed by the Commission.' (Emphasis added.)

This section makes it clear that Judge's decisions are decisions of this Commission unless

modified by the Commission following a direction for review under this section.

The decisions of the United States Courts of Appeal indicate agreement with this opinion. For example, on appeal of Secretary v. Felton Construction Company, 8 OSAHRC 327 (1974), the United States Court of Appeals for the Ninth Circuit, the jurisdiction in which the instant case arose, considered a decision of Review Commission Judge Stuller which had not been reviewed by the Commission members. Felton Construction Company v. OSAHRC, 518 F.2d 49 (9th Cir. 1975). The court used the following language in considering the Judge's decision: '. . . the Commission found,' '. . . the hearing examiner's order became the final order of the Commission,' '. . . the Commission's order.'

There is no court decision that treats an unreviewed decision of a Review Commission Judge any differently than the Ninth Circuit did in Felton Construction. The courts have uniformly treated a Judge's decision the same as those rendered by the three Commission members. Such treatment is, of course, exactly what the Act contemplates and what its language specifically provides. Accordingly, Judge Oringer's decision is attached hereto as Appendix A in order that it may be given the weight to which it is entitled.

APPENDIX A

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, JOHN R. DAVIES & SON, Respondent.	OSHRC DOCKET NO. 5486

FINAL ORDER DATE: December 9, 1974

Appearances:

For the Secretary of Labor:
Altero D'Agostini, Regional Solicitor;
John M. Orban, Associate Regional Solicitor;
Beverly B. Lord, Attorney
U.S. Department of Labor
Office of the Solicitor
300 North Los Angeles Street
Room 7313 Federal Building
Los Angeles, California 90012

For the Respondent
John R. Davies, Jr.
John R. Davies & Son
2101 East Lambert Road
La Habra, California 90631

For the Employees
Paul R. Guzman, Business Agent
Laborers International Union of America
1/832 East Chestnut Street
Santa Ana, California

DECISION AND ORDER

David G. Oringer, Judge:

This is a proceeding under Section 10c of the Occupational Safety and Health Act of

1970, 29 U.S.C. 651 et seq. (hereinafter referred to as 'the Act') to review a citation for serious violation issued by the Secretary of Labor (hereinafter referred to as 'Complainant') pursuant to Section 9(a), and a proposed assessment of penalty in the amount of $550, thereon issued, pursuant to Section 10(a) of the Act.

The citation issued on or about November 9, 1973, alleges that as a result of an inspection of the employer's workplace on November 1, 1973, the employer, (hereinafter referred to as 'Respondent'), at a workplace under its ownership, operation, and/or control, violated one occupational safety and health standard duly promulgated pursuant to Section 6(a) of the Act, in a serious manner.

The standard allegedly violated by the respondent reads as follows:

1. 29 C.F.R. 1926.652(g)(1)
(1) Minimum requirements for trench timbering shall be in accordance with Table P–2. (See Table P–2, Annexed to Decision.)

The violation, as alleged by the complainant, is described as follows:

Standard	Description of Alleged Violation
29 C.F.R. 1926.652(g)(1)	Employer failed to install trench timbering in accordance with the minimum requirements for trench shoring, as set forth in Table P–2. Location is Station 3 + 90.

Notification of proposed penalty was issued to the respondent by the complainant, on even date, to wit, November 9, 1973, proposing a penalty of $550 for the alleged serious violation. On or about November 19, 1973, the respondent filed a timely Notice of Contest with a representative of the Secretary of Labor, contesting the citation and the proposed penalty. The case was assigned to the undersigned on February 1, 1974 for hearing and disposition pursuant to Section 12(e) of the Act.

Pursuant to notice, the trial of this case was held on March 5, 1974 in Los Angeles, California.

Having heard the testimony and observed the demeanor of the witnesses, and having considered the same, together with the citation, notification of proposed penalty, notice of contest, pleadings, representations, stipulations and admissions of the parties, it is concluded that substantial evidence, on the record considered as a whole, supports the following

FINDINGS OF FACT

1. The respondent, John R. Davies & Son, is engaged in the construction business and uses equipment which has been manufactured outside the State of California. In addition thereto, he receives correspondence from outside the State of California (Tr., p.5).

2. During the year the inspection took place, the average number of employees of the respondent was 69. At the time of the hearing the employer employed approximately 48 employees (Tr. p. 4).

3. On November 1, 1973 the Occupational Safety and Health Administration conducted an inspection of the respondent's worksite located at 7th Street and Channel Drive in Long Beach, California (Tr. p. 5).

4. At the time in question, the respondent was under contract with the Bixby Ranch Company to lay underground utilities of power and telephone lines (Tr. p. 5).

5. On November 9, 1973, as a result of an inspection by an authorized representative of the complainant on November 1, 1973 conducted at a workplace wherein the respondent employed employees, the aforesaid respondent was issued one citation alleging a serious violation of that standard found at 29 C.F.R. 1926.652(g)(1), as well as a notification of proposed penalty, proposing a penalty in the amount of $550 for the alleged serious violation (Citation, Notification of Proposed Penalty, Complaint).

6. The respondent filed a timely notice of contest (Notice of Contest).

7. At the time of the inspection herein concerned, at station location number 3 + 90, the trench was 8 feet deep, approximately 46 inches wide, and approximately 250 feet long (Tr. p. 19).

8. The trench was in soft, loose, sandy material (Tr. p. 19, 84).

9. The trench contained a ladder as a means of access. There was also a shovel in the trench (Tr. 20, 21). The trench was shored with uprights and jacks. The spacing of the horizontal uprights was approximately 8 feet apart (Tr. p. 21, 22).

10. During the inspection, an employee came out of the trench by virtue of the means of access which was a ladder in the vault area (Tr. 16, 20, 21).

11. The employee of the respondent, one Jesus Ruiz, was apparently the only employee exposed and the record does not disclose how long the employee was in the trench (Tr. p. 1–166).

12. Shoring that is provided for a trench which does not meet the standards creates a hazard of collapse of the sides of the trench. In the event of a trench collapse, there is a probability that death or serious injury would occur (Tr. p. 110).

13. A reading of Table p–2 that gives the minimum requirements for trench shoring as part of that standard under 29 C.F.R. 1926.652, reveals that minimum requirements for trench shoring require maximum spacing of six feet and, in soft, sandy or loose soil there should be closed sheeting, neither of which existed in the trench in question. (See that standard found at 29 C.F.R. 1926.652 and Table P–2 therein.)

14. The penalty proposed for the serious violation alleged in the instant cause was inappropriate (Tr. p. 1–166).

OPINION

In this cause the respondent represented his company, unaccompanied by counsel. Certain objections that may have been raised, had he been represented by counsel, were not raised in the instant cause. In my opinion, the citation in this case does not describe the violation with sufficient particularity. The description of the alleged violation, in the citation, relates that 'employer failed to install trench timbering in accordance with the minimum requirements for trench shoring, as set forth in Table P–2, location station 3 + 90'.

I do not believe that the citation states the violation with sufficient particularity as required by the governing Act. Table P–2 gives minimum requirements for uprights, stringers, cross braces, and gives maximum spacing for various types of soil. The citation did not recite whether the violation was of the minimum dimension of the upright, or in the spacing of the upright, the minimum dimension of the stringers, the maximum spacing of the stringers, and, if similarly stated in the complaint, may well have led to a dismissal of the charge. The complaint, however, remedied the defect by relating that the failure of the respondent was in using uprights which were spaced a distance of 8 feet between each upright.

In a Commission decision, the majority opinion decided that a defective citation may be cured by a subsequent pleading in a proceeding brought pursuant to Section 10 of the Act, Secretary of Labor v. J. L. Mabry Grading, Inc., DOCKET No. 285, decided April 27, 1973. Inasmuch as this tribunal is constrained to follow that Commission decision, the complaint was sufficiently particular to advise the respondent of what he allegedly violated and therefore constituted due process of law.

In my opinion, the compliance officer did observe Mr. Ruiz exiting from the trench at the site and time of the inspection. While Mr. Guzman, in his zeal to help take the statement of Ruiz, used the word 'loamy' rather than 'loose', in my opinion this soil was, in fact, described by Mr. Ruiz in Spanish, at the time that he made the statement, as 'tierra suelta', or loose soil.

The respondent argues that inasmuch as the foreman or supervisor had to go about with the compliance officer, if Mr. Ruiz was exposed it was because the foreman was not present. I do not find this a telling argument in view of Mr. Fegley's testimony on page 159 of the transcript, where he stated that he occasionally leaves the site and being that his truck driver has been around 20 years and Mr. Ruiz for 17 years and his operator and carpenter each for four years, the employees know what to do and they do not shut down the job site when he leaves. On page 160 of the transcript, in answer to the question, 'We're talking about men who know what to do in your absence'. Mr. Fegley stated, 'That's right'. In other words, the foreman depended upon the men to perform their jobs in his absence.

In reading Mr. Ruiz's testimony and his statement and observing him on the stand, it is my opinion that he was in the trench and was exposed. I further believe that the employer was under the impression that 8-foot spaced uprights may have been sufficient. I credit Mr. Raymond's testimony on page 14 that Mr. Fegley told him that the State called for 8-foot spacing between uprights. Interestingly enough, if I correctly understand the testimony on page 14 about the first trench, the respondent was told to and did bring the spacing up to the minimum, which was 6 feet, despite the fact that the first trench observed was between 4-feet 8-inches and 5-feet deep, and therefore the respondent was not mandated so to do by the standard. The first trench was 5 feet or less in depth, so that anything that the respondent did in response to the compliance officer's suggestions was not necessary on his part, inasmuch as the standard does not require sheeting and does not require such bracing, in a trench that is not in excess of 5 feet in depth. Anything required by the compliance officer in the first trench about which he testified was ultra vires and the cooperation by the respondent was certainly more than necessary. However, in the second trench, in my opinion, the violation came about as a lack of understanding of federal shoring requirements by the respondent. I do credit the compliance officer's testimony that Mr. Fegley was under the impression that the uprights had to be spaced 8 feet apart rather than 6 feet apart (Tr., p. 14).

It is my opinion that there is sufficient proof that Mr. Ruiz was exposed in the trench, so

that technically a violation existed.

While the gravity was much less than that in many, many serious cases, and the exposure in this case was minimal and the cooperation excellent, nevertheless the violation was proven to be a serious one in that credible testimony was adduced that there was a danger of collapse of the trench and that in the event of collapse of the trench serious injury or death could result. It is patently obvious that a reading of the standard at Table P–2 thereof would have advised the respondent that the standard requires no more than 6 feet between uprights and a measuring of the uprights would clearly reflect that they were 8 feet apart rather than 6 feet. I further believe that it was the common usage of the respondent to space his uprights 8 feet apart because of a misunderstanding of the requirement of the federal standards.

In considering the penalty, however, in view of the extreme cooperation of the defendant in correcting the spacing of uprights in a trench where it was not required, its immediate attempts to correct whatever was wrong throughout the project, the fact that only one man was exposed and the record being absent of any evidence as to how long the exposure took place, mitigation of the proposed penalty is appropriate. The employee was not asked how long he was in the trench, whether it was a second, a minute, five minutes or an hour. In addition thereto, there was shoring in the trench, although it lacked two feet from the minimum. The violation alleged is that the respondent did not meet the minimum requirements of trenching, which is an implicit admission by the Secretary that only minimum trenching requirements were necessary and therefore his proof of soft, sandy or filled earth was in reality not necessary to the charge, inasmuch as the minimum requirements of spacing were 6 feet. The fact that there was shoring that lacked the 2-foot differential certainly decreases the hazard, just as the lack of proof as to the length of time of exposure decreases the exposure. Further, in my opinion, in view of what I consider was more than adequate cooperation, I find the penalty to be excessive in the instant premises and assess a penalty of $150 in lieu of the $550 penalty proposed therefor.

Based on the foregoing considerations, the Judge makes the following

CONCLUSIONS OF LAW

1. At all times herein mentioned, this respondent was engaged in a business affecting commerce, within the meaning of Section 3 (5) of the Occupational Safety and Health Act of 1970.

2. The respondent was, on the date of inspection at its workplace herein concerned, and at

all times mentioned herein, an employer subject to the safety and health regulations promulgated by the Secretary of Labor and referred to in the citation and complaint herein.

3. The respondent, on the day of the inspection herein concerned, was in serious violation of that standard found at 29 C.F.R. 1926.652(g)(1).

4. The penalty of $550 proposed for the alleged serious violation in that standard found at 29 C.F.R. 1926.652(g)(1), found proven herein, is inappropriate, and is herewith modified to the sum of $150.

In view of the foregoing, good cause appearing therefor, it is ORDERED that:

1. The serious violation, alleged in the complaint, to wit, of that standard found at 29 C.F.R. 1926.652(g)(1), be, and the same, is herewith AFFIRMED.

2. The penalty proposed for the serious violation, found proven in 1. above, in the sum of $550, is inappropriate, and is herewith MODIFIED to the sum of $150.

SO ORDERED

David G. Oringer,
Judge, OSAHRC
Dated: November 8, 1974
APPENDIX A

TABLE P-2

TRENCH SHORING—MINIMUM REQUIREMENTS

Depth of trench	Kind or condition of earth	Size and spacing of members										
		Uprights		Stringers		Cross braces [1]				Maximum spacing		
						Width of trench						
		Minimum dimension	Maximum spacing	Minimum dimension	Maximum spacing	Up to 3 feet	3 to 6 feet	6 to 9 feet	9 to 12 feet	12 to 15 feet	Vertical	Horizontal
Feet		Inches	Feet	Inches	Feet	Inches	Inches	Inches	Inches	Inches	Feet	Feet
5 to 10	Hard, compact	3 x 4 or 2 x 6	6			2 x 6	4 x 4	4 x 6	6 x 6	6 x 8	4	6
	Likely to crack	3 x 4 or 2 x 6	3	4 x 6	4	2 x 6	4 x 4	4 x 6	6 x 6	6 x 8	4	6
	Soft, sandy, or filled	3 x 4 or 2 x 6	Close sheeting	4 x 6	4	4 x 4	4 x 6	6 x 6	6 x 8	8 x 8	4	6
	Hydrostatic pressure	3 x 4 or 2 x 6	Close sheeting	6 x 8	4	4 x 4	4 x 6	6 x 6	6 x 8	8 x 8	4	6
10 to 15	Hard	3 x 4 or 2 x 6	4	4 x 6	4	4 x 4	4 x 6	6 x 6	6 x 8	8 x 8	4	6
	Likely to crack	3 x 4 or 2 x 6	2	4 x 6	4	4 x 4	4 x 6	6 x 6	6 x 8	8 x 8		6
	Soft, sandy, or filed	3 x 4 or 2 x 6	Close sheeting	4 x 6	4	4 x 6	6 x 6	6 x 8	8 x 8	8 x 10	4	6
	Hydrostatic pressure	3 x 6	Close sheeting	8 x 10	4	4 x 6	6 x 6	6 x 8	8 x 8	8 x 10	4	6
15 to 20	All kinds or conditions	3 x 6	Close sheeting	4 x 12	4	4 x 12	6 x 8	8 x 8	8 x 10	10 x 10	4	6
Over 20	All kinds or conditions	3 x 6	Close sheeting	6 x 8	4	4 x 12	8 x 8	8 x 10	10 x 10	10 x 12	4	6

[1] Trench jacks may be used in lieu of, or in combination with, cross braces.
Shoring is not required in solid rock, hard shale, or hard slag.
Where desirable, steel sheet piling and bracing of equal strength may be substituted for wood.